

COMMONWEALTH OF THE BAHAMAS

2022

IN THE SUPREME COURT

FAM/div/00438

Family Division

BETWEEN

E.H.J

Petitioner

AND

K.S.J

Respondent

BEFORE: The Honourable Madam Justice C.V. Hope Strachan

APPEARANCES: Bryann Hepburn for the Petitioner
Janet Lisa Bostwick Dean and Nioshi Ferguson for the Respondent

HEARING DATE: 21st November 2023

Family law — Divorce — Cruelty — Petitioner claiming cruelty by respondent — Respondent claiming cruelty by petitioner — Grounds on which divorce may be obtained in The Bahamas — Whether the actions by the Petitioner and/or Respondent amounted to cruelty — obligation to show conduct grave and weighty - obligation to demonstrate health is affected.

RULING

C. V. H. Strachan, J;

Background Facts:

1. EHJ (“the wife”) and KSJ (“the husband”) were married on 27th December 2014. There is one child of the marriage, E.K.A.J born on 29th April 2015.
2. By a Petition filed 27th July 2022, the wife, sought a divorce on the ground that since the celebration of the marriage the husband has treated her with cruelty.

3. The husband filed an Answer and Cross Petition on 17th May 2023 denying the allegation of cruelty and prayed for the dissolution of the marriage on the ground that since the celebration of the marriage the wife has treated him with cruelty. Consequently, there are competing claims, each contending cruelty by the other party.

4. Both the wife and the husband gave oral evidence at the hearing of the matter in support of their case. Neither called any other witnesses at trial.

The Wife's Allegations in the Petition are as follows:

5.

7(a) The Petitioner first took notice of a change in the Respondent's behaviour and attitude towards her about three (3) years into the marriage.

(b) The Respondent appeared to be very disinterested in the marriage and seldomly assisted the Petitioner with household chores or caring for the child of the marriage. The Petitioner was made to feel lonely and overwhelmed with shouldering the responsibility of taking care of the home and family.

(c) The Petitioner voiced on numerous occasions that she needed the Respondent to be more emotionally available. The Petitioner also spoke to the Respondent repeatedly about assisting with the household chores and helping with tasks like feeding and dressing the child of the marriage. The Respondent would typically give assistance for a short period of time and then revert to his normal lackadaisical behaviour.

(d) The Petitioner was diagnosed with Scleroderma in 2019 and was admitted to the Intensive Care Unit during November 2020. The Petitioner's condition at the time was critical. In January 2021 the Petitioner was released from hospital.

(e) As a result of this condition, the Petitioner experiences joint pains, shortness of breath, reduced mobility, callouses on the skin and difficulty swallowing.

(f) Notwithstanding the Respondent being aware of the Petitioner's current limitations, the Respondent continues to neglect providing the Respondent with the assistance she desperately needs. The Petitioner is made to struggle to.

(g) The Respondent has gotten increasingly cold towards the Petitioner after her illness. It is not uncommon for the Respondent to show no concern when he hears the Petitioner coughing, vomiting, or gasping for breath. In these moments, the Petitioner feels abandoned and uncared for.

(h) The Respondent has in recent times made it clear to the Petitioner that he would expect sex in exchange for providing money for household expenses. This ultimatum has made the Petitioner feel hurt and dejected. The Respondent is aware of how Scleroderma has negatively impacted the Petitioner's image and desire for sex. The Respondent has been insensitive towards the toll these changes have put on her.

(i) There were periods of time when the Respondent would withdraw from the Petitioner. The Respondent also became angry and irritable for the most trivial things. The Petitioner felt lonely during these periods when the Respondent would withdraw himself.

(j) The Petitioner has been advised that she has a life expectancy of years. She cannot live out her remaining days in a household devoid of love, compassion and understanding.

(k) The Petitioner is resolute in her belief that the marriage is beyond being salvaged.

8 There have been no previous proceedings in the Supreme Court or any Court of Summary Jurisdiction with respect to the marriage within the Commonwealth of The Bahamas.

9. That this Petition is not present or prosecuted in collusion with the Respondent.

9. That the Petitioner has not been accessory to or connived or condoned the Respondent's conduct hereinbefore alleged.

10. That there is no possibility of reconciliation.

WHEREFOR THE PETITIONER PRAYS:

- 1. That the marriage be dissolved*
- 2. That there be a declaration pursuant to Section 73 (1) (b) (i) of the Matrimonial Causes Act, Chapter 125*
- 3. That all ancillary matters be adjourned to Chambers.*
- 4. That the Court may order such further or other relief as the Court may deem fit and proper in all the circumstances of this case.*

The Husband's Allegations in the Answer and Cross Petition are as follows:

6.

1. *After admitting to the formal allegations which are enumerated in Paragraphs 1,2,3,4,6,8,9,9 and 10 of the Petition the Respondent denies the allegations of cruelty made by the Petitioner against him in his Answer as follows:*

“2. Paragraph 5 of the Petition refers. It is admitted that the Respondent is self-employed and that he resides at the Pepper Street residence. It is further admitted that the Petitioner is employed with the Ministry of Immigration as a Clerk and that she resided at Pepper Street on June 23, 2022. The Petitioner vacated the Pepper Street residence in September 2022.

3. *Paragraph 7 of the Petition refers.*

(a) The Respondent does not admit or deny paragraph 7 (a) of the Petition. The Respondent denies that he changed his behavior and attitude towards the Petitioner about three (3) years into the marriage or at all.

(b) The Respondent denies that he was disinterested in the marriage. He admits that he did not assist with household chores; however, he hired a maid to assist in the home with the household chores and the Petitioner said she did not want the maid there. As a result, the maid was dismissed. The Respondent did and does assist with the child of the marriage. The Respondent is unable to speak to the Petitioner's alleged loneliness, but he is aware that she complained about the household chores which she would not allow him to hire any help to assist her with. For the reasons given herein the Respondent denies that the Petitioner had to shoulder the responsibility of taking care of the home. She chose to do so. Further, she did not have the responsibility of caring for the family as he assisted with their child and with family expenses.

(c) The Respondent admits that the Petitioner indicated that she needed him to be more emotionally available; however, the Respondent has not changed from the person that he was prior to their marriage. He was never a demonstrative person with respect to his feelings, but he demonstrated his love and affection for the Petitioner by working extremely hard to ensure that all her needs were met as best he could do so. The Respondent denies that he only assisted with their child periodically. As per the above he was always willing to provide the Petitioner with assistance for completing the household chores as he could not undertake doing them himself as he worked full-time as a self-employed refrigeration technician. Most of his clients are commercial clients – restaurants, hotels, and food stores- and he has to be on call 24/7 to make necessary repairs whenever they are needed. In order to make ends meet he would have to be on call seven (7) days per week.

- (d) *The Respondent admits Paragraphs 7 (d) and 7 (e) of the Petition.*
- (e) *The Respondent denies paragraph 7 (f) of the Petition. The Respondent either personally gives the Petitioner any assistance that she needs, or he has hired or offered to hire her any assistance that she needs that he is unable to give because of his work demands.*
- (f) *The Respondent denies paragraph 7 (g) of the Petition. The sad fact is that the Petitioner is constantly ill. The Petitioner always coughs, vomits, and gasps for breath. The Respondent cannot render 24/7 care, nor can he be there with her 24/7. The Petitioner refuses to understand this. When she experiences these symptoms in the Respondent's presence the Respondent ascertains either by asking or looking at her that she is well as can be expected and then moves on to whatever he was engaged with.*
- (g) *Paragraph 7 (h) of the Petition refers. The Respondent denies that he ever told the Petitioner that he expected sex in exchange for providing money for household expenses or for any kind of financial gain. Despite the fact that the Petitioner says that she has a negative image of herself and a resulting decreased desire for sex as a result of her Sclederma the Respondent still desired his wife. He did not care what she looked like. The Respondent regrets that she feels that he was insensitive towards the toll that her illness put on her as at all times he sought to demonstrate care by providing for her and to reassure her by demonstrating that he continued to desire her.*
- (h) *The Respondent denies the allegations made about him in paragraph 7(i) of the Petition in their entirety.*
- (i) *The Respondent does not admit or deny paragraphs 7(j) and 7(k) of the Petition.*

CROSS PETITION

4. *The Respondent alleges that since the celebration of the marriage the Petitioner has treated him with cruelty.*

- (a) *When the Petitioner feel ill in or for her to be released from the hospital she had to have a lot of medical equipment at home and the home had to be prepared for her return. The hospital provided the Respondent with a list of items that she needed included but not limited to a wheelchair, walker, oxygen tank, oxygen tubing, oxygen concentrator, suction machine, suction lines, suction tips, for the tracheotomy, adult diaper, gauze, saline vials, portable*

commode and prescription medication. The Petitioner was not insured. The Respondent purchased all of those items out of pocket. The Petitioner fails to realise that as a self-employed man in order to pay for those items the Respondent has to go to work and work very hard. She has not shown any appreciation for the sacrifices that he willing made to her health and wellbeing.

- (b) The Petitioner continuously harassed the Respondent to assist with the household chores knowing how many hours he had to put into his work in order to provide for them. She refused to accept the assistance of hired help. The Petitioner did this despite it not being in her best interests given her health.*
- (c) The Petitioner denied the Respondent his conjugal rights because she developed a low self-esteem as a result of her illness. Despite the Respondent demonstrating to her that he still found her desirable, she lacked interest in sexual intercourse and has gone so far as to now lie by saying that he demanded sex in exchange for money.*
- (d) Without notice to the Respondent, the Petitioner removed everything from the home on Pepper Street when she left the home despite the fact that she did not pay for any of it. This caused the Respondent considerable financial stress as he had to go and repurchase everything that he needed for the home.*
- (e) The Petitioner's illness and her conduct since she fell ill has caused the Respondent considerable financial pressure which has resulted in him having to work even harder in order to continue making ends meet.*
- (f) The Petitioner fails to appreciate that as a self-employed man with the financial responsibilities that he has to take care of his family that he cannot provide for them and clean the house, and/or sit by her side to tend to her medical needs. He has to work and he does so. He shoulders his responsibilities without complaint.*

5. It is unacceptable and unforgiveable to the Respondent that the Petitioner has alleged that he has treated her with cruelty and that he does not assist with caring for their child when nothing can be further from the truth. The Respondent is hurt by these allegations and will not allow her to proceed with the divorce on those grounds without defending himself against such accusations.

6. The Respondent feels that he would be in a better place mentally if he did not have to deal with the Petitioner's ungratefulness and/ or suffer from the pressure that she places on him.

7. The parties have lived separate and apart since September 2022. He does not wish to reunite or even attempt to do so.

8. *The Respondent has not condoned the cruelty of the Petitioner.*

9. *There is no possibility for reconciliation between the parties.*

AND the Respondent humbly prays that:

(i) *The said marriage be dissolved on the grounds that the Petitioner has treated the Respondent with cruelty.*

(ii) *There be a declaration pursuant to section 73 (1) (b) of the Matrimonial Causes Act Ch. 125;*

(iii) *Costs;*

(iv) *The ancillary matters be adjourned to Chambers if not agreed;*

(v) *Any other order the court deems just.*

7. Counsel for both the Wife and the Husband gave brief oral submissions to the effect that the court should dismiss the opposite petition and grant relief to their respective clients because they had the stronger claim.

8. The Issues

The issues to be determined by this Court are whether, since the celebration of the marriage the husband through his actions towards the wife is guilty of cruelty entitling the wife to a Decree Nisi. Concomitantly, whether the wife has since the celebration of the marriage been cruel towards the husband entitling him to a Decree Nisi.

9. The Law

If the court is persuaded by either or both the wife and the husband that they have been treated with cruelty within the marriage their respective petitions may be grounded in The Matrimonial Causes Act, Chapter 125 of the Statute Laws of the Bahamas.

10. Pursuant to **Section 16 (1) of the Matrimonial Causes Act, Chapter 125** statute laws of The Commonwealth of The Bahamas.

- **“16 (1) A Petition for divorce may be presented to the Court either by the husband or the wife on any of the following grounds that the Respondent:-**
 - **(a) has since the celebration of the marriage committed adultery;**
or
 - **(b) has since the celebration of the marriage treated the Petitioner with cruelty; or**

- (c) has deserted the Petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or
- (d) has lived separate and apart from the Petitioner for a continuous period of at least five years immediately preceding the presentation of the petition; or
- (e) has, since the celebration of the marriage been guilty of a homosexual act, sodomy or has had sexual relations with an animal.

Provided that a wife may also petition on the ground that her husband has since the celebration of the marriage been guilty of rape.

11. Cruelty is defined in Section 2 of the Matrimonial Causes Act, as:-

“Cruelty includes voluntary conduct reprehensible in nature or which is a departure from the normal standards of conjugal kindness on the part of one party to a marriage thereby occasioning injury to the health of the other spouse or a reasonable apprehension of it on the part of the other spouse and being conduct which, after taking due account of all the circumstances of the case, would be considered to be so grave and weighty a nature that should such other spouse be called upon to continue to endure it, would be detrimental to his or her health.”

12. Insight into the meaning and interpretation of Section 2 is available from an abundance of authorities available from the English courts and locally. Watkins J. as she then was in the case of *Bowleg v Bowleg [2006] 1 BHS J. No. 49* set out to formulate an approach which this court adopts in deciding whether either of the parties have been cruel to the other.

She said:

“In order to succeed in his application for dissolution of the marriage the Petitioner must prove:

- i) that the Respondent engaged in voluntary conduct*
- ii) that the Respondent's conduct was reprehensible in nature, or*
- iii) that the Respondent's conduct was a departure from the normal standards of conjugal kindness*
- iv) that the Respondent's behaviour caused injury to the health of the Petitioner, or*
that the Respondent's conduct caused the Petitioner to have a reasonable apprehension of injury to his health

- v) *that the Respondent's conduct was so grave and weighty that should the Respondent be called upon to continue to endure it, it would be detrimental.*

13. In other cases, depending on the facts of the case, it would be appropriate for the judge to focus on a particular aspect of the definition as explained throughout the cases. This was demonstrated when in *Gollins v Gollins (1963) 2 All ER 966 at page 986 Lord Pearce* in dealing with the standard that must be met to succeed stated:

“... it has been acknowledged that to support a finding of cruelty the matter must be grave and weighty; and in Russell v Russell, this House finally settled that conduct must, in order to constitute cruelty in the legal acceptance of the term, be such as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger.”

14. Furthermore, in the case of *Allen v Allen [1991] BHS J. No. 170; No. 80 1991, Sawyer, J., as she then was expressed the test in this way:*

"To my mind, in order to establish "cruelty" within that definition, either/both parties would have had to satisfy me that the conduct of the other was voluntary and was of a blameworthy nature or was a departure from the normal standards of conjugal kindness which one party to a marriage should show to the other. In addition, the conduct of one party must either have actually occasioned injury to the health of the other party or to have caused a reasonable apprehension of such injury. The conduct which is alleged to be cruel must be such as, after taking into account all of the circumstances of this particular marriage and the parties themselves, would be of so grave and weighty a nature that the complaining spouse should not be called upon to continue to endure it as it would be detrimental to his or her health. See e.g., Katz v. Katz [1972] 3 All E.R. 219 at p. 223 per Sir George Baker, P., and Stevens v. Stevens [1979] 1 W.L.R."

15. Notwithstanding that the court is provided with clear, defined and confirmed definitions and a formula for determination this court must be satisfied to the requisite “standard” that the husband has been cruel to the wife and/or the wife has been cruel to the husband which would entitle either or both of them to a Decree Nisi. It is also possible that neither the husband nor wife have proved their respective claims. It is accepted that the civil standard is applicable however with a specific qualification:

16. Per Lord Pearce in *Blyth v Blyth 1 All E.R. 524* quoted by Denning L.J. in *Bater v Bater [1951] P at p.37 [1950] 2 All E.R. at pg. 459* approved in *Hornal Neuberger Products Ltd,*

“The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best, C.J., and many other great judges have said, “in proportion as the crime is enormous, so ought the proof to be clear.” So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard.”

17. *Again in Blyth v Blyth [1996] Per Denning L.J.:*

“So far as the grant for divorce are concerned, the case like any other civil case may be proved by a preponderance of probability but the degree of probability depends on the subject matter. In proportion as the offence is grave, so ought the proof to be clear.”

18. The standard was upheld by Hall J. in *Lockhart v Lockhart [1995] BHS J No. 37, 1994 No. 6, Hall CJ*, as he then was, said:

“Adultery, desertion and cruelty must be proved to the Court's satisfaction when they operate by way of a bar to relief just as much as when they are relied on to found a right to relief, and this requires them to be proved by a preponderance of probability, the degree of probability depending on the subject matter ...”

19. Because of the wife’s illness and prognosis, it is my view that focused consideration should also be given to that part of the S.3 definition which mandates that the court “take account of all the circumstances of the case.”

20. *In Windeatt v Windeatt (No.2) [1963] P 25, [1962] 1 All ER 776* “The Court of Appeal held that a husband’s conduct had constituted cruelty justifying the grant of the decree nisi, since the question as to whether treatment accorded by the husband to the wife amounted to cruelty, entitling the wife to a divorce, was one of fact and degree depending on the circumstances of the case.”

“The conduct had to be looked at as a whole in the light of the sort of people that the parties were, and what sort of person the wife was and how the husband’s conduct affected her.”

DISCUSSION AND ANALYSIS OF THE WIFE AND HUSBANDS RESPECTIVE CLAIMS.

21. Since the wife and the husband have accused each other of cruelty and neither of them have called any independent witnesses in support of their allegations I am forced to rely strictly upon my observations of their respective demeanors while giving oral testimony at the hearing.

22. Personality differences were obvious from the start. I got the distinctive impression that they were both genuine in their beliefs as to what occurred in the marriage. However, it was clear from the start that the wife displayed through her body language and her emotive responses under cross-examination that she was angry with the husband, that she was still frustrated with the position that she felt she was forced to take when she moved out from the husband. She seemed bitter that the husband had “changed” on her from what he used to be prior to their marriage.

23. The husband was calm and stoic while testifying. He admitted that he is still interested in the marriage however, as the wife is not, he is willing to accept that the marriage is no longer salvageable. This admission in and of itself may be interpreted as a continuing desire to still please his wife despite the fact of their competing petitions.

24. My assessment is that trouble started brewing in the marriage from sometime in 2017, emanating from the husband’s attitude towards household chores and chores related to child rearing. Feeling frustrated and overwhelmed from bearing the brunt of these responsibilities, the wife complained to him about her feelings. I believe the husband when he said that he tried to appease the wife by taking on some of these duties. However according to the wife, these efforts were not sufficient and that the husband would soon revert to his previous position. Examining this in light of the husband’s responses in totality I have taken into consideration the nature of the husband’s profession as a refrigeration technician servicing mostly commercial clients, he indicated that this kept him away from home a lot. I accept that this was the case.

25. Accepting that this was in fact the situation, the question must then be asked whether the wife’s insistence on the husband doing the household chores himself was reasonable given that he had provided a maid to take on those chores. I am of the view that the hiring of the maid was a reasonable solution to the problem. Moreover, through this act the husband clearly demonstrated that not only was the husband hearing the wife’s complaints, but he acted to rectify the problem which was burdening his wife. The wife’s continued insistence on the husband doing the chores, after firing the maid he hired, supports his allegation made in his cross-petition that the wife “continually harassed” him.

26. Harassment or by another term; nagging; was held to be cruelty in the cases of *Atkins vs. Atkins [1942] 2 All E. R. 637 at p. 638* and *Horton v Horton [1940] 2 All E.R. 380*.

Per Henn-Collins, "It is not necessary, as is quite obvious, in order to bring about the state of things there should be violence. One knows that dropping water wears the stone. Constant nagging will become completely intolerable, and though in the course of married life you may be able to point to no single instance which could possibly be described as, in common parlance, a row, yet nagging may be of such a kind and so constant that it endangers the health of the spouse on whom it is inflicted. Then this court intervenes, as it always will intervene, for the protection of the person."

27. One of the keys to what was held in Atkins was the endangerment to the claimant's health. In this case the husband alluded to the fact that his wife's conduct hurt his feelings. The only other allegation he made was that he would be in a better place mentally if he did not have to deal with the wife's ungratefulness and or suffer from the pressure that she places on him. This can hardly be described as evidence of injury to health or even an apprehension of it. So, notwithstanding that the wife's nagging in certain circumstances could amount to cruelty, those circumstances are absent in this case. Consequently there is no need for this court's intervention to protect the husband.

28. It is obvious that the wife's diagnosis in 2019 of Scleroderma, and its debilitating symptoms introduced serious challenges and negatively impacted the marital relationship. The husband's alleged inaction and lack of attention to her bouts of coughing and vomiting were perceived by her as cold, callous, neglectful, and uncaring. However, the wife herself admitted that her illness caused her to lose the desire for sex. When she testified that her husband did not seem to be understanding of her lost desire for sex, she, unwittingly corroborated her husband when he said that he still desires his wife sexually. It further confirms to my mind his averment that it was the Petitioner who changed on him after the illness and that it was, she who lost interest in him touching her. He testified that the medication changed her features and opined that it may have affected her mind. She did not want him around.

29. Answering the wife's accusation the husband flatly denies ever telling his wife that she had to have sex with him to get money for medication or household expenses. While it is conceivable that desperate to have sexual relations with his wife, the husband might have sought to demand her consort, by putting ultimatums to her, I do not believe that such demand came about, if at all, in the serious manner that the wife relayed to the court. From what I have observed of the husband he appears to be malleable to his wife's wishes even to the extent that he is prepared to comply with her desire to end the marriage since as he put it "if that's what she wants." Fortunately, or unfortunately, depending on how one views the state of the divorce and matrimonial laws in this jurisdiction, divorces are not obtained by parties because they desire them. The Matrimonial Causes Act provides only several distinct grounds, quoted infra all of which create matrimonial

offences. For one to obtain a divorce under any of those specified provisions one must satisfy the court, borne out by the facts/evidence that such offence has been committed by the offending spouse against the complaining spouse.

30. In view of the foregoing, the specter of the wife's refusal of sexual intercourse with the Respondent is raised. **In H v H [2010] 3 BHS J No. 72 per Bain J.**

"It has been held that persistent and unreasonable refusal of sexual intercourse could amount to cruelty. Evans v Evans [1966] 2 All E.R. 78.

31. Both parties herein have raised the issue of sexual intercourse as a source of discontent in the marriage. The husband said he was refused, and the wife contends that the husband demanded it, using it as a form of inducement or extortion to get money for household expenses. Having already decided that the wife unwittingly corroborated the husband's allegations that she refused him sex, when coupled with the fact that she has voluntarily absented herself from the matrimonial home preventing any marital consortium or conjugal intimacy with her husband, this may be accepted as acts which, provided the other prevailing circumstances exist could amount to cruelty. However, here again the remaining elements of the marital offence must exist."

32. More importantly, just because the wife feels aggrieved by the husband's conduct does not necessarily equate to cruelty. The court is still mandated to ensure that her claims are credible, justified, and substantiated. The wife's ill health and shortened life expectancy of Five (5) years evokes this court's empathy and would likely do so even to any disinterested party. However, in these circumstances the court is even more vigilant in ensuring that feelings of empathy towards the wife do not cloud its judgment in determining the husband's conduct towards her. Of material importance is the fact that there is no allegation nor is there any evidence that the disease from which the wife suffers was in any way caused by or contributed to by the husband. Hence, I cannot attribute the disease nor any of the symptoms suffered by the wife to the husband. This is important as the authorities point to the fact that if the alleged behaviour of the offending spouse has health implications for the aggrieved spouse cruelty may be established. I am of the view that the converse is also true, that if no health implications are found, cruelty as defined in law will not be made out.

33. The husband testified as to an exhaustive list of items he provided to the wife to take care of her health-related needs after her stay in hospital and her diagnosis. The wife did not in any way contest or deny that he did indeed provide these items. I accept the husband's account as truthful. His actions are opposite to being cold, callous, uncaring or neglectful and goes completely against the characterization of him as a cruel husband.

34. The Petitioner leaving the matrimonial home suggests that she had reached the limits of her patience in the marital relationship. She obviously considered the Respondent's conduct objectionable enough that "she" could not endure it any longer. She testified that she "wanted to be happy and loved during the time she had left on earth." There is a subjective element to the cruelty definition that might inure to the benefit of the Petitioner in that the court is required to take "*due account of all the circumstances*" and I hasten to add that the wife's health and her prognosis is a circumstance that cannot be ignored. However, the wife did not attribute any health-related issue to her husband's behaviour other than her feeling unhappy and feeling unloved. It would be a considerable overreach for this court to equate feelings of unhappiness and feeling unloved as "injury to the health" or "a reasonable apprehension of it" as required by the Act. It is unfortunate that the wife failed to offer the court any medical evidence, opinion, or witness to testify about her disease and its effects. This would certainly have provided more clarity to the court about her condition and any possible injury to her health.

The Conclusion

35. In utilizing the Watkins J, formula as set out in *Bowleg*, infra, I believe that the conduct of both of the parties towards each other was "voluntary" in the sense that neither of them were suffering any defect of mind, such that might require consideration of the *M'Naughten's Rules (1843) 10 Cl. & Fin. 200 House of Lords* or an examination of a line of authorities like *Squire v Squire* [1948] 2 All ER 51 where it was held that;

"The principle that a person must be presumed to intend the natural and probable consequences of his or her acts is applicable acts alleged to amount to cruelty in matrimonial causes. It is not, necessary, therefore, to constitute cruelty that conduct complained of should have proceeded from malignity or an intention to harm the complaining spouse."

"Where Therefore, an invalid wife made excessive demands on her husband, which included requiring him to read to her through the night, and otherwise prevented him from sleeping, with the result that his health and efficiency as an army officer became impaired, though his wife did not so behave with the intention of harming him; Held the absence of a malignant motive did not prevent that conduct from amounting to cruelty and in the circumstances, it amounted to cruelty."

36. While the wife's insistence that her husband do household chores and childcare chores in the circumstances of his professional and employment duties can be equated to the Squire wife's nagging demands, this wife is unable to avail herself of the advantage of the lack of intention due to a mental condition to harm the husband or the lack of malignity to claim cruelty. The Petitioner's health issues spoke strictly to bodily symptoms as opposed to mental and there is no indication that she was unaware of the impact her behaviour was having on her husband when she

fired the maid, refused to hire a replacement, and left the matrimonial home taking most of the furnishings.

37. Based on the evidence given by both the wife and the husband and applying the principles above, on a preponderance of probability, (per Blyth) further applying the Bowleg Formula by Watkins J, I am satisfied that the matters complained of by both parties were not sufficiently reprehensible, nor a departure from the normal standards of conjugal kindness. Moreover, I found it impossible to attribute them as so grave or weighty a nature as to test the endurance of either party to such an extent that they should no longer be called upon to stay in the marriage. I find that the events and actions which led to the breakdown of the relationship was to some extent “unkind” but did not meet the requisite threshold. While the wife’s nagging and moving out of the matrimonial home may well be viewed as actions that are against the normal standards of conjugal kindness the husband did not complain of any injury to his health and even expressed that he did not want a divorce himself. The wife’s complaints against the husband can be attributed to the reasonable wear and tear of married life. There has been no injury to her health, bodily or mental caused by the husband. She merely professes feelings of unhappiness and feeling unloved, caused by her husband’s behavior. This does not meet the requisite standard. In fact, neither of them expressed even a reasonable “apprehension of danger” as offered in the S. 2 definition. I am therefore satisfied that the health of neither the husband nor the wife was affected as required by S.2 MCA.

38. It is clear that the problems in the marriage could well amount to what is known in other jurisdictions as irretrievable breakdown or irreconcilable differences, however according to **Maynard, J in P v. P [2007] 5 BHS J. No. 9:**

“the ground of cruelty should not be confused with irretrievable breakdown or irreconcilable differences, as appear in other jurisdictions. Given the options available in section 16 of the Matrimonial Causes Act (Ch. 125) (the Act), parties often choose cruelty as a catch-all, when the circumstances may not amount to cruelty.”

39. Additionally, in *H v H BS 2010 SC 93*, Bain J, did not grant the Petitioner or the Respondent a divorce because cruelty had not been satisfied. She indicated at paragraph 35 of the judgment:

“The marriage between the petitioner and the respondent appears to have broken down. This is not a ground for divorce. Trivial marital misdemeanors would not suffice. The conduct of both parties must be grave and weighty that should such other spouse be called to continue to endure it, it would be detrimental to his or her health. I am not satisfied that the health of the petitioner or respondent was affected.”

40. As it stands, the wife is hurt by the husband's lack of help around the home and lack of attention to her since her diagnosis, however, the wife admitted under cross examination that the husband was always not helpful in the home from the beginning of their marriage. I think that the wife and the husband's relationship has broken down over the years and now that the wife is ill the problems that they were experiencing at the beginning of the marriage is now a concern for her. The matters between them fall far short of the legal standard.

41. The wife testified that sometime between October and November 2022 she left the matrimonial home because of the husband's behaviour. While desertion was not a ground that either of the parties relied on, I thought it useful to determine whether desertion would be applicable in this matter.

42. Under the Matrimonial Causes Act, Ch. 125, desertion includes: -

“behaviour without cause or excuse on the part of one party to a marriage towards the other spouse whereby it can reasonably be concluded that that party intended through such behaviour to bring the matrimonial consortium to an end.”

43. The evidence given by the wife did not support the view that there was any conduct by the husband that was aimed at expelling her from the home. It was solely the wife's decision to leave the matrimonial home taking the child of the marriage and some of the appliances without discussing it with the husband. Her actions resulted in the husband having to replace those items.

44. According to S. 16 (1) (c) of the Matrimonial Causes Act, Ch. 125, the wife would have to prove that the husband left her for a continuous period of at least two years immediately preceding the presentation of the petition. In other words the husband would have to be the offending party. This is so even in the case of constructive desertion. In this case the wife left the matrimonial home and only a year ago. This does not meet the legal requirement. Additionally there is no allegation by the wife or husband for that matter that the other party is guilty of constructive or actual desertion.

45. I am satisfied that neither the wife nor the husband has proved the ground relied on in their respective petitions that the other party has treated them with cruelty as defined by the Matrimonial Causes Act to the required standard.

46. Therefore, I dismiss the Petition and the Cross Petition. Both parties are to bear their own costs of these proceedings.

Dated the 8th day of February A.D. 2024



The Honourable Madam Justice C. V. Hope Strachan

