

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

CAUSE NO: FAM 104 OF 2018

BETWEEN:

CHRISANNA SHARERIA TULLOCH

Petitioner

AND

THEODORE ASPHANEL ATKINSON

Respondent



Appearances:

**The Petitioner in person
The Respondent in person**

Before:

Hon. Mr. Justice Richard Williams

Heard:

30 July 2019

**Date of circulation of
transcript of Ruling:**

31 July 2019

HEADNOTE

Husband and Wife - Divorce - Wife's Amended Petition - Wife's prayer for divorce on ground of parties living apart for five years - Whether amended petition part of original petition - Petitions to be treated as one petition and 5 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. As indicated by me this morning, an Ex Tempore Ruling is required. This issue about the effect and status of amended petitions is an important one requiring clarification as it appears not to have been addressed in any judgment in the Cayman Islands prior to today. 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 3 September 2011. There is one child of the marriage who was born on 23 May 2012, and remains dependent on both of her parents. Importantly, these proceedings were commenced by the Petitioner's Petition filed on 11 April 2018 in which she apparently pleaded the ground of divorce to be the parties living apart for four years. That, of course, is not a valid ground for divorce under the Matrimonial Cause Law (2005 Revision) ("the Law"). In the Petition the Particulars of Separation gave the beginning of October 2013 as the date of separation, therefore less than five years prior to the filing of the Petition.
3. The Petitioner, in her Amended Petition dated and filed on 8 January 2019, made an amendment to paragraph 7 therein to contend that the parties had been living apart for five years. The Petitioner again pleaded that the Respondent left the former matrimonial home in October 2013 and that since that date the parties had not cohabited. I note that the first time that the Petitioner filed proceedings to apply for spousal maintenance and child financial orders was in the Summary Court on 10 February 2015.
4. 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

5. 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)-(d)

(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.¹

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.”*

6. 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)”

7. 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.”

The purpose of s.10(3) of the Law is to allow the situation where parties may come together for a short time in an attempt to be reconciled. This section, which allows parties

¹ My emphasis by underlining.

to live together for up to three months and then separate again without affecting them being able to obtain a decree on this ground, is necessary as otherwise a party who has attempted a failed reconciliation for such a period would not otherwise be able to rely upon the ground provided in the Law. The wife is not contending that the parties have reconciled at any time after October 2013, even for a short period of three months.

8. It is evident that the parties will not be reconciling. The only issue I have to determine is whether the parties have “*lived apart*” for five years immediately preceding the presentation of the Petition.

Factual Background

9. At the outset of her evidence in chief, the wife gave evidence about the date that she contends that the parties commenced living apart. Her evidence was rather confusing, as she initially stated that the parties separated in October 2014 when she left the former matrimonial home due to the husband inflicting abuse upon her. She then stated that, although she was certain that the year was 2014 because it happened when her daughter was aged one, she could not be so sure of the month. I then pointed out to her that a 2014 commencement date for their living apart was inconsistent with what was pleaded in both her Petition and in her Amended Petition where she had contended that the parties stopped living together in October 2013. I invited her to look at the Amended Petition and, after doing so, she said that she now recalled that they separated in October 2013.



10. The husband contends that the parties have been living apart for between one to two years and therefore the five year separation ground could not be made out.



Preliminary Issue

11. At that stage of the wife's evidence I informed the parties that, as the wife had pleaded and contends that the living apart commenced in October 2013, there was a need to determine a preliminary issue about whether the Court had jurisdiction to grant a decree on the ground pleaded by the wife. I stated that the preliminary issue is whether the five years living apart must immediately precede the presentation of the Petition or whether it may immediately precede the date of the filing of the Amended Petition.
12. Regrettably I was only informed at 9:20 a.m. this morning that this matter, which did not appear in the Court List, had been fixed for a one day hearing commencing at 9:30 a.m. As a consequence I was not afforded the opportunity, in a case where the parties are litigants in person, to research and review any case law dealing with the preliminary issue prior to the hearing. With that in mind, following the wife's confirmation in her oral evidence about the date upon which she contends the parties separated, I put the matter back until 2:00 p.m. to enable me to conduct some research. Prior to coming back into Court the parties were provided with copies of the case law to which I will be referring this afternoon.
13. After hearing further from the parties this afternoon I now provide this Ex Tempore Ruling on the preliminary issue. If I find that the Court has jurisdiction to grant a decree

on the pleaded case I will then continue with the hearing to determine whether the ground as pleaded has been proved.

The Law

14. 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 five years immediately preceding the presentation of the petition.



15. In the English Court of Appeal decision of *Sandler v Sandler (Davies and Johnstone, Co- Respondents)*² a husband had presented his petition alleging that the wife had committed adultery with the co-respondent Davies. Later by amendment of that petition and a supplemental petition he alleged the adultery to be also with the co-respondent Johnstone. At the hearing before the President, Johnstone disputed only the damages claimed. The President found that the original petition had been presented in collusion between the petitioner and the co-respondent, Davies, and that it must fail. The President left the charge of adultery with Johnstone to the jury, finding that the supplemental petition was untainted by collusion. The jury found adultery against Johnstone and assessed damages. The President found adultery against Johnstone on the supplemental petition, dismissed the prayer of the original petition and pronounced a decree nisi on the supplemental petition. Johnson appealed the decision and the Court of Appeal who had to consider the effect on the supplemental petition of the dismissal of the petition on the ground of collusion.

² [1934] p149.

16. The Court of Appeal, with some regret, allowed the appeal. Lord Hanworth M.R., after reviewing cases concerning any distinction to be made between the petition and supplemental petition, stated at page 156:

“The result is that it is impossible to hold that a supplemental petition is anything more than a part of and an amendment to the original petition, and stands by virtue of the original citation on which the original petition was founded. The supplemental petition and original petition accordingly cannot be severed for the purposes of granting relief. The petition in this case comes on as a petition amended and supplemented, and as the petitioner has been found to be guilty of collusion, the result is that the whole of the original petition as amended and supplemental petition must be dismissed.”

The Court of Appeal concluded that the Court could not treat a supplemental petition as a separate and independent suit.

17. In *Spawforth v Spawforth*³ the wife, in her petition of January 1945, sought a divorce on the ground of desertion, alleging desertion from October 1941. The parties had associated within the three years preceding the presentation of the petition and leave was sought to file a supplemental petition in January 1946, alleging desertion from August 1942. The husband denied the desertion and asked for a divorce by his answer on the ground of adultery by the wife.



³ [1946] p131.

18. In *Spawforth* Hodson J. referred to his decision in *Chapman v Chapman and Thomas (Taylor Intervening)*⁴ which he had reached following consideration of *Sandler*. In *Chapman* the question had arisen, where the court was considering whether there had been desertion for a period of at least three years immediately preceding the presentation of the petition, as to whether the presentation of the petition need be of the original petition or not.

19. Hodson J. noted at page 133 that in *Chapman* he had found that the presentation of the petition needed to be of the original petition and stated that he came to that conclusion:

“.... having regard to the language of the Court of Appeal in the case of Sandler v Sandler, where Lord Hanworth M.R. said: “.... it is impossible to hold that a supplemental petition is anything more than a part of and an amendment to the original petition.” He was not, in that case, dealing with the point of desertion at all; he was dealing with the question whether collusion in respect of a main petition affected a supplemental petition, and he said that it did, and the Court of Appeal unanimously came to that conclusion. The position in this case seems to me to be exactly the same. I have to consider whether a supplemental petition in this case would be anything more than an amendment of the original petition; and I see nothing to indicate the contrary.”

20. Hodson J. then concluded on page 134:

“.... in my view of the wording of this statute, the supplemental petition must be treated as part of the original petition, and “the petition” in the statute means the original petition, and the three years must precede that date, the consequence of

⁴ [1938] p93.

that is that this petition fails, the desertion not having lasted for the three years before the petition."

Conclusion

21. It is clear that a supplemental/amended petition is not a separate petition. As clearly stated in *Spawforth*, it is itself part of the original petition and effects an amendment to that petition. Although that case dealt with desertion, it follows that, 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 any of these grounds by way of amendment of the petition or by supplemental petition. I am satisfied that under the Law 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 filed.

22. In the matter before me, as pleaded and confirmed by the wife in Court this morning, the date she relies upon as being the commencement of living apart is October 2013. That is less than five years prior to the filing of the Petition on 11 April 2018 and that Petition could therefore not be proved. The Amended Petition filed on 8 January 2018, although being five years after the commencement date of the separation relied upon by the wife, does not rectify the position as it is in itself a part of the original petition. In such circumstances the five year period must have preceded the date of the filing of the original petition. The original petition would have had to have been filed on or after a date in October 2013. Based on my ruling on the preliminary issue there is no need to receive further evidence from the parties.

23. Accordingly, the Petition fails, as the parties had not lived apart for five years immediately preceding the filing of the Petition and I must dismiss the Amended Petition.

Observations

24. If the wife seeks a divorce she will have to file a fresh petition based on any of the relevant grounds set out in s.10(1) of the Law. If the wife still seeks a divorce of the ground of five years separation, she will need to establish on the balance of probabilities that she and the husband have been living apart for five years immediately preceding the filing of that fresh petition. If the husband was willing to give consent to a fresh petition being proved on the ground of two years separation, that may be viewed as the most sensible course moving forward.
25. I note that as per my observation at the hearing on 5 October 2018, the spousal maintenance orders and the child financial provision orders made by the Summary Court remain in force before that Court.

Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT

