

Judgment 19/2009

**A v A – Royal Court (Divorce File 7056) – 9 April 2009
and 3 June 2009**

Matrimonial Causes (Guernsey) Law, 1939 – contested petition by the Wife alleging unreasonable behaviour by the Husband – legal principles to be applied – civil standard of proof – allegation of unreasonable behaviour upheld – wife awarded costs on the full indemnity basis

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Matrimonial 7056

On the 9th day of April, 2009

Before John Russell Finch, Esquire, Lieutenant Bailiff

Between

A	Petitioner
and	
A	Respondent

IN THE MATTER of the Petition of Divorce dated the 10th day of December 2008, and the Petitioner's application dated the 15th day of January 2009 that the said Petition be heard;

THE COURT, on the 25th day of March 2009, having heard Advocates A.N. Brown and A.J. Ayres, Counsel for the Petitioner and Respondent respectively, and the parties in person RESERVED JUDGMENT;

THE COURT this day handed down judgment in the terms attached hereto and RULED that the Petitioner had established her case;

AND THE COURT RESERVED the matter of costs and directed that the written submissions of Counsel shall be lodged within ten days (or such time period as agreed by Counsel) of the date of this judgment.

M A TOSTEVIN
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF GUERNSEY
MATRIMONIAL CAUSES DIVISION**

A

and

Between:

A

Petitioner

Respondent

Date of hearing: 25th March, 2009

Judgment handed down: 9th April 2009

Before: John Russell FINCH Esq., Lieutenant-Bailiff

Advocate for the Petitioner: A N Brown

Advocate for the Respondent: A J Ayres

Materials referred to:

Rayden & Jackson on Divorce, 18th Edition, paras 9.20 – 9.28

F v F Royal Court (Divorce 6524) 22nd November, 2004 (Judgment 57/2004)

Judgment

1. This is an unusual case. Very rarely indeed are the actual grounds for a divorce opposed and this is the first case I have encountered for several years. Normally, contested matrimonial cases relate to the financial arrangements after divorce. I have to decide if the Wife's (hereafter "W") petition should be granted against the Husband (hereafter "H"). There is only one slim agreed bundle and any references to documentation will be to pages within that bundle. W's petition is found at pages 10 – 23. The application is based on the "*unreasonable behaviour*" ground plus the necessary allegation of irretrievable breakdown of the marriage. The only witnesses at the hearing, which took place over one day, were the parties themselves. I propose to set out firstly how I approach the legal framework and follow that with my findings of fact and then set out the conclusions.

Legal Framework

2. The legal principles were well set out by Brelsford LB in *F v F (2004)* and I cannot improve on her exposition. Accordingly, I set it out in full:

“The legal principles

5. *The words “reasonably be expected” prima facie suggest an objective test. Nevertheless, in considering what is reasonable the Court (in accordance with its duty to inquire, so far as it reasonably can into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable: allowance will be made for the sensitive as well as for the thick skinned; or as it used to be put in cruelty cases the conduct must be judged up to a point by reference to the petitioner’s capacity for endurance, and in assessing the reasonableness of the respondent’s behaviour the court would consider to what extent the respondent knew or ought reasonably to have known of that capacity. The approach can thus be summed up:- the Court has to decide the single question whether the respondent has so behaved that it is unreasonable to expect the wife to live with him: in order to decide that, it is necessary to make findings of fact as to what the respondent actually did, and findings of fact as to the impact of that conduct on the Petitioner: there, of course a subjective element has been evaluated but at the end of the day the question falls to be determined by an objective test. It has been said that the correct test to be applied is whether a right thinking person looking at the particular husband and wife, would ask whether the one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective characters and personalities of the two parties concerned. It is the effect or reasonably apprehended effect of the Respondent’s behaviour that has to be considered, behaviour of such gravity that causes the Court to come to the conclusion that this petitioner cannot reasonably be expected to live with the respondent.*
6. *Any and all of behaviour whether active or passive may be taken into account: the court will have regard to the whole history of the matrimonial relationship but behaviour is something more than a mere state of affairs or a state of mind. Behaviour in this context is action or conduct by the one which affects the other. It may be an act or omission or course of conduct: but it must have some reference to the marriage. While in most cases it is behaviour after the marriage that is solely to be considered, cases can be envisaged where after the marriage the respondent behaves unreasonably in relation to pre-marriage matters: such unreasonable behaviour may, for example, relate to breaking promises made before the marriage, or to the disclosure to the petitioner after the marriage of facts which ought reasonably to have been disclosed to the petitioner before the marriage. The behaviour in*

question may occur when the parties are living together or when they are separated. Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is apparently reasonable in itself, the conduct may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the respondent.

7. *It is “behaviour” to which the court must have regard, not “intentional behaviour”. Intent may aggravate the effect of the behaviour of which the petition complains, and intent may make behaviour unreasonable that without such intent would not have been unreasonable that without such intent would not have been unreasonable. There may be conduct which it is difficult, prima facie, to assess as reasonable or unreasonable, and in this category the question of intention may be the decisive factor. Knowledge that the petitioner regards certain conduct as unreasonable may make behaviour by the respondent unreasonable, whereas absence of such knowledge might result in the respondent’s conduct not being stigmatised in that way. It is a question of fact in every case and there may be circumstances where the respondent is in a sense completely blameless but nevertheless his **behaviour** entitles the petitioner to a decree. Negative as well as positive behaviour is capable of forming the basis of a decree of divorce. The court is not in a sense concerned with putting conduct into categories but in investigating the facts of the particular case before it and deciding the reasonableness of the respondent’s behaviour*

..... if the Petitioner can prove sufficient of her allegations to convince me that the Respondent did act unreasonably towards her in such a way that she could not continue to live with him, then she is entitled to a divorce.

Burden of proof

8. *The burden of proof is on the person alleging that the other spouse has behaved in such a way that he or she cannot reasonably be expected to live with the respondent. It is for the person making the allegation to prove the behaviour by the other party **and** that he or she cannot reasonably be expected to live with the respondent, and, unless he or she satisfies the court of both these matters, the court will not hold that the marriage has broken down irretrievably. Divorce is a civil matter, and the allegations may be proved by a preponderance of probability.*

It is these principles which I propose to apply to the facts found in the present case. For the sake of completeness I note that corroboration is considered desirable, but not essential, and I shall refer to this when looking at the facts.

3. I must first consider whether this marriage has irretrievably broken down. Again I refer to Brelsford LB's helpful judgment in *F v F* (supra), where she quotes the words of Simon P in a 1970 lecture, including:

"If even one of the parties adamantly refuses to consider living with the other again, the court is in no position to gainsay him or her."

If the Petitioner can establish her allegation on "unreasonable behaviour" there is a presumption that the marriage has irretrievably broken down. It is a question ultimately to be decided on the facts found in a particular case.

Facts

4. In making my findings of fact, I have throughout noted that the burden lies on W to the civil standard of proof, viz, the preponderance of probabilities. There is no corroboration, in the sense of independent evidence of her allegations beyond what is written and agreed by H and his own description of the facts as he perceived them. In the final analysis, the factual areas in dispute are relatively few, but the interpretation is important.

[In paragraphs 5 to 10 of his Judgment the Lieutenant Bailiff set out his finding on the facts]

Application of Facts to the Law

11. I have set out the excellent summary by Brelsford LB at para 2 above. It is only necessary to refer to one aspect of this, which is apposite in the present case:

"Regard will be had to the cumulative effect of behaviour, for while conduct may consist of a number of acts each of which is apparently reasonable in itself, the conduct may well be even more effective if it consists of a long continued series of minor acts, no one of which could be regarded as serious if taken in isolation, but which, taken together, are such that the petitioner cannot reasonably be expected to live with the respondent."

I find that the accumulation of acts in the present case fits that statement of the law. In addition I repeat the observation made in para 7 about the constant chipping away of W's confidence is established and is, of itself, a decisive factor in the determination of this case. Accordingly, W has established her case and proved that the marriage has irretrievably broken down and that H is unfortunately responsible for unreasonable behaviour so that the Petitioner cannot reasonably be expected to live with him.

Costs

12. It was accepted that on the morning of the hearing, W's Advocate offered to amend the Petition to substitute a two year consensual separation as a ground for dissolution. This was refused. Accordingly, a good deal of evidence was heard on the question of unreasonable behaviour; this included embarrassing matters which W had to recount and deal with. It is H's right to contest the Petition, but it is beyond my

comprehension why a dignified method of resolving this matter was not accepted; I have heard no explanation. It is plain that giving evidence of such matters to strangers in a court-room was a real ordeal for W, and occasioned stress, which could have been avoided. In my judgment this is another symptom of H's inability to empathize with W or consider any point of view other than his own.

13. Accordingly, I advise counsel that I am actively considering the imposition of full indemnity costs. I will make my mind up after considering the written submissions of the parties, which should go, by letter or e-mail, to HM Deputy Greffier within ten working days of the date of this judgment. I will then issue a further short decision on costs alone. Would counsel please ensure that all relevant factors are pointed out to me before a final decision is made. The ten day period may be extended if counsel agree, without further reference to the Court.

J R Finch
Judge of the Royal Court

9th April 2009

(On 3 June 2009 the Court, by consent, awarded costs to the Wife on the full indemnity basis)