

COMMONWEALTH OF THE BAHAMAS

2023/FAM/div/00077

IN THE SUPREME COURT

Family Division

BETWEEN

T.D

Petitioner

AND

P.D

Respondent

AND

A.N

Co-Respondent

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

APPEARANCES: Yolanda Rolle for the Petitioner
Ranard Henfield for the Respondent
No appearance for the Co-Respondent

HEARING DATES: 1st November 2023

Family law — Divorce — Adultery — Cruelty — Desertion - Petitioner claiming adultery, cruelty and desertion by respondent — Respondent claiming desertion by petitioner – Whether the actions by the Respondent amounted to adultery, cruelty and/ or desertion – Whether the actions by the Petitioner amounted to desertion – Exercise of the Courts discretion where discretion has not been prayed in the Petition – Exercise of the courts discretion where discretion statement not in conformity with R.28 Matrimonial Causes Rules

RULING

Strachan, J;

Background Facts

1. The Petitioner, T.D, and the Respondent, P.D., were married at St. Mary Magdeline, Glinton's, Long Island on 15th August 2015. The Petitioner is an administrative assistant and the Respondent is a ship master.

2. There are two children of the marriage namely J.B.M.D. born on 24th July 2011 and P.Z.D born on 5th December 2018.

3. By a Petition filed 13th February 2023, the Petitioner, sought a divorce on three grounds, that since the celebration of the marriage the Respondent has committed adultery, the Respondent has treated the Petitioner with cruelty and that the Respondent has lived separate and apart from the Petitioner for a continuous period of at least two years immediately preceding the presentation of this Petition. As the third ground to which the Petitioner relied does not exist under the Matrimonial Causes Act, the court granted leave to the Petitioner to amend the petition. The third ground was amended to two years desertion.

4. The Respondent filed an Answer and Cross Petition on 13th October 2023 admitting the allegation of adultery, however he denied the allegations of cruelty and desertion. He prayed for the dissolution of the marriage on the ground that since the celebration of the marriage the Petitioner has deserted the Respondent for a continuous period of at least two years immediately preceding the presentation of the petition.

5. Both the Petitioner and the Respondent gave oral evidence at the hearing of the matter in support of their case.

6. The Co-Respondent, A.N. did not enter an appearance, did not file an answer and took no part in the proceedings.

The Petitioner's Evidence

7. The Petitioner alleged in her Petition filed 13 February 2023 that:

PARTICULARS

- (a) Shortly after their marriage the Petitioner and the Respondent were forced to relocate from their native Long Island to live in Nassau after Hurricane Joaquin destroyed their home and forced the closure of their jobs.*
- (b) The Respondent shortly after the move to Nassau became very controlling and even became physically abusive toward the Petitioner if she didn't cook him a meal, didn't in his opinion say the right thing or even wear the right thing. The Petitioner recalls being physically attacked by the Respondent even while holding their first child, who was at the time an infant in her hand.*
- (c) The Respondent's behaviour and pattern became suspicious to the Petitioner as he began to sleep out and often would not come home for days on end without any form of communication to the Petitioner. This proved very stressful for the*

Petitioner who was caring for an infant and felt that she was being abandoned and forced to carry all of the weight of the family physically, emotionally and financially. The Petitioner suspected very early on that the Respondent was having an extra marital affair however, she could not prove it neither did she have any specific individual to suspect at the time.

- (d) During this period 2017-2018 the Petitioner not wanting to expose herself to any possible sexual sickness was not intimate with the Respondent and was in fact proposing, for the sake of peace and to give the Respondent some space, to visit her father out of the jurisdiction.*
- (e) The Respondent found out about the Petitioner's plans and forced a sexual encounter between him and the Petitioner shortly after which the Petitioner discovered that she was pregnant, and the Respondent advised her that it was an intentional act on his part. Due to the state of their relationship this discovery caused the Petitioner to spiral into a state of depression to the point that she was unable to attend work for a period of two weeks (2) as the Respondent in his customary fashion continued to ignore the Petitioner and carry on with his suspicious and independent lifestyle to the exclusion of the Petitioner and their minor son.*
- (f) During her pregnancy the Respondent remained physically abusive to the Petitioner who on several occasions was admitted to hospital for stress and with bruises from the Respondent's physical attacks.*
- (g) After the birth of their daughter the Respondent denied paternity of the child and advised the Petitioner that he would not be taking care of the children of the marriage anymore and he took a job and relocated to Abaco Island leaving the Petitioner to care for the children of the marriage all on her own. The Petitioner being financially unable to bare this burden alone was forced to move in with her grandmother so that she and the children of the marriage could have a place to stay without fear of being evicted.*
- (h) While in Abaco the Respondent sent the Petitioner a photo of a young lady, the Co-Respondent, advising her that this was his girlfriend and that he had moved on with his life. This devastated the Petitioner who then advised the Respondent that his chances with her and reconciling their marriage were exhausted.*
- (i) The Petitioner continued to experience stress over this most embarrassing situation as many of her clients from her then place of employment would constantly tell her how they would see the Respondent out with the Co-Respondent in very intimate positions and circumstances.*
- (j) The Petitioner had occasion to travel to Abaco as a decision was made to have their son live with the Respondent for a period during which time, she unknowingly encountered the Co-Respondent for the first time without incident.*

- (k) Hurricane once again touched the Petitioner and the Respondent's life as the Petitioner had to aid in the rescue of the Respondent and their son after the passing of Hurricane Dorian. The Petitioner recalls that after the Respondent and their son were secured the Respondent in her presence got on his cellular phone and phoned the Co-Respondent to see if she was ok telling her "I can't live if you are not safe and ok." The Petitioner was very insulted by this given all of her efforts to ensure that the Respondent was secured. This incident was compounded when the Petitioner on another rescue mission having fallen asleep in the deck of the boat had to be awoken to the news that while she is sleeping the Respondent was on the boat in very intimate moments with the Co-Respondent without shame, apology or discretion.
- (l) The Respondent after Hurricane Dorian was forced to relocate to Nassau and rented the Petitioner's former apartment unit in Faith Gardens. The Petitioner wishing to see if their relationship could be repaired and wanting her marriage to work in order to raise her children in a home with both parents actively in the home moved in with the Respondent and once again she, their daughter and the Respondent were all living under the same roof, as their son was being schooled in Long Island and lived with his grandparents. Despite what the Petitioner thought was a glimmer of hope the Respondent's behaviour did not change and the Co-Respondent then began to torment the Petitioner's life. The Respondent resumed his practice of physically abusing the Petitioner and they would argue constantly.
- (m) Due to the Petitioner's suspicion she and the Respondent were not intimate since their last encounter that resulted in her last pregnancy. On being confronted with the question of his infidelity the Respondent would become hostile and deny the accusations of the Petitioner until one day when he outrightly told the Petitioner "I want new Pussy and I want to be single."
- (n) The Respondent told the Petitioner that he wasn't giving her anything for the children and in the year 2020 the Respondent told the Petitioner that if she isn't prepared to give him sex, she must pack up her and her daughter and leave. On preparing to leave the Respondent once again attempted to physically assault the Petitioner who had to call the police for assistance to leave.
- (o) Within less than a week after the Respondent threw the Petitioner and their daughter out of his apartment the Co-Respondent moved in with her daughter, who the Petitioner suspects is also the Respondent's child. The Petitioner on confronting the situation was told by the Respondent that she is the devil as she is causing problems with him and his girlfriend.
- (p) The Co-Respondent during the pandemic constantly harassed the Petitioner constantly calling her cellular phone and telling her that she is taking better

care of her son, who was living with his father at the time, than the Petitioner ever could. This angered the Petitioner.

- (q) The Respondent's abusive nature carries over even into his relationship with the Co-Respondent as the Petitioner's son and the Respondent were thrown out of the apartment by the Co-Respondent after a fight in which the Petitioner's son was almost hit by a missile.*
- (r) The Petitioner has recently discovered that the Respondent has proposed to the Co-Respondent.*
- (s) There has been no intimacy between the Petitioner and the Respondent since on or about the year 2018*

The Respondent's Evidence

8. In his cross petition, the Respondent sought a divorce from the Petitioner on the ground that she deserted him for a continuous period of at least two years immediately preceding the presentation of the petition. I set out the particulars of his cross-petition as follows: –

PARTICULARS OF DESERTION

- a) That sometime in 2019, the Petitioner and the Respondent resumed co-habitation as husband and wife in an apartment in Faith Gardens.*
- b) That by mid-2020, the Petitioner was withholding sex from the Respondent. The Respondent confronted the Petitioner about her sexuality and at least two female co-workers he suspected were either lesbian or bisexual. The Petitioner denied both females as intimate partners. Upon giving the Petitioner an ultimatum to resume conjugal kindness, the Petitioner packed and left the matrimonial home.*
- c) That the Petitioner to this day, lives with her lover – one of the female friends the Respondent suspected was her lesbian lover.*
- d) The Petitioner's conduct was not condoned or accepted, and the Respondent accepted that the marriage was over as the Petitioner was seeing women.*
- e) The Petitioner's conduct caused the Respondent, hurt, stress and frustration. The Respondent is equally concerned for the family values and lifestyle the Petitioner is exposing the minor children to as she has taken up residence with the female and sleeping with her in the home."*

Issues

9. The issues before the Court are whether the Respondent committed adultery since the celebration of the marriage, whether he treated the Petitioner with cruelty and/ or whether he deserted the Petitioner for a continuous period of two years immediately preceding the presentation of the Petition. The court is also to consider the Respondent's Answer and Cross Petition and determine whether the Petitioner deserted the Respondent. In determining whether to grant a decree nisi to both or either of the parties, the court will consider the evidence provided and their testimonies.

Allegation of Adultery made by the Petitioner against the Respondent

10. The Petitioner became suspicious that the Respondent was having an extramarital affair when he began to sleep out often and would not come home for days on end without any form of communication to the Petitioner. Her suspicions were confirmed when the Respondent moved to Abaco in 2019.

11. The Petitioner testified that she caught the Respondent and Co-Respondent red handed on several occasions. The first time she heard about the Co-Respondent was when the Respondent sent the Petitioner a photo of her where he stated that she was his new lady. The Respondent confirmed this during trial that he had in fact sent the Petitioner the photo but denied that he was having sexual intercourse with the Co-Respondent at that time. In fact, the Respondent said that he sent the photo to provoke the Petitioner to come to Abaco.

12. Another encounter the Petitioner recalls was when she was working at Bahamas Food Services. She was on a rescue mission to rescue people from Hurricane Dorian. While on the boat, she said that her cousin awoke her, and she went downstairs. The Petitioner saw the Respondent and the Co-Respondent together. She confronted them and the Respondent told the Petitioner that nothing was going on between him and the Co- Respondent. The Petitioner did not believe the Respondent because she had seen a message on his cellular phone where he had said to the Co-Respondent *"I can't live if you are not safe and ok."* The Respondent testified that he sent the text message to the Co-Respondent. He also confirmed the incident on the rescue mission.

13. The two other occasions where the Petitioner caught the Respondent and the Co-Respondent together were in Cost Right and at the Petitioner's aunt house. She recalls asking the Respondent to purchase a nebulizer for their daughter because she was having breathing problems in 2019. She witnessed her husband during a video call where he was at Cost Right with the Co-Respondent. Later that day, the Petitioner went to her aunt's house to see her niece. She stated that she also saw the Respondent there with the Co-Respondent. The Respondent admitted that he was with the Co-Respondent on those occasions, but the timeline was not correct. The incident at Cost Right occurred in 2019 and the incident where the Petitioner saw him with the Co-Respondent at her niece residence happened in 2020.

14 Adultery is defined under s. 2 of the Matrimonial Causes Act, (“MCA”) Chapter 125 as:

“... any voluntary act of an intimate sexual nature, other than that regarded as an act of mere familiarity, between one party to a marriage with another party of the opposite sex who is not the other spouse and which act is inconsistent with that sexual fidelity that is presumed in the interest of public policy to exist between parties to a marriage, or any conduct between a party to a marriage with another person as afore-mentioned whereby a strong presumption arises that such sexual act occurred between them”

15. The Respondent admitted during trial that he had an affair with the Co-Respondent. He stated *“It’s not a lie, I’m sleeping with the Co-Respondent and was at the time my wife filed her petition. But this did not begin until after in February 2019 to June 2019.”* He further stated under cross examination that *“I felt my wife was not on my run, so I had an affair with A.N.”*

16. Notwithstanding the Respondent’s contention regarding the timeline when he began his adulterous affair with the woman named I prefer the evidence of the Petitioner that the Respondent committed adultery with the Co-Respondent from the time of the several personal encounters with him and the Co-Respondent together and the time he sent the photo to the petitioner.

17. While the Respondent is seeking a Decree Nisi on the basis of desertion during his testimony as well as during cross examination of the Petitioner herself it was revealed that the Petitioner had also confessed to having an adulterous relationship with a person named “Brent.” The Respondent alluded to the fact that he forgave the Petitioner for this and they came back together to live as man and wife in 2019.

18. Both parties having admitted the adultery, the issue now before the court is whether the either of them or both of them condoned the acts of adultery they confessed.

THE ISSUE OF CONDONATION

19. To determine whether either the Petitioner or the Respondent condoned their respective acts of adultery regard must be had to S. 31 (8) of the M.C.A. which states as follows:

“For the purpose of proceedings on an application under this section adultery which has been condoned shall not be capable of being revived, and any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted by evidence sufficient to negative the necessary intent.”

20. Furthermore, Viscount Simon L.C. in **Henderson v Henderson [1944] 1 All ER 44** indicated at p. 46 of the judgment that:-

“Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven ...”

21. Under cross examination, the Petitioner was asked whether she filed for divorce after she saw the photo of the Co-Respondent that was sent to her. She answered that she did not because she could not afford it. Additionally, in 2019, the Petitioner admitted that she moved back in with the Respondent. When asked why she moved back in with the Respondent, her response was that she moved back to mainly give her aunt and grandmother a break which had nothing to do with the Respondent’s infidelity. She admitted that she and the Respondent lived as roommates and there was no romance. In fact, the Petitioner stated that she had not had sex with the Respondent since 2018.

22. The Respondent confirmed that there was no sex between him and the Petitioner but that they agreed to get back together in September 2019, and they stayed together until March 2020. The Respondent stated that when the Petitioner moved back in with him, she baked him a cake for his birthday which the Petitioner confirmed. They both testified to the fact that they had forgiven each other past indiscretions.

23. In March 2020, the Respondent asked the Petitioner for sexual intercourse. In answer the petitioner demanded that the Respondent wear a condom. The Respondent refused to wear a condom. It was immediately after this incident that, the Petitioner packed her belongings and left the matrimonial home. To date she has not returned. The Respondent recommenced a relationship with the Co-Respondent just about a month later in April/ May 2020. He further confirmed that the Co-Respondent moved in with him, and it was only then that sexual intercourse between him and the Co-Respondent resumed. This was allegedly after having ceased during the period when he and the Petitioner was reconciling September 2019 to March 2020.

24. Counsel for the Petitioner submits that the Respondent’s admission of adultery was not forgiven by the Petitioner. Even if the Court accepts some form of forgiveness, the Respondent has continued the relationship with the Co-Respondent. Counsel for the Respondent submits that there was unreasonable delay by the Petitioner in presenting and prosecuting the petition. The Petitioner knew of the Respondent’s adultery from the summer of 2019 and did nothing.

25. The Co-Respondent’s move into the matrimonial home within a month of the Respondent leaving raises serious questions about the Respondent’s motives in issuing the wife an ultimatum when she refused sexual intercourse with him. He told her she can go. The alleged rapid rekindling of the relationship between the Respondent and Co-respondent right after the Petitioner left, leads me to believe the Petitioner’s contention that the relationship never ceased notwithstanding the professed period of reconciliation. The wife was therefore justified in her suspicions and her requests that the Respondent wear a condom during sexual intercourse with her.

26. *The question to be answered is whether either party condoned the others adultery as defined in the MCA and through the well-established authorities;*

Section 16 (4) MCA states;-

On a Petition for divorce it shall be the duty of the court -

- (a) To, inquire, so far as it reasonably can into facts alleged and whether there has been any connivance or condonation on the part of the Petitioner and whether any collusion exists between the parties; and*
- (b) To inquire into any counter charges made against the Petitioner.”*

27. *Section 19(1) “If the court is satisfied on the evidence that the case for the Petitioner has been proved and*

- (a) where the ground of the petition is adultery, that the petitioner has not in any manner been accessory to or connived at or condoned the adultery;*
- (b) Where the ground of the petition is cruelty that the petitioner has not in any manner condoned the cruelty,*

The court shall subject to S.18 grant a Decree declaring the marriage to be dissolved; and if the court is not satisfied with respect to any matters aforesaid; shall dismiss the petition.”

28. The operation of condonation is described by Bucknell L.J in **Richardson v Richardson** [1950] P.16

“The Lord Justice quoted the words of Sir John Nicholl, Dean of Arches, in Durant v. Durant’. Sir John said: “The plainer reason and the good sense of the implied condition is that ‘you shall not only abstain from adultery, but shall in future treat me - in every respect (to use the words of the law) with “conjugal kindness”.’” Finally, there is a judgment of Sir Francis Jeune P., in Houghton v. Houghton where he said: “The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties,

Later in his judgment he went on to state;

“I think that the proper test to apply is one which is indicated by the words of Sir Francis Jeune P. to which I have just referred, that the conduct of the spouse must be such as to make decent married life together impossible. That is putting it as broadly as I can. I think a matrimonial offence means an offence against the vows of marriage. The vows of marriage are pretty well known. Desertion is certainly one offence, and cruelty as defined by the law is another.

Per Denning L.J.:

Such conduct short of “cruelty” will revive condoned adultery, if it consists of harshness or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage.

29. Authority for condonation is also found in **Lockhart v Lockhart [1995] BHS J. No. 37** which defined condonation as:

“the reinstatement in his or her former marital position of spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not henceforward commit any further matrimonial offence”

30. Seemingly, for the Court to accept this position, it must be satisfied that when the initial acts of adultery occurred, the wife had not reconciled with the husband for his indiscretions and vice versa. The element of forgiveness is essential to condonation.

31. Bain J in the case of **MDM v. EHM BS 2015 SC 146** referenced **Mackrell v. Mackrell 1948 All ER 858** where Denning LJ stated:-

“Reconciliation does not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not until then, are the offences condoned.

*Reconciliation being the test of condonation, nothing short of it will suffice. The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive. The longer the parties continue together and the closer their relationship, the stronger, of course is the evidence of reconciliation... In my opinion therefore, attempts to effect a reconciliation do not amount to condonation unless and until a reconciliation is actually achieved. The only exception to this is the positive rule that one act of sexual intercourse by a husband with full knowledge of his wife's guilt is conclusive evidence of condonation, but as Bucknell, LJ said in *Fearn v. Fearn 1948 1 All ER 459* that is because of the serious prejudice to the wife that may hereby be occasioned. She may have a child as a consequence of it.”*

32. I do believe that the Petitioner and the Respondent attempted reconciliation and truly believed that they had forgiven each other by resuming co-habitation but their actions belied that. The Petitioner still suspected the Respondent was continuing his adulterous affair with the Co-Respondent and she demonstrated this by withholding sex and/or insisting on him wearing a condom. The Respondent was still accusing the Petitioner of sex with her co-workers and arguing with the Petitioner about Brent. There was no restoration of mutual trust and confidence in the marriage as described in **MDM v. EHM BS 2015 SC 146** referenced **Mackrell v. Mackrell 1948**

All ER 858. Consequently I do not find that either of the parties condoned the adulterous relationships in which they had engaged.

33. I am further convinced that the adulterous relationship between the Respondent and the Co-Respondent continued the whole time that he was supposedly reconciling with the Petitioner. She moved in with him in record time. Clearly the Respondent felt no qualms about giving the Petitioner the ultimatum which precipitated her leaving on that fateful day in March, 2020. The Petitioners' rapid decision to leave underscores my assessment that she did not condone the Respondent's adultery or his acts of physical and mental abuse borne out by the facts.

34. I therefore find that neither the Petitioner nor the Respondent condoned the adulterous acts they both admitted to.

EXERCISE OF THE COURT'S DISCRETION

35. It should be noted that the court may under **S. 18 (a) and (c) of the M.C.A.**, dismiss a petition for divorce on the following grounds:

"The court may dismiss a petition for divorce if:

- (a) it is not satisfied on the evidence that the case for the petitioner has been proved; or ...**
- (b) it finds that the petitioner has during the marriage been guilty of adultery; ..."**

36. The Petitioner admitted during trial that she committed adultery with an individual named Brent in 2015. The Respondent also testified that in 2016 he confronted the Petitioner about Brent and thereafter she admitted to having sex with Brent. The Respondent purported to forgive the Petitioner and they both continued living together. The Petitioner submitted a discretion statement to the court of her present indiscretion with C.S. which did not include the previous indiscretion with Brent.

37. **Section 28 (1) of the Matrimonial Causes Rules ("M.C.R.")** states that:

"Every party to a matrimonial cause praying that the court shall exercise its discretion to grant a decree nisi notwithstanding his adultery shall lodge in the Registry a statement (in this rule called "a discretion statement") signed by him or his attorney, stating that the court will be asked to exercise its discretion in his favour notwithstanding his adultery, and setting forth particulars of the acts of adultery committed and of the fact which it is material for the court to know for the purpose of the exercise of its discretion."

38. As the Petitioner did not fully disclose the "acts" of adultery in her discretion statement, the court has the discretion to dismiss her petition in accordance with **S. 18 (c) of the M.C.A.** It must be noted the Respondent testified that he forgave the Petitioner for the adultery

that she committed with Brent; notwithstanding his purported forgiveness, the law is quite clear that all acts of adultery should be disclosed in a discretion statement.

39. The court may exercise its discretion to grant the Petitioner a Decree Nisi notwithstanding her own adultery in accordance with **rule 4(3) of the M.C.R** which states:

“The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages, any claim for costs, and, in appropriate cases, a prayer that the court will exercise its discretion to grant a decree nisi notwithstanding the adultery of the petitioner during the marriage.”

40. In the case of **Lepre v Lepre [1963] 2 All ER 49**, the court granted the wife a Decree Nisi of divorce notwithstanding that she did not pray for the exercise of the court’s discretion and having not prayed for it nevertheless filed a discretion statement that did not disclose all acts of adultery that she had committed. At p. 58 of the judgment, Sir Jocelyn Simon stated that:-

“There remains the difficult problem in the exercise of the court’s discretion in favour of the wife. When she originally filed her petition, she did not pray for discretion at all. When she did file her discretion statement it was far from a full disclosure of her adultery. Even in the witness-box she told untruths about it, and it was only as a result of close questioning that she came finally to disclose the adultery which is now set out in the amended discretion statement with another man as well as Mr. Voitasik ...I am, therefore, though I confess with some hesitation, prepared to exercise the discretion of the court in favour of the wife and to grant her a decree nisi of divorce”

41. The court may grant leave to the Petitioner to amend her petition to include a prayer for the court to exercise its discretion in her favour notwithstanding her adultery.

42. In **Cartwright Jr. v. Cartwright 2006 1 BHS J. No. 62** Watkins, J. in considering whether to grant leave to amend a petition to include a prayer for the court’s discretion concluded at paragraphs 23-26:-

“In considering whether to grant the leave requested I have taken into account the fact that the grant of discretion is solely within the purview of the court. While the respondent may wish to voice objections to the grant, the objections, if any ought to be made by way of submissions by Counsel and not by way of evidence taken from the respondent.

The possibility of the respondent suffering any hardship from non-disclosure is minimal or perhaps non-existent. The petitioner is still saddled with the onus of proving the allegations on which his Petition is based. The fact that a discretion statement is presented to the court by way of a sealed envelope is indicative of the fact that the statement is not meant to be a contentious. It is

an issue that arises after the contentious issues have been disposed of and one for the sole consideration of the court.

I am of the view that omission of a prayer for the exercise of the court's discretion is not of such a critical nature as to strike at the root of the Petition. The effect of such an omission is to render the Petition irregular or defective. This defect can be cured without infringing on the rights of the respondent.

Leave is therefore granted to the petitioner to amend the Petition to include a prayer invoking the jurisdiction of the Court to exercise its discretion under the provisions of Rule 28 of the Rules. The Amended Petition and Discretion Statement must be filed within seven (7) days of the date of this Ruling. Re-service of the Petition is dispensed with."

43. Furthermore, Bain J in **J.R.P v C.M.P BS 2009 SC 92**, adopted the ruling of Watkins J in **Cartwright Jr. v Cartwright 2006 1 BHS J. No. 62** where leave was granted to amend the petition for the exercise of the court's discretion. Bain J stated at paragraph 37:-

"I adopt the ruling of Watkins, J. and would grant leave to the petitioner to amend the petition to include a prayer invoking the jurisdiction of the court to exercise its discretion under the provision of Rule 28 of the Matrimonial Causes Rule."

44. The cases of **Cartwright Jr. v Cartwright** and **J.R.P v C.M.P** are distinct from the present case in that the Petitioner in those cases did not file a discretion statement disclosing their act/ acts of adultery. In the present case, the prayer for discretion was omitted from the Petition, however having filed a Discretion Statement since 24th October, 2023 counsel for the Petitioner sought and was granted leave to amend the prayer at trial to include a prayer for the court to exercise discretion.

45. Counsel for the Respondent clearly recognized that any deficiencies in the discretion could be employed to his client's advantage in having the Petition of the Petitioner dismissed under S. 28 of the Matrimonial Causes Rules. He reasoned that if the discretion Statement disclosed any name other than "Brent" the person with whom the Petitioner had confessed to having committed adultery, then in addition to possible dismissal under S.18 MCA the deficiency also offended R. 28 MCR that "all" acts of adultery needed to be set forth in the discretion statement. The statement did in fact not speak to "Brent" but some other person, C.S.

46. In deciding this contested issue I found the remaining portion of R.28 MCR provisions helpful. It continues; "and of the fact which is material for the Court to know for the purpose of the exercise of it's' discretion." I am of the view that the fact of disclosure of the commission of adultery by the Petitioner in and of itself is sufficient for this court to know the purpose for the exercise of it's' discretion.

47. The exercise of the courts discretion is just simply that; a matter that is in the purview of the court to decide based on the circumstances in each particular case. In the circumstances and having regard to the authorities discussed above I hereby grant leave to the Petitioner to amend her discretion statement to include all acts of adultery committed during the marriage to comply with Rule 28 of the Matrimonial Causes Rule.

48. Counsel's submissions on this issue alerted the court to a similar deficiency in the Respondent's Cross-Petition. Having complained of the Petitioner's failure to include all acts of adultery in her discretion statement, and, having admitted to adultery himself it became obvious that he was not in compliance with Rule 28. There was no prayer for discretion made in the Respondent's Answer and Cross-Petition nor any application made on his behalf during the trial. Thus, the Respondent is in no better position than the Petitioner and his Petition is subject to dismissal under S. 18 of the Act. However, in keeping with the obligation to be just and fair in these matters, leave is also hereby granted to the Respondent to file a discretion Statement in conformity with the R.28 MCR.

49. In the premises I dismiss both the Petitioner's and the Respondent's allegations of adultery as a basis for the granting of a Decree Nisi.

Allegation of Cruelty made by the Petitioner against the Respondent

50. The Petitioner's evidence was that the Respondent became very controlling and even became physically abusive shortly after they were married. She recalled being physically attacked by the Respondent even while holding their first child, who was at the time an infant in her hand. During trial, the Petitioner testified that the Respondent had hit her countless times. She recalled that while they were living in Long Island, her son was in her arms and the Respondent was fighting her. Thereafter, he came back into the room and took their son. He continued fighting the Petitioner where he slapped, pushed and shoved her down in the bathroom.

51. The Respondent recalled the incident in Long Island. He claims that he and the Petitioner did have a disagreement and that their son was in hand. However, he denied putting hands on her. He stated that the mother came in and took their son and told him and the Petitioner to sit down and talk. He stated further that he and the Petitioner slept together in the same bed that night.

52. As to the second allegation of cruelty, the Petitioner stated that during her pregnancy the Respondent remained physically abusive to her who on several occasions was admitted to hospital for stress and with bruises from the Respondent's physical attacks. In her testimony, the Petitioner said that she was eight months pregnant and she came home and said something that the Respondent didn't like so he hit her. The Respondent shoved her onto the floor and as he was about to punch her in the face, the Respondent's cousin and the cousin's girlfriend pried him off her. The Petitioner also testified that when the incident happened while she was pregnant her son was a toddler, however in her petition, she stated that her son was an infant at that time. The Respondent denied this allegation. In his words, "*why would I hit a pregnant lady with my kid*"?

53. The Petitioner did not report this incident to the police. She continued to live with the Respondent throughout this time. No witnesses that were alleged to have been present during that time, the Respondent's cousin and/or cousin's girlfriend came to testify on her behalf.

54. Assuming the physical altercation did in fact take place, the Court must determine whether these patently abusive acts amount to cruelty within the legal definition.

55. **Section 2 of the M.C.A** defines cruelty 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 circumstance 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”.

56. Moreover, s. 19(1) (b) of the M.C.A, it states that:-

“If the court is satisfied on the evidence that the case for the petitioner has been proved and where the ground of the petition is cruelty that the petitioner, has not in any manner condoned the cruelty, the court shall, subject to section 18 grant a decree declaring the marriage to be dissolved; and if the court is not satisfied with respect to any of the matters aforesaid; it shall dismiss the petition”

57. The onus of proof is on the Petitioner to show that the behaviour of the Respondent was fell short of the normal standards of conjugal kindness that she ought to expect of him and that it caused her health to suffer and was of so grave and weighty a nature that if she should be called upon to continue to endure it, would be detrimental to her health.

58. In the case of *Gollins v Gollins (1963) 2 All ER 966* at p. 986, Lord Pearce 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.”

59. Counsel for the Petitioner submits that the Petitioner has sufficiently proved cruelty. The Respondent's counsel counters that since the Petitioner failed to provide a police report or medical report to substantiate her allegations in the face of the Respondent's vehement denial she has failed to prove her case. However, I believe the Petitioner when she spoke of the

physical attacks upon her by the Respondent, and that he had hit her countless times. The fact that there is no medical or police reports of the incidents does not alter my view that she was telling the truth in making these allegations. Additionally, the parties both gave their respective accounts of the March 2020 incident about the condom. Their accounts differed in details but not much concerning the husband's demand for sex, the request for the condom and the refusal and ultimatum issued by the husband, which amounted to, no sex, then be gone. I believe this was the straw that broke the camel's back for the Petitioner. Given all of the Respondent's misdeeds with the Co-Respondent and his previous acts of physical abuse I accept that the Petitioner's insistence on the condom was her taking preventative measures to preserve her health from the dangers that could possibly result.

60. Therefore, I am satisfied that the acts complained of by the Petitioner were sufficiently grave and weighty to amount to cruelty despite there being no independent witnesses to corroborate her allegations of acts of cruelty perpetrated against her by the Respondent. Additionally, according to the definition of cruelty in S. 2 the Petitioner need only demonstrate to the court that the Respondent's behaviour occasioned "injury to her health, or *a reasonable apprehension* of it. To my mind it is reasonable for a wife with concrete knowledge that her husband is engaging in sexual intercourse with someone else to apprehend that she might catch a sexual disease from him. Having admitted the adultery and believing that he was still involved sexually with the Co-Respondent it was unreasonable and cruel to refuse to wear the condom and to top it off with an ultimatum. In the final analysis I find that the Respondent's behaviour was sufficiently grave and weighty that the Petitioner should not be called upon to continue to endure it as it would be detrimental to her health. Consequently, I am satisfied that the Respondent was cruel to the Petitioner.

Allegations of Desertion by the Petitioner and the Respondent

61. As both the Petitioner and the Respondent are alleging desertion by the other spouse, they both must prove all elements of the legal definition of desertion if either of them is to succeed in having the marriage dissolved on this ground.

62. Each of them must satisfy the Court that the other spouse left the matrimonial home/marriage physically or that the other spouse evinced an intention not to co-habit with the other spouse. The latter act is known as constructive desertion. This is usually demonstrated by intentional or willful refusal to engage in sexual intercourse with the other party and/or to fail or refuse to perform any marital chores or show any kindness towards the other party. In effect living in the same matrimonial home but living separate lives. In other scenarios a spouse's behaviour may be such to compel the other party to leave the matrimonial home, where there is no cause or excuse for their behaviour. Further, that it is reasonable to conclude that he/ she behaved in that manner in order to compel the other person to leave the matrimonial home.

63. Desertion is defined in **Section 2** of the **M.C.A.**, as:-

"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”

64. The Petitioner’s evidence is that the Respondent took a job and relocated to Abaco leaving the Petitioner to care for the children of the marriage all on her own. The Petitioner being financially unable to bare this burden alone was forced to move in with her grandmother so that she and the children of the marriage could have a place to stay without fear of being evicted. Under cross examination, the Petitioner testified that she was supposed to join the Respondent in Abaco and that he had reached out to her to inquire when she was coming to Abaco. She told him she was not coming after he sent her the photo of the Co-Respondent.

65. The Respondent’s evidence differed slightly, that the parties agreed to relocate to Abaco in December 2018, the Respondent moving first for work in January and the Petitioner joining in a matter of weeks. He continued that once the Respondent had relocated, the Petitioner advised that she wasn’t leaving her job and that she and the daughter would be staying in Nassau. The Respondent later testified that the Petitioner’s allegations were not true. He indicated that they came to live separate from each other because he was offered a job in Abaco. He and the Petitioner agreed that she would join him with the kids once school had closed in June 2019. He further admitted that he sent the photo of the Co-Respondent to the Petitioner in June 2019 apparently to compel the Petitioner into hurrying to Abaco, appreciating that the possibility of the Respondent being tempted into adultery with the woman in the photo was a real possibility.

66. Reviewing other conduct relevant to the issue of desertion the Respondent stated that he gave the Petitioner an ultimatum in 2020 to either resume sexual intercourse or that it didn’t make sense that they continue living as husband and wife. He stated that upon the Petitioner hearing the ultimatum, she freely packed up her and the daughter’s belongings and moved out. The context in which the ultimatum was given was stated during trial. The Respondent testified that when the Petitioner was in the shower, he asked her for “*some*”. The Petitioner said, “*No stop asking me*”. He said, “*If it’s gonna be like this, no sense us being together.*” The Petitioner asked him to wear a condom to which he refused. In his words, “*who wears a condom with their wife*”?

67. The Respondent further testified that the Petitioner asked him if he wanted her to leave which he told her “*if you want to go the door is there go*”. Thereafter, the Petitioner started packing. The Respondent indicated that he did not pack the Petitioner’s belongings and he never told her to get out.

68. It is equally well settled that the mere refusal of sexual intercourse by one of the spouses does not constitute desertion. (See the decision of the House of Lords in **Weatherley v. Weatherley 1947 A.C. p. 628.**)

69. Counsel for the Petitioner submits that it was the Petitioner’s decision to leave. The Respondent did not force her to do so. Further that the Petitioner’s allegation of desertion must fail because both parties evidence prove that they both agreed to relocate. The Petitioner in February 2019 made a choice not to go to Abaco to be with the Respondent.

70. In **Lundy v Lundy BS 1993 SC 3**, Sawyer, J, referred to the case of **Pardy v. Pardy 1939 P 288**, whereby Sir Wilfred Greene M.R. said at pp. 306–307:–

“I may summarize my opinion by saying: (1.) that where the original separation was by mutual consent, desertion may supervene without the necessity of a resumption of cohabitation; (2.) that this can happen where (a) on the part of the spouse alleged to be in desertion there is repudiation of the agreement under which separation took place, no step taken towards the resumption of cohabitation in fact, and, in addition to repudiation, the animus deserendi, and (b) on the part of the spouse alleging desertion there is not only no insistence on the terms of the separation agreement, but a bona fide willingness to resume cohabitation without regard to its terms — in short, if it can be said that both parties are during the relevant period in truth regarding the agreement as a dead letter, which no longer regulates their matrimonial relations; (3.) that whether or not these conditions exist during the relevant period is a question of fact in each case, the answer to which depends upon the true inference to be drawn from the words and conduct of the parties; (4.) that, once these conditions are fulfilled, all the elements necessary to constitute a state of desertion are present, namely, de facto separation, animus deserendi, and absence of consent on the part of the spouse alleging desertion.”

71. Furthermore, to prove desertion, s. 16 (1) (c) of the M.C.A states:-

“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 has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition”

72. The evidence demonstrates that the Respondent has not deserted the Petitioner. I believe that the Petitioner consented to relocating to Abaco with the Respondent in 2019 and she was to follow him there. I accept her evidence though, that when the Respondent sent her the photograph she changed her mind and that resulted in her not going to Abaco as they had initially agreed. It was reasonable for her not to go given the photo sent to her by the Respondent of another woman, together with the related message spoken or subliminal. However, receipt of the photo did not necessarily mean that the Respondent had left the marriage at that time although it was a portent of things to come.

73. The Petitioners’ overall approach to sex is also indicative of acts of desertion. The evidence suggests she had weaponized this aspect of her relationship with the Respondent. While it can be said that the Respondent’s ultimatum played a role in causing the Petitioner to leave ultimately she did so of her own volition.

74. Moreover, an examination of the Petitioners conduct over the course of the marriage also reveals critical aspects of desertion. Despite committing to a reconciliation of the marriage in 2019 and moving back in with the Respondent, her protestations that she had forgiven

him were not borne out through her actions; she refused to act within what would normally be expected of a spouse determined to continue with the marriage. Using sex to “punish” the Respondent, began from 2017 and continued up to the time of the proceedings. In fact the Petitioner clearly admitted that the lone sexual encounter she had with the Respondent in 2018 was forced upon her by the Respondent. She also, seemed content with the arrangement of the couple living as room-mates. While I accept unreservedly the House of Lord’s “Weatherley” authority I feel that I am equally bound to factor in this conduct.

75. In totality I am therefore satisfied that the Petitioner’s refusal to follow through with the agreement to relocate to Abaco, her continuous refusal of sexual intercourse, her withholding of sexual intercourse from her husband as “punishment” for the extended period of time from 2017 onwards amounted to “constructive” desertion of the Respondent. She clearly evinced an intention not to co-habit with the Respondent. In 2020, when she finally left the matrimonial home she further exacerbated an already tenuous marriage. She was not forced to leave by the Respondent. and her failure to return to the matrimonial home and her choice to now live with C. S. and engage in an adulterous relationship is to my mind a clear case of physical” desertion. Upon these considerations I am satisfied that since the celebration of the marriage, the Petitioner has deserted the Respondent for a continuous period of at least two (2) years immediately preceding the presentation of the petition.

76. It is also significant, that when the physical separation occurred between the parties the Respondent was no longer in Abaco but had returned to New Providence and had taken up residence with the Petitioner. He wanted to have sexual intercourse with her. My assessment is that he felt desperate to engage her consortium. And misjudging the outcome, issued an ultimatum intended to persuade her in his direction. His attempt backfired having the opposite effect to what he intended. Their interchange on the day in question lays waste to the Petitioner’s claim that the Respondent deserted her. The claim is unsubstantiated.

77. In all the premises I find that the Petitioner’s claim that the Respondent deserted her fails. However, I am satisfied that the Petitioner deserted the Respondent. .

78. CONCLUSION AFTER ASSESSING ALL OF THE ISSUES;

- i. Both parties are adjudged to have committed adultery during the marriage.
- ii. Both parties are given leave to file Discretion statements in conformity with R. 28 MCR. The discretion statements cancels the courts ability to grant the Decree Nisi on grounds of adultery.
- iii. Neither party condoned the others adultery and in the case of the Petitioner she did not condone the Respondent’s cruelty, the result is that neither the Petition or the Cross-petition is dismissed;
- iv. The Respondent was cruel to the Petitioner; and

v. The Petitioner did desert the Respondent.

79. Accordingly, subject to amendment of the Discretion Statement to be filed within Ten (10) days of the date hereof and in compliance with R. 28 MCR, on behalf of the Petitioner, the court will exercise discretion in favour of the Petitioner and grant a Decree Nisi to the Petitioner on the ground that since the celebration of the marriage the Respondent has treated her with cruelty.

80. Also, subject to the filing of a Discretion Statement, within Ten (10) days of the date hereof and in compliance with R. 28 MCR, on behalf of the Respondent, the court will exercise discretion in favour of the Respondent and grant a Decree Nisi to the Respondent on the ground that since the celebration of the marriage the Petitioner has deserted the Respondent for a continuous period of at least two (2) years immediately preceding the presentation of the petition.

81. Service of the Petition or other amended documents are dispensed with.

82. Both Decree Nisi are not to be made absolute for three months. Both parties are to bear their own costs of these proceedings. Ancillary matters are adjourned to chambers.

Dated this 30th day of January, A.D. 2024



The Hon. Madam Justice C.V. Hope Strachan

