



**IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS
IN DIVORCE**

Action No. D 3/21

**IN THE MATTER OF SECTION 5 OF THE MATRIMONIAL CAUSES ORDINANCES
2012**

BETWEEN:



DT

Petitioner

-and-

CG

Respondent

JUDGMENT

CORAM: The Hon. Mr. Justice B. St. Michael Hylton QC (Ag)

**Appearances: George C. Missick for the petitioner
David Cadman QC for the respondent**

Hearing Date: 7 July 2022

Venue: Court No. 5, Graceway Plaza, Providenciales

Date Delivered: **29 July 2022**

Background

1. This is a ruling on a contested petition for divorce brought by DT (“the petitioner”) against CG (“the respondent”) pursuant to section 5 of the **Matrimonial Causes Ordinance**¹ (“MCO”). The petitioner and the respondent have been married for 18 years and 4 months. There are 2 children of the family, an 18-year-old son and a 13-year-old daughter.

The petition

2. The petitioner contended that the marriage had broken down irretrievably, as the respondent had behaved in such a way that he could not reasonably be expected to live with her. The petitioner’s allegations included the following:
 - a. Although they were married for 18 years at the time the petition was presented, for the greater part of their marriage the parties have not lived as a married couple.
 - b. The parties lived without any communication, like perfect strangers for the greater part of their marriage.
 - c. The petitioner and respondent live like strangers in shared adjacent accommodation, despite having two children (the petitioner lives in the guest house annexed to the matrimonial home).
 - d. The respondent ignores any concerns, or suggestions the petitioner makes with regard to the children; she only gives him instructions.
 - e. The respondent wishes to be in control of all matters, including repairs to the house without consulting the petitioner, thus making the petitioner feel marginalized and inferior.
 - f. The petitioner suffers stress and is unhappy due to the continued circumstances of the marriage, leading to him being unable to sleep properly, which affects his general health, his focus and his energy at work and in his daily life.

¹ CAP 11:04.

3. The petitioner also alleged that due to “the breakdown of the marriage”, he has moved on from the respondent and has started an intimate relationship with another woman.

The response

4. In response, the respondent denied these allegations and denied that the marriage has broken down irretrievably. Further, the respondent said that if the petitioner has started a sexual relationship with another woman, it was not due to the “breakdown of the marriage”, or any behaviour on her part.

The arrangements for the children

5. In the statement of arrangements, there was no agreement between the parties on current or future custody arrangements. The children live with the respondent, on the same property where the petitioner lives. The petitioner said that in those circumstances the children have everyday contact with him. The respondent admitted they live in adjacent properties, but claimed the children only have occasional contact with their father. The petitioner seeks an order for joint custody and care. The respondent seeks full custody.

The hearing

6. Both parties gave sworn evidence at the hearing and were cross-examined by opposing counsel. The petitioner reiterated his view that the marital situation caused him stress and unhappiness, and affected his performance at work and his health. In cross examination he denied relying on his own adultery as a reason for the divorce.
7. In her oral evidence at the hearing the respondent, contended that it was the petitioner’s behaviour that was unreasonable. She also alleged that she was solely responsible for the children. She said that save for agreeing they would split the educational expense for the children there was no agreement as to the financial

consequences of the divorce. In cross examination, the respondent admitted that communication was bad in the marriage and that only the first 6 or 7 years of the marriage were good. She denied not respecting the petitioner's opinions. She also gave evidence that she had attempted counselling on one occasion, but he did not attend. She agreed that the last time they spoke was in October 2021, and in that conversation she told him there was no point in talking as they were "going in circles" and were "wasting time". She also admitted that since the petitioner moved out in 2020 without telling her, she did not seek him out as she did not feel she had to "run him down".

The submissions

8. Counsel for the respondent contended that the divorce would cause the respondent financial hardship. Counsel also argued that to grant the divorce the court would have to conclude that the respondent had acted "unreasonably". Counsel submitted it was the petitioner who acted "unreasonably", and that he could not rely on his own adultery or unreasonable behaviour in support of his petition.

9. In response, Counsel for the petitioner submitted that the financial hardship argument was not sound as the MCO contains provisions to address any hardship. Counsel claimed that the irretrievable breakdown was proved by reason of the respondent's admission that the marriage had gone badly for about twelve years; the petitioner leaving in 2020 and the respondent not going after him, with no efforts by either party to reconcile; and as the parties had not spoken since October 2021. Counsel for the petitioner also submitted that the court would need to find "unreasonable behaviour" on the part of the respondent. This was satisfied in his view by the lack of communication, and the exclusion of the petitioner from important decision making, especially as regards the children. Counsel submitted finally that the petitioner could not be expected to live with the respondent because of the impact of the marriage on his health, particularly the lack of sleep which had consequences as he works shift.

The law

10. Section 5 of the MCO provides:

5. (1) Subject to section 7, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.

(2) The court shall not hold the marriage to have broken down irretrievably, unless **the petitioner satisfies the court of one or more of the following facts—**

(a) that the respondent has committed adultery and in consequence of that adultery the petitioner finds it intolerable to live with the respondent;

(b) that **the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;**

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) 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 (hereinafter in this Ordinance referred to as “two years of separation”) and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition (hereinafter in this Ordinance referred to as “five years of separation”).

(3) On a petition for divorce, it shall be the duty of the court to inquire, so far as it reasonably can, into **the facts alleged by the petitioner** and into **any facts alleged by the respondent.**

(4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2), then, **unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall,** subject to sections 7(3) and 9, **grant a decree of divorce.**

(emphasis mine)

11. Section 5(1) of the MCO makes it clear that there is **one ground** under which a petition may be presented; **that the marriage has broken down irretrievably.** Section 5(2) of the MCO then provides five factual scenarios, at least one of which a petitioner must satisfy the Court of, before it may find that the marriage has broken down irretrievably. To satisfy itself the court must enquire into “**any facts**” alleged by the parties (section 5(3)). Even where the Court is satisfied of a section 5(2) fact,

pursuant to section 5(4), the court must notwithstanding the occurrence of the fact, be further satisfied “**on all the evidence**” that the marriage has broken down irretrievably.

12. In the instant case, the petitioner relies on section 5(2)(b); that the respondent has behaved in such a way that he cannot reasonably be expected to live with her. Counsel for both parties have used the common shorthand “unreasonable behaviour”, to describe this ground. However, as the decided cases have pointed out, this is undesirable, as on its plain interpretation section 5(2)(b) does not require a respondent’s behaviour to be “unreasonable”. In **Owens v Owens**², the Supreme Court of the United Kingdom was considering the similarly worded section 1 (2)(b) of the *Matrimonial Causes Act 1973 (UK)*. Lord Wilson commented on this important difference:

[37] Nevertheless, in making that reference, I used a phrase which I regret: for I referred to the 'unreasonableness of the behaviour'. **'Unreasonable behaviour' has always been the family lawyer's shorthand description for the content of the subsection. But it is wrong. The subsection requires not that the behaviour should have been unreasonable but that the expectation of continued life together should be unreasonable.** Within about a year of the advent of the 1969 Act, the error inherent in the shorthand description was exposed: *Katz v Katz* [1972] 3 All ER 219 at 223, [1972] 1 WLR 955 at 960. Indeed, in *Bannister v Bannister* (1980) 10 Fam Law 240, in which the Court of Appeal allowed a wife's appeal against the dismissal of her petition for divorce, Ormrod LJ observed (at 240):

'The learned judge, I am afraid, fell into the linguistic trap which is waiting for all of us when we speak of “unreasonable behaviour” in relation to section 1(2)(b) cases. The basis of this subsection is not “unreasonable behaviour”, but behaving in such a way that the petitioner “cannot reasonably be expected to live with the respondent”, a significantly different concept. It is difficult to find an alternative shorthand expression for this subsection, so we all talk, inaccurately, of “unreasonable behaviour”.'

² [2018] UKSC 41; [2018] 4 All ER 721.

13. To satisfy section 5(2)(b), the Court must ask whether given the respondent's actions the petitioner could not reasonably be expected to continue to live with them, taking into account all of the circumstances and the characters and personalities of the parties³. The Court must be fair to both parties, expecting of them "neither heroic virtue nor selfless abnegation"⁴, keeping in mind that it is the subjective reaction of the petitioner to the respondent's conduct which must be taken into account⁵, and the behaviour need not be "grave or weighty"⁶.
14. In the instant case, having heard and seen the parties under cross examination, I find that the respondent failed to communicate both before and after the petitioner left the home⁷. I accept the petitioner's evidence in relation to the failures to communicate while they shared a household and that his subjective reaction was as he claimed. The respondent also confirmed that she had not spoken, or made any efforts to speak to the respondent since October 2021.
15. I find it would be unreasonable to expect the petitioner to continue in a marriage with a spouse in all the circumstances. I find given the characters and personality of the petitioner including his non-argumentative personality and his existing health conditions, that there is sufficient proof of behaviour on the part of the respondent, such that expectation of continued life together would be unreasonable. This is not to say that the petitioner's conduct has been blameless, however for the purposes of proving the s 5(2)(b) fact, his behaviour is not relevant.
16. After being satisfied of the fact under section 5(2)(b), I am entitled pursuant to section 5(4), to take "all the evidence" into account in determining whether the marriage has broken down irretrievably⁸. I find that there is sufficient evidence that the marriage has broken down irretrievably. Despite living apart for almost two years neither party

³ *Livingstone-Stallard v Livingstone-Stallard* [1974] 2 All ER 766, [1974] Fam 47 at page 54 per Dunn J.

⁴ *Pheasant v Pheasant* [1972] 1 All ER 587, [1972] Fam 202. at page 208 per Omrod J.

⁵ *Balraj v Balraj* (1981) 11 Fam Law 110 at page 112.

⁶ *Buffery v Buffery* [1988] 2 FLR 365 at 367 per May LJ.

⁷ *Thurlow v Thurlow* [1975] 2 All ER 979 at page 984 per Rees J.

⁸ *Stevens v Stevens* [1979] 1 WLR 885.

has made any effort to rescue the marriage. The petitioner has no interest in rescuing it and he is seeing someone else.

17. For completeness, I have considered that the petition in **Owens v Owens** failed due to a lack of pleadings and evidence. In the instant case the pleadings, response and evidence of both parties are sufficient to satisfy the ground that the marriage has broken down irretrievably.
18. As to the respondent's submission that the divorce would cause her financial hardship, I reject this argument. Pursuant to section 9 of the MCO, the court may refuse a decree on grounds of grave hardship to a respondent, however this is where a petitioner relies on five-year separation. In the instant case, the petitioner does not rely on five-year separation.
19. Furthermore, Part IV of the MCO empowers this court to make orders for financial provision and property adjustment, even after the decree is made absolute⁹. As to custody, pursuant to section 45(1), the Court may not make absolute any decree of divorce unless it is satisfied with the arrangements for the welfare of every child of the marriage. I am satisfied that the current arrangements for the relevant child are satisfactory.

Disposition

20. I therefore grant the petition for a decree nisi herein, with no orders as to costs.

The Hon. Mr. Justice B. St. Michael Hylton QC

Judge of the Supreme Court

29 July 2022



⁹ MCO sections 27, 28.