IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

2025/FAM/div/00006

B E T W E E N:

N.M.N.

Petitioner

AND

M.S.C.N.

Respondent

Before:	The Honourable Justice C.V. Hope Strachan
Appearances:	Robert Adams K.C.; Richard Todd K.C., and Samuel Brown for the Petitioner
	Gail Lockhart-Charles K.C. and Tatyanna Maynard for the Respondent
Hearing date:	Heard on written submissions received 11th Sept, 2026 and 5th Oct. 2026

Contested divorce and matrimonial proceedings, strike out application, interception of communications act, matrimonial causes rules, inherent jurisdiction of the courts.

RULING

C.V.H. STRACHAN, J

[1.] This interlocutory judgment determines the Petitioner's ("the husband" / "N") application to strike out parts of the Respondent's ("the wife" / "S") Affidavit and exhibits on the basis that certain audio and video recordings (and transcriptions) were unlawfully obtained and/or are consequently inadmissible hearsay. The husband also is seeking costs of the application.

Background Facts

[2.] The parties were married on 27th April, 2007. They have Three (3) children, ZN (m) age 15 years, AN (m) age 13 years and LN (f) age 10 years. The husband petitioned for divorce from the wife on 13th January, 2025 on the ground of cruelty. The wife answered and cross-petitioned on the grounds of the husband's cruelty and adultery. After a great deal of manoeuvring a Decree Nisi was granted to the wife in an uncontested hearing upon the admitted adultery of the husband on 5th October 2026. An enormous amount of court time and resources has been expended on a proliferation of interlocutory applications, as the parties engage in a tit for tat battle to inflict as much pain upon each other as possible.

[3.] The Court is poised to make a final determination of the issue of the custody of the children. Again, the parties have determined that another chance is presented to extend litigation far beyond what may reasonably be required. This litigation has extended over a prolonged period, notwithstanding that the husband and wife both professed from the outset that they both wished to be divorced and that the only difference on the issue of custody, care and control, was the percentage of time the three children would spend with each parent.

[4.] Over the passage of time that this action has dragged on, the parties have filed voluminous affidavits, social workers from The Department of Social Services have interviewed the children and parties and made Two (2) reports, the Court has itself spent time individually with the children on Two (2) occasions and the position of the parties on the percentage of time to be spent with the children has changed, and save for the youngest child, their daughter aged ten (10) years, the period of time that the older children wish to spend with the parties have changed.

[5.] The current Interim Order with regard to the children accords with the wishes expressed by the children and broadly aligns with what the husband and wife sought insofar as the wife asked for the oldest son to be sent to Boarding school, which would mean he would not be living with her at all and that LN, the daughter, spend equal time with both parents.

[6.] The Court has, on just about every occasion, urged the husband and wife to seek to resolve this matter by agreement. In particular, the Court has sought to encourage the parties to agree to these applications as a determination of one of these applications could potentially have an impact outside of this litigation and create a new dispute/case that would impede/prolong the parties' ability to get to working on resetting a healthy relationship for the benefit of the children and themselves. I remind the husband and wife that they will have a relationship with each other for the lives of their children and any grandchildren that they may be blessed with.

The Applications

[7.] On 30th April 2025 the wife by Summons applied for a Protection Order pursuant to the Domestic Violence Protection Orders Act, Chapter 99 A of the Statute Laws of the Bahamas supported by an Affidavit filed even date. The Affidavit was also sworn for opposing the husband's application made by Summons filed 20th January, 2025 and in response to the Affidavits of the husband filed 20th and 28th January, 2025. The wife's affidavit also countered the affidavits filed on behalf of the husband by NW on 27th January 2025, the affidavit of MER filed 27th January 2025, the affidavit of RF sworn 24th January 2025, the affidavit of TN sworn 27th January 2025 and the affidavit of SM sworn 27th January 2025.

[8.] On 9th May 2025 by Notice the husband applied to strike out recordings recorded by the wife. An Order that paragraphs 23, 56, 74, 83, 84, 92, 118, 144, 236, 237, 238, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, and the Transcripts of Recordings exhibited and marked "MSN-1, Pages 6, 7, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 29, 30, 49, 50, 51, 52, 53, 54, 55" of the First Affidavit of MSCN filed herein on 30th April 2025 be struck out as scandalous, irrelevant or otherwise oppressive in that they refer to recordings of private conversations that were unlawfully obtained by the wife contrary to the provisions of the Act and consequently inadmissible in evidence.

1. An Order that paragraphs 7,8,9,12,13,14,15,16,17, and the Transcripts of recordings exhibited and marked "JH.1", "JH.2," "JH.3", "JH.4", "JH.5", "JH.6", "JH.7", "JH.8" "JH.9", "JH.10", "JH.11", and "JH.12", of the Affidavit of Dr. Jane Haynes filed herein on 30th April 2025, be struck out as scandalous, irrelevant or otherwise oppressive in that they refer to recordings of private conversations that were unlawfully obtained by the wife contrary to the provisions of the Act and consequently inadmissible in evidence.
2. An order that the costs of and occasioned by this application shall be paid by the wife to the husband, to be taxed if not agreed.
3. Such further or other relief as the Court thinks fit.

[9.] As a corollary, on 14th May, 2025 the husband filed a Notice that he intends to advance objections to the evidence relied upon in support of the said application pursuant to s.27, 28 and 34 of the Interception of Communications Act 2018 ("the Act"/ "the ICA") and the inherent jurisdiction of the Court to seek an order and/or direction that:

1. Paragraphs 23, 56, 74, 83, 84, 92, 118, 144, 236, 237, 238, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, and the Transcripts of Recordings exhibited and marked "MSN-1, Pages 6, 7, 8, 9, 10, 11, 13, 14, 16, 17, 18, 19, 20, 21, 22, 29, 30, 49, 50, 51, 52, 53, 54, 55" of the First Affidavit of MSCN filed herein on 30 April 2025 be struck out.

2. Paragraphs 7, 8, 9,12, 13, 14, 15, 16, 17, and the Transcripts of Recordings exhibited and marked "JH.1". "JH.2", "JH.3", "JH.4", "JH.5". "JH.6", "JH.7", "JH.8", "JH.9", "JH.10", "JH.11" and "JH.12" of the Affidavit of Dr. Jane Haynes filed herein on 30th April 2025 be struck out on the ground that they refer to recordings of private conversations and communications unlawfully obtained by the Complainant contrary to the provisions of the Act and consequently contain inadmissible evidence.

The Wife provided a brief description of each recording at paragraph 243 of her Affidavit.

[10.] These amount to recordings:

(a) in which the Wife was not a party, namely the recordings listed at 1, 6, 10, 11 and 12;

(b) in which the Wife and one of the children were alone as a party, namely recordings listed at 2,3,4,5, and 14;

(c) in which the husband is present either alone with the wife or additionally a child, namely 7,8,9 and 13.

[11.] Dr. Jane Haynes is one of the wife's therapist. In the wife's First affidavit, the subject of the husband's application resides substantially on the challenged audio / video recordings which she made on her personal mobile phone and on transcripts derived from those recordings.

[12.] The recordings encompass some interactions in which the wife actively participated or which occurred in her immediate household, presence, and others in which she did not participate (private exchanges between the husband and a child or third party). In one case it is a telephone call the wife overheard between the husband and a third party. In several instances, the husband's contention is that those recordings are "private conversations" captured by a listening device in breach of s.27 of the ICA and are inadmissible under s. 34 of the Act, and/ or constitute hearsay evidence under s.38-39 of the Evidence Act. Additionally, the husband contends that by virtue of the relevant paragraphs and recordings being unlawful and in contravention of the ICA they should be struck out a scandalous, irrelevant or otherwise oppressive and should be rendered inadmissible at trial.

[13.] The specified paragraphs of the wife's First Affidavit, are extracted from the affidavit as appears hereafter. In the extracts the husband is referred to as P and/or N and the wife is referred to as R. AN is referred to as A and ZN is referred to as B. LN is referred to as X.

> "23. A began to whimper and I saw him cowering like he would often do in fear when N would hit him. N then followed A shouting at him and calling him a liar. This occurred in front of the household staff. I have an audio recording of this incident. I recorded the incident

with my cell phone. I have a copy of the audio recording which I will be seeking to have admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit "MSN-I at Pages 6 and 7" a transcription of the audio recording."

"56. I have a copy of the audio recordings of each of the events listed at Paragraphs 30 and 45 of my Affidavit. I will be seeking to have these recordings admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit "MSN-I at Pages 8 and 9 and at Pages 10 and 11" a transcription of the audio recording."

"74. I did not make up this allegation. I do however have an audio recording of the incident. I recorded the incident with my cell phone. I have a copy of the audio recording which I will be seeking to have admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit "MSN-I at Pages 13 and 14" a transcription of the audio recording."

"83. I also have an audio recording of this incident. I recorded the incident with my cell phone. I have a copy of the audio recording which I will be seeking to have admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit MSN-I at Pages 16 and 20 a transcription of the audio recording."

"84. This incident was also so distressing and abhorrent that I made a report to the Police, on the advice of Dr. David Allen who, when I recounted the details of the incident and played the recording to him, was very concerned and stated very firmly that I should report this. I have requested a copy of the Police Report and I hope to have it in hand prior to the hearing of this application."

"92. I also have an audio recording of the incident. I recorded the incident with my cell phone. I have a copy of the audio recording which I will be seeking to have admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit MSN-I at Pages 21 and 22 a transcription of the audio recording."

"118. I also have audio recordings of the incidents referred to in Paragraphs 104 and 105 of this Affidavit. I recorded the incidents with my cell phone. I have copies of the audio recordings which I will be seeking to have admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit MSN-I at Pages 29 and 30 a transcription of the audio recording."

"144. Another example of this occurred recently on 6th April, 2025. I heard N come into the house and moments later I heard him on the phone chuckling to his friend and enjoying making comments in Arabic "she's crazy…she lost her mind". Literally just a few minutes later, I hear the children come into the room and then I heard N sobbing. I went over to see what was happening and N was sobbing in front of the children. I immediately asked what was happening because I was shocked. A then lashed out at me very angrily clearly upset that his father was crying and seemingly blaming me. I said to N that he was just laughing moments ago, to which he didn't respond. I suspect he didn't realize that I had heard him laughing or seen his smiling face while speaking to his friend. This was extremely troubling to me because even if N were genuinely upset he ought not to have been intentionally crying

in the children's presence. It was even more troubling because I knew I had just heard him laughing on the phone and I truly believed that the sobbing in front of the children was another cruel manipulation of them with callous disregard for their emotional welfare. I also have audio recordings of this incident. I recorded the incident with my cell phone. I have a copy of the audio recording which I will be seeking to have admitted into evidence. I give additional evidence for this purpose below. Additionally, there is now produced and shown to me marked Exhibit MSN-I at Pages 49 to 56 a transcription of the audio recording."

"236. As stated above I have recorded many of the interactions between N and myself and the children."

"237. Actually, my recording first started as a means of trying to get through to N about his behavior which he would deny or refuse to acknowledge. I had hoped that by showing him what he did or how he spoke he might express remorse and make a genuine effort to work on himself. This never happened.

"238. The recordings also became used concurrently as a defense to the abuse. I noticed that when things escalated and N was in a fit of rage, he would tend to temper his behavior when I took out my phone and started recording him. It therefore also served as a defense mechanism."

"239. As time progressed, besides being abusive, the reality was N is also manipulative, coercive, powerful, resourceful and he lies incessantly. He would actually give an account to me of a conversation he and I had, or an incident that had happened, which was completely inconsistent with what had actually occurred."

"240. N would very convincingly seek to advance his false account of what had occurred. I then realized that I needed to accurately document what was happening and so I then started recording for the purpose of providing an accurate account of what had occurred so that I could then present it to him to defend against his lies and misrepresentations."

"241. For the purpose of this application, I rely on the recordings specifically identified above and will be respectfully inviting the Court at the appropriate time to have the recordings tendered into evidence."

"242. I confirm that all of the recordings were recorded by me using my personal cell phone."

"243. I set out in the chart below the various recordings I have referenced in this Affidavit and which have been referenced in Dr. Hayne's Affidavit along with the dates when I made them, the type of recording and a brief description of what is occurring in the recording."

Number	Date of Recording	Recording	Wife's Description
1.	8th November 2020	Video	Husband (P) cursing at A.

2.	7th June 2021	Video	A reporting P grabbing and dragging B to R (the wife).
3.	22nd June 2021	Video	A reporting to R that P choked him
4.	6th December, 2021	Audio	A reports to R that P smacked him in the face
5.	9th April, 2022	Video	A reports to R that P stood on his stomach
6.	5th July 2024	Audio	P's outburst at A at the hotel in Japan.
7.	10th November 2024	Audio	P tells R in A's presence that she will be sued and be in trouble
8.	29th December, 2024	Audio	R confronting P about letting air out of her tires
9.	25th January, 2025	Audio	P incites A to attack R …B is also present.
10.	18th February 2025	Audio	P challenging A about prior statement that P was angry and unpleasant to him. R present.
11.	23rd February, 2025	Audio	P calling A stupid kid. R present.
12.	5 March 2025	Audio	P instructing someone to follow R and check her bank accounts.
13.	25th March 2025	Audio	P's verbal assault of R over the housekeepers
14.	28th March 2025	Audio	X reports that P told her R called the police for him.

"244 I confirm firstly that on each and every date when I made the recordings listed above and during the period that the recordings were made by me, my cellphone was regularly used by me for the purpose of making audio and video recordings, for the purpose of saving such recordings on its hard drive and for the purpose of conveying such recordings externally to other devices."

"245. Secondly, I confirm that on each and every date when I made the recordings and during the period that the recordings were made by me, my personal cell phone was in perfect working condition and specifically its ability to record both audio and video files and to store, play back and send or conveying such recordings externally to other devices was in perfect working and operational condition.

"246. Thirdly, I confirm that on each and every date when I made the recordings listed above and during the period that the recordings were made by me, my personal cell phone was regularly used by me for the purpose of making, storing and sending audio and video recordings."

"247. Fourthly, I confirm that the information contained in each and every one of my recordings listed above was derived from my personal cell phone, recorded, stored on and conveyed from by my personal cell phone in the ordinary course of its audio and video recording, storage and conveying functions and capabilities."

"248. Fifthly, I confirm that all of the recordings were made in our private home, in the bedroom, bathroom or kitchen save for two (2) which were made in our personal hotel rooms which we stayed at during our holidays.

"249. Sixthly, I confirm, as stated above that I gave the recordings to my Attorneys and that the recordings were conveyed from my personal cell phone to my attorneys via WhatsApp. At this time, I routinely used WhatsApp on my phone to receive and send messages including audio and video recordings and my WhatsApp was in perfect working condition."

"250." Seventhly, I confirm that the audio and video recordings have been transcribed by myself in conjunction with one of my Attorneys namely Sarah Walker on my behalf. I confirm that I have since read each of the transcriptions exhibited to this affidavit and confirm that each and every transcription accurately transcribes the content of my recordings.

"251. Finally, I confirm that, I have also transferred the recordings listed above to external flash devices which I can make available to the Court and to N's Counsel."

[14.] The specific paragraphs of Dr. Jane Haynes' affidavit filed 30th April 2025 are set out hereafter:

> "7. While Mrs. N has provided me with videos and audios which document some of the abuse by Mr. N of her married life (whilst living in temporary accommodation in 2021 in the Bahamas) as evidence of her husband's bullying and physical violence directed at both Z and A but with particular focus on A. I have however decided to limit my report to the three alarming incidents which have taken place at her home in the Bahamas, (with one instance taking place on the half term holiday in Austria), since we have been meeting and which I have direct knowledge of the context and geography in which these instances have occurred. I have heard and seen the other recordings and videos-exhibited to this Affidavit and in my view, they demonstrate a chronic and serious pattern of

behavior on the part of Mr. N."

"8. I have also listened to several of the historical audios she has submitted and the videos during her time in London including excerpts such as this where A confirms witnessing his father's physical abuse of his brother Z on 7th June 2021 in the rented house in the Bahamas:

> A: "He pushed him down to the floor".
> S: "Sorry Dada did what?"
> A: "So Z kicked his toy and L told him and then Dada just grabbed his neck, like pushed him to the floor ... and then he knocked him down and then he dragged him to his room".

"9. I found the most recent report which was submitted to me as an audio on Saturday 29th March at home in Nassau as almost too distressing and violating to listen to. It left me feeling great concern that the children had witnessed such mental cruelty as Mr. N tried to convince the children that their mother did not own any property or even personal chattels of the household. It was conducted in front of the domestic staff and Z and A were incited to join their father in his battering of accusatory and emotionally violent abuse of their mother. To denounce her mental health and assign mental instability to the quality of her maternal functions."

"10. In one of our earliest conversations, I expressed concern on hearing about Mrs. N's anxieties about her children's future travel when she will no longer be accompanying them and indeed living arrangements when her and Mr. N are no longer occupying the same property."

"11. In my view there is a vital necessity for a nanny to be employed who is chosen by Mrs. N and answerable to her who can accompany the children to their father's new home and on holidays. The nanny does not need to closely supervise. The nanny can also be employed for Mrs. N's home for continuity and ease of employment

"12. Audio I: January 25th 2025 - I believe it took place sometime over the conversation reported above after which Mrs. N asked her lawyer to send a letter with this request for a nanny to her husband. As so often happens at the dining room table during a meal, occurring after Mrs. N's solicitor (Ms. Krystal D. Rolle) sent a letter to Mr. N's lawyer Mr Robert Adams, informing him that it was required that a nanny accompany the children on their forthcoming holiday with their father. As will be heard, Mr. N used this instruction, which has become a habitual practice every time he is subject to legal requests to submit to good parenting practices to manipulate the two boys. On this occasion it was by telling the two boys that their mother had insisted that it was necessary for a nanny to accompany them to a planned football match during the trip to celebrate Z's birthday. It will be heard that Mr. N, in his wife's presence and despite her attempts to re-contextualize the request, he incites the two boys' understandable indignation that their mother, quite erroneously, is trying to humiliate and infantilize them in this way. At no time will he allow his wife's explanation to contextualize the legal instructions. His voiced is raised and threatening, and A becomes more and more emotionally dysregulated and insulted by his father's insistence that his mother is intentionally trying to infantilize her son."

> "13. Audio 2 occurred when the children were on holiday in Austria for half term in February and A had complained to his mother privately before they sat down to breakfast that his father had been aggressive with him in his bedroom earlier that morning. The audio is a self-explanatory example of Mr. N's coercive behavior in which he tries to persuade A to comply with his version of events and manipulation of the facts until A's voice is subdued by his father's authority and in spite of his mother's attempts at getting him to speak up and to confirm his reporting of significant earlier distress at his father's bullying and critical behavior on waking up."
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> "14. In Audio 3 on Tuesday 25th March, Mr. N turns his emotional dysregulation and violent verbal rage regarding Mrs. N's meeting with the children's headmaster and her dismissal of a member of the staff into a verbal assault on his wife in front of the children and several members of the domestic staff. His continued humiliation of his wife and attempts to nullify her status as both mother, and homemaker is contemptible in every way. Once again, he vilifies her to his sons telling them that she is a person of no material status and without any authority to run the household."
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> "15. On this occasion his sons join their father in vilifying their mother, again in front of the domestic staff. When I questioned Mrs. N about the children who were apparently again sitting around the dining table, she reported that L reached under the table and grasped on to her mother's hand while remaining silent."
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> "16. After having listened to Audio recordings I, 2 and 3, I became increasingly concerned about the mental health of all three children in a continuing and threatening domestic situation in which they are held in daily thrall to an emotional "double bind' by their father which in brief, if they submit to their father's version of marital events they know they are betraying their mother but if they confirm their mother's observations not only do they fear that they are betraying their father, but they also fear that they are at risk of retaliation and punitive behavior. This kind of scenario reaches a climax in a fourth audio submitted which was too complex for me to be certain of the context but appears to have occurred after Mrs. N reported her husband to the police for domestic emotional abuse and bullying behavior. L, in particular sounds desperate and fearful that her father would be taken away to prison. As will be heard in the course of the video L is trying to contact her father to allow her to visit her friend which he seems to have forbidden her to do. Mr. N, instead of attempting to conceal this information about a police visit from the children goes out of his way to inflame their indignation, to frighten them with the consequences of their mother's action. This resulted in L's case in heightened anxiety about the parental conflicts and thoughts about police and prisons."
>
> "17. In addition to these contemporaneous audio recordings, I had a session with Mrs. N on the 20th March that left me reeling with anxiety and distress afterwards in a way that I have not experienced in any other divorce scenario as to why the domestic professionals involved therapeutically had not reported it as a safeguarding issue. This is the single occasion on which Mrs. N and myself have explored episodes of violence that took place between Mr. N and his son A at their London home."

[15.] The wife applies to strike out some parts of the 12th Affidavit of the Husband or the entire Affidavits for reasons that the content amounts to inadmissible evidence. This will be embodied in a separate ruling.

The Law

[16.] Section 27 of the Interception of Communication Act ("the Act") creates an offence of using a listening device to inter alia record a private conversation by a person who is not a party to the conversation. Section 28 of the Act makes it an offence for any person to communicate to another a private conversation that has come to his attention by use of a listening device. To this end, reference to definitions were pertinent:

Definitions:

> "listening device" means any instrument, apparatus, equipment or device capable of being used to hear, listen to or record a private conversation.
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> "Private conversation" means any words spoken by one person to another in circumstances indicating that those persons or either of them desire the words to be heard or listened to only by themselves or by themselves and some other person but does not include a conversation made in circumstances under which the parties to the conversation ought reasonably to expect the conversation to be overheard.

[17.] Section 34 of the Act renders evidence of any private conversation recorded by use of a listening device contrary to section 27 of the Act Inadmissible in evidence. Section 34 does not make evidence obtained or communicated by a breach of section 28(2) of the Act inadmissible.

[18.] Under rule 68 of the Matrimonial Causes Rules and the cited CPR provisions, the Court may strike out a statement of case, or part of it, for procedural non-compliance, lack of reasonable grounds, or being frivolous, vexatious, scandalous, abusive, prolix or likely to obstruct the just disposal of proceedings; it may also stay a substantially similar subsequent claim against the same defendant pending payment of costs ordered following the striking out of the earlier claim.

[19.] Part 30 Supreme Court Civil Procedure Rules 2022 (CPR) generally confines affidavits to facts within the deponent's own knowledge, permits information and belief in specified circumstances where their nature and sources are identified, and empowers the Court to strike out scandalous, irrelevant or otherwise oppressive affidavit material.

[20.] Section 38 of the Evidence Act, Ch. 65 defines hearsay as evidence seeking to prove a fact through a statement made by a person or contained or recorded in a book, document or other record. Section 39 generally excludes hearsay, subject to the Act and specified exceptions, including where the statement is a necessary part of the fact or transaction under investigation, or proves or disproves a person's knowledge, intention, motive, feelings, or mental or bodily state where that matter is in issue.

[21.] Statutory objection. The Husband submits that the Interception of Communications Act 2018 protects private conversations against unauthorized recording and disclosure. Section 27 prohibits a person from intentionally using a listening device to record a private

conversation to which that person is not a party, subject to its stated exceptions. Section 28 regulates subsequent communication or publication, including by a party who recorded the conversation, subject to the exceptions in subsection (3). Section 34 excludes evidence of a conversation obtained through a device used contrary to section 27, save where a party to the conversation consents to the evidence being given or the evidence is given in a prosecution under the Act.

[22.] The Husband admits that the wife was a party to recordings **2,3,4,5,7,8,9,13 and 14**. But notwithstanding his acceptance of that fact his position is that the disclosure of these recordings to Dr. Jane Haynes and others contravened s. 28 of the ICA. His position is that although the Act does not expressly exclude them on that ground, they are inadmissible hearsay under sections 38 and 39 of the Evidence Act.

[23.] The husband also submitted that not all interlocutory applications are governed by the same evidential rules. He accepts that Order 41, rule 5(2), applied through rule 68 of the Matrimonial Causes Rules, permits statements of information and belief, with their sources and grounds, in affidavits for interlocutory proceedings. However, **Rossage v Rossage** [1960]1 All E.R. 600 demonstrates the difference in the treatment of certain interlocutory applications. In **Rossage** the Court of Appeal held that there was a distinction to be observed between interlocutory applications generally and interlocutory applications where the rights of parties would be decided by the judge. Where an interlocutory application involved the judge making determination of the rights of the parties, the admissibility of evidence must be regulated by the ordinary rules. Based on this argument, hearsay evidence under this scenario is therefore inadmissible.

[24.] Using the **Rossage** principle he posited that the interim custody and living-arrangement applications, and the related DVA proceedings, determine such rights. On that footing, he asks the Court to strike out the hearsay as irrelevant under Order 41, rule 6. Independently, he invokes the Court's discretion to exclude the recordings as selective, potentially incomplete or manipulated, and unfairly prejudicial. He relies on **Alana Major**, which in turn considered **Singh v Singh** [2016] 1432 Ch., for the risk that a person who alone knows a conversation is being recorded may shape it to gain a forensic advantage, and for the concern that admitting such material may appear to condone that practice. The husband says he did not consent to the recordings and disputes whether the excerpts convey the full circumstances.

[25.] With respect to Paragraphs **1, 6, 10, 11, and 12** The husband submits that the wife is not a party to the conversations at all and therefore her recording contravenes s. 27 ICA and without more, should be struck out. However, relevance is the gatekeeper, even illegally obtained material may be admissible if its probative value outweighs the impropriety of its acquisition. The primary test is admissibility, as the courts retain the discretion to admit illegally obtained recordings, in exceptional circumstances. The court of Appeal in **Regina v Respondent and Khan (Sultan) Appellant** [1997] A.C. 558 dismissed an appeal on the question of whether evidence obtained via an illegally obtained listening device should be admissible. The case involved trespass and the installations of listening devices that recorded a conversation between the Defendant and others in the house. The Court held "(1) that it

was an established principle in English law that the test of admissibility was relevance; that relevant evidence, even if illegally obtained was admissible, and that therefore the evidence of the tape-recorded conversation was admissible."

Recordings Of The Children And Relief

[26.] The husband further submits that recording children covertly for use in proceedings against the other parent may harm their welfare and erode trust, particularly where recordings are shared with third parties. He relies on **M v F (Covert Recording of Children)** [2016] 4 WLR 92, in which *Peter Jackson J* warned that placing a recording device on a child to gather evidence in family proceedings is almost always likely to be wrong and identified the potential harm, damaged relationships, wasted costs and limited evidential value that may result. He also cited **Re C (A Child)** [2015] EWCA Civ 1096 for the concern that repeated recording of a child in order to criticize the other parent may be emotionally abusive. Invoking the Court's duty to give paramount consideration to the children's best interests, he submits that the recordings should not be admitted and asks that the challenged passages in both affidavits be struck out, with costs to follow the event.

The Wife's Submissions;

[27.] The wife's position is that all of the recordings should be admitted into evidence however she acknowledges that the court should not treat all of the subject portions of the wife's affidavit and the recordings and transcripts as a single class. She emphasizes that the court must distinguish whether the wife is a party to the conversation, whether and to whom it was subsequently communicated, the purpose for the communication and whether there is independent evidence of the underlying event.

[28.] The wife also relies on **Alana Major v Family Guardian Insurance Company Ltd**., 2021/CLE/gen/00181, and **Marvin Dames and Latalia Dames v First Caribbean International Bank (Bahamas) Ltd and Insurance Management (Bahamas) Ltd,** 2019/CLE/gen/FP/00224. She submits that section 27 does not prohibit a party from recording their own private conversation; section 28 separately regulates subsequent communication or publication; and an alleged breach of section 28 does not, of itself, make the recording inadmissible. Section 34 addresses statutory inadmissibility arising from a contravention of section 27, but otherwise the Court retains its discretion to assess relevance, probative value, reliability, prejudice and fairness. The wife avers further that Alana Major illustrates that the court has a discretion to determine the issue rather than the creation of a rule excluding covert recordings. She also relies on **Jones v University of Warwick** [2003] EWCA Civ 151 and **Mustard v Flower** [2019] EWHC 2623 (QB) as persuasive English examples of relevant covert evidence being admitted despite concerns about how it was obtained. Applying those principles, the wife says she participated in most of the recorded conversations and that their later provision to her attorneys, and to Dr Haynes within an existing therapeutic relationship, must be considered separately under section 28 and its exceptions. As to the 5th March 2025 telephone conversation, she says she could clearly hear the husband speaking in the matrimonial home and disputes that it was a "private conversation" within the Act. She submits that the alleged directions to follow her and

investigate her finances are material to the protection issues, including the statutory provisions concerning stalking and harassment. She asks the Court to dismiss the Summons or, alternatively, to confine any exclusion to a particular inadmissible recording or transcript and evidence dependent upon it, leaving independently founded factual and clinical evidence intact.

Discussion and Analysis

Examining the Facts and Relevant Authorities;

[29.] The wife's use of her cell phone to record the conversations fell within the definitions of "listening device" and "private conversation" in section 26 of the ICA, and whether she was a party to each conversation was pivotal to determining the lawfulness of her actions. Although her participation in some conversations was absent or unclear, the parties are of one accord that she participated in conversations numbered 2, 3, 4, 5, 7, 8, 9, 13 and 14; the husband nevertheless objects to their admission as hearsay under section 38 of the Evidence Act, an issue addressed later in this ruling.

[30.] The husband submitted that recordings 1, 6, 10, 11 and 12 were obtained in breach of section 27 of the ICA because the wife was neither a participant nor authorized by the other party under section 28, with neither her affidavit nor Dr. Jayne Haynes' affidavit indicating such authorization. He further argued that the single instance of accidental overhearing did not qualify as hearing a private conversation over the telephone, rendering the recordings inadmissible on the authority of **Alana Major**. The court must consider all of the circumstances toward determining the correctness of the husband's position.

[31.] Hearsay is inadmissible unless an exception under section 39(2) of the Evidence Act applies, while section 34 of the ICA excludes evidence of private conversations obtained in breach of section 27, subject to statutory exceptions. The paragraph states that those exceptions do not apply but ends by referring to two exceptions without identifying them.

[32.] A statement is not scandalous or oppressive merely because it describes disputed conduct or refers to a challenged recording, and the Court may consider its factual account separately from its reference to an exhibit.

Irrelevance

[33.] In **Bagwell v Bagwell** [1984] EWCA Civ J0525-3, the Court of Appeal declined to strike out potentially damaging affidavit allegations because their truth remained undetermined and they were relevant to the issue before it, illustrating that embarrassment, seriousness or denial alone may not justify removal, without requiring truth to be finally determined on every strike-out application.

[34.] Relevance depends on the issue to be decided and the purpose for which evidence is tendered: in **Pegg v Triangle Press Ltd** [1995] EWCA Civ J1103-7, sexual harassment allegations did not establish that a dismissal was legally unjustified, but evidence that they

were made and affected subsequent events could illuminate the parties' relationship and a witness's alleged bias.

[35.] "Otherwise oppressive" requires a concrete unfair or disproportionate consequence, not merely distress. In **Bagwell**, feared harm from possible circulation of the affidavit did not justify striking it out, while **Re R Williams Leisure** plc [1994] Ch. 350 recognized that excessive affidavit material may impose unnecessary costs without defining "otherwise oppressive" under the affidavit strike-out rule.

[36.] In **Bacardi & Company Limited v. Whymms** and others [2016] 2 *BHS J*. No. 129, Bahamas Court of Appeal SCCivApp. 205 of 2013 Judgment: 28th September 2016 was a Civil appeal in the Bahamas Court of Appeal where *Allen J* as she then was explained the approach to determining whether evidence is scandalous or oppressive and should be struck out. The case involved an affidavit sworn contrary to the Environmental Health Services Act without leave and contrary to the protection of trade secrets and other confidential information provided in the act. The respondents, owners of the land neighboring the appellant's premises, commenced proceedings against the appellant claiming an injunction and damages for nuisance. Their claim alleged that noxious and offensive particulates, fumes, vapors and smoke were being discharged from the appellant's premises. In support of their claim, they rely on an affidavit filed by Mr. Anthony Ryan (Ryan), an employee of the Department of Environmental Health Services. As a result of the respondents' allegation Ryan was assigned to do an investigation of the appellant's premises. Following the investigation Ryan produced a report and the details of his report were outlined in an affidavit (the Ryan affidavit). Pursuant to Order 41 rule 6 of the Rules of the Supreme Court the appellant sought to have the affidavit struck out as being scandalous and oppressive and containing confidential information concerning the appellant. The judge below found that no confidential or private information or secret processes belonging to the appellant was contained in the report which was pertinent and material to the case; it could not, therefore, be described as scandalous and irrelevant or otherwise oppressive. The appellant appealed.

Held: appeal dismissed and decision affirmed, costs to the respondents to be taxed if not agreed.

Per **Allen, P (Jones, JA dissenting)**, the issue to be decided on appeal is whether the affidavit is scandalous, irrelevant or otherwise oppressive and whether it ought to be struck out under Order 41 rule 6 of the Rules of the Supreme Court.
Order 41 rule 6 provides that the court may order any matter which is scandalous, irrelevant or otherwise oppressive to be struck out of any affidavit. The effect of this rule is that an affidavit must be pertinent, and material to the issues in dispute; and any facts and matters deposed in an affidavit which are inadmissible in evidence on the basis that they are scandalous, irrelevant or otherwise oppressive, will be struck out.
While the respondents did not comply with section 30(1) in obtaining the appellant's consent, or an order of disclosure from the court before filing the affidavit, that is not, on a consideration of the affidavit's content, sufficient, in my view, to warrant holding that the affidavit was, scandalous, irrelevant, or otherwise oppressive. The affidavit has now been examined by the learned judge who found the contents thereof relevant to the issues joined

between the parties, and admissible in evidence to show the truth of the allegations by the respondents. *Allen J* continued, "In the present case, it would be wrong to strike out, on the basis of a procedural irregularity, an affidavit which contains a report which is pertinent and material to the disposition of the issues in dispute in this case, and disclosure of which, the appellant would have been obligated to give during discovery under Order 24 of the Rules of the Supreme Court."

Family / Child Welfare Guidance

While there are obvious pitfalls for the wife as it relates to the challenged statements and recordings, the most significant challenge she faces is the court's mandate to consider the admissibility of the recordings against the backdrop of doing what is in the best interest of these minor children.

[37.] There is a wealth of authority in connection with covertly recording children and they emphasize that such recordings raise a distinct and particularly serious welfare concern. It is not, however, subject to a simple rule that the recording must be excluded. The court separates whether to receive the evidence from what the act of recording says about the child's welfare and the recorder's parenting.

[38.] The principal authorities present several scenarios:

Recording children and other family members;

In **M v F (Covert Recording of Children)** [2016] EWFC 29, [1], [3] – [8], briefly, the facts of the case are that a father and his partner had concealed devices in the child's clothing to capture her conversations with professionals and others. The judge admitted the recordings, partly because the manner in which they were made was itself relevant to assessing the father's parenting. But the recordings yielded no useful information, created risks for the child's trust and emotional welfare, and featured prominently in the conclusion that the father and his partner could not meet her emotional needs as main carers. *Peter Jackson J* cautioned against the placement of listening devices on children. He noted that ; "it was unnecessary to determine whether the fathers actions were illegal but it was almost always likely to be wrong for a recording device to be placed on a child for the purpose of gathering evidence in family proceedings, whether or not the child was aware of its presence; that a main reason for changing the child's home base to the mother had been the conclusion that the father and his partner could not meet her emotional needs as main carers; that the recording program was not the only indicator of that, but it was a prominent one." [Emphasis Mine]

[39.] Thus, the futility of the collection of over 100 pages of transcript recordings was described by the judge in the following manner;

"the issue had increased the length and cost of the hearing yet had not produced a single piece of useful information…." *Jackson J* maintained that the recordings further damaged the family relationships and put the family's standing in the community at risk. Transcript

recordings both increased the length and cost of the proceedings. The judge expressly said that his judgment did not decide the position for covert recordings of adults, or every other way of recording a child. [Emphasis mine]

Recording children and other family members;

[40.] In **Re C (A Child)** [2015] EWCA Civ 1096 the Court of Appeal upheld an injunction restricting a father's recordings in the circumstances of that case. It left undisturbed findings that his persistent recording and photographing of the child was emotionally abusive; some recordings involved repeated, leading questioning and had been edited. The qualification matters: earlier recordings of adult handovers had exposed exaggerations in the mother's allegations. The decision does not say that every recording involving an adult—or every recording involving a child—is inherently abusive. [Emphasis mine]

The distinction and admissibility;

[41.] In **Re B (A Child)** [2017] EWCA Civ 1579, [12]–[16], [19]–[23], the Court of Appeal identified recordings of children, other family members, and professionals as different categories that may raise different issues. It cautioned against a sweeping general rule condemning all covert recording: who recorded whom, and why, matters. In that case the father was permitted to rely on recordings of conversations with professionals, although the trial judge gave them little weight. The Court of Appeal also cautioned against treating a proposed general requirement to obtain advance permission for every covert recording as settled law.

[42.] In short: a parent who secretly records a child to obtain litigation evidence faces a much sharper welfare objection than someone who records an adult conversation. Yet, neither the method nor the subject alone determines admissibility or weight.

[43.] This court has taken into consideration the children's involvement and potential harm, the purpose and extent of recording, whether questioning was suggestive, whether the material is complete and authentic, and its actual relevance. The court is cognizant of the fact that a child may be especially susceptible to prompting; a selected excerpt may misrepresent what the child meant; and making or revealing the recording may itself harm the child's trust and emotional welfare.

Best Interest Of The Children

[44.] Recalling that the wife's excuse for recording the interactions were; "as a means of trying to get through to the husband[sic] about his behavior which he would deny or refuse to acknowledge." She said she had hoped that by showing him what he did or how he spoke he might express remorse and make a genuine effort to work on himself. This never happened. She said also that the recordings also became used concurrently as a defense to the abuse. I noticed that when things escalated and the husband [sic] was in a fit of rage, he would tend to temper his behavior when she took out her phone and started recording him. It therefore also served as a defense mechanism. She continued that as time progressed, besides being abusive, the reality was the husband [sic] is also manipulative, coercive, powerful,

resourceful and he lies incessantly. He would actually give an account to her of a conversation he and she had, or an incident that had happened, which was completely inconsistent with what had actually occurred. The husband [sic] would very convincingly seek to advance his false account of what had occurred. She continued that she then realized that she needed to accurately document what was happening and so she then started recording for the purpose of providing an accurate account of what had occurred so that I could then present it to him to defend against his lies and misrepresentations.

[45.] The guiding principle is to be found in The Child Protection Act 2007 ("CPA"), that in all matters concerning children their welfare must be given paramount consideration.

Child Protection Act (CPA)

> **S 3. (1) -** Whenever a determination has to be made with respect to — (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the paramount consideration. (2) In all matters relating to a child, whether before a court of law or before any other person, regard shall be had to the guiding principle mentioned in subsection (1) and that any delay in determining the question is likely to be prejudicial to the welfare of the child.

[46.] Generally, the court may exclude the submission of private conversations into evidence, based on unfairness, prejudice and possible manipulation of recordings. In **Alana Major and Family Guardian Insurance Co. Ltd.** 2021/CLE/gen/00181, the case involved evidence of recordings which were unlawfully or irregularly obtained. The issue before the Court was "whether a clandestine recording by the Plaintiff of a meeting between herself and the President of the Defendant company and the transcription of that recording are admissible and should be received in evidence in the Plaintiffs claim against the company for negligence and breach of statutory duty." *Klein J* expressed concerns regarding possible manipulation of evidence and noted at pg. 45 "I would exclude material on grounds of unfairness and the possible prejudicial effect."

[47.] Having regard to the recordings in this application and the statutory provisions and authorities discussed above, a further question arises: whether the recordings may lawfully be disclosed. In my view, **Alana Major** treats subsequent communication to others as a distinct question under section 28, even where the recording itself was made without contravening section 27. A general desire to preserve a reliable record or secure an advantage in litigation does not, without more, establish that disclosure was reasonably necessary to protect the recorder's lawful interests; a genuine and particularized need to protect the children may, however, warrant a different assessment.

[48.] Many transcripts and therapist's recitations are deemed hearsay. Statements recorded or recounted by persons not testifying live. Some recorded statements may qualify under s 39(2) exceptions. Those would be admissions by the recorder (s 39(2) (c); statements demonstrating state of mind (s.39 (2) (b); statements made in the presence of the person

against whom they are tendered with opportunity to reply (s.39 (2)(d); or where the statement is a necessary part of the fact or transaction under investigation (s.39 (2)(a). However, the wife has not established that all impugned items fit these exceptions. The therapists' affidavit largely paraphrases recorded content and the wife's reports'; much of that material is hearsay and where it is based on recordings excluded under the Act, are doubly inadmissible.

[49.] As to admissibility, **Alana Major** establishes that the statutory bar under section 34(1) applies where a witness learned of a private conversation through a device used in contravention of section 27. *Klein J* distinguished that prohibition from a breach of section 28: unlawful disclosure does not, of itself, render a recording inadmissible, nor does admissibility require the Court to receive it. The judge nevertheless excluded the adult meeting recording in the exercise of discretion, having regard to unfairness, the recording party's ability to steer the conversation, uncertainty as to its completeness, its limited materiality, and the availability of ordinary witness evidence and cross-examination.

CONCLUSION

[50.] I have considered the submissions of both parties the relevant statute law and case law cited and after balancing statutory protections, hearsay rules, fairness, and the paramountcy of the children's welfare, I consider the following factors as pivotal to my decision:

[51.] The domestic violence cross applications of the parties raise the spectre of parental alienation raised by the wife as the underlying cause of much of the volatility in the relationship between the wife and the husband and children. Thus, I am keenly aware of the care that must be taken in deciding whether to admit the subject recordings into evidence. The authorities demonstrate that the admission of covert recordings of children carries risk.

[52.] I accept the view of *Klein J* in **Alana Major** that neither s. 27 nor s. 28 itself determines admissibility and that a breach of the communication provisions does not ipso facto make the recording or transcript inadmissible. The court retains a discretion which must be exercised by reference to relevance, probative value, prejudice, fairness and the interests of justice.

[53.] I am of the view that this application is interlocutory in nature and does not fall within the principles espoused in **Rossage**.

[54.] I find that the wife's communication/publication of the recordings to her psychotherapist is protected under s. 28 (3) (b)(iii) of the ICA in that the provision expressly recognizes communications which is reasonably necessary in the public interest or for the protection of lawful interests of the person making the communication. Section 28 (3)(c) also permits communication to a person who has, or is reasonably believed to have, such an interest in the private conversation as to justify the communication. However, the matter does not end there.

[55.] I find that the recordings made by the wife in which she was not a party were made in contravention of the ICA and are unlawful and inadmissible. By way of observation, the court recognizes that the recordings deemed to have contravened the ICA s. 27 has resulted in the commission by the Wife of a criminal offence. This Court is not minded to be an active

participant in the commission of a criminal offence. Indeed, if the Court were not to strike out this evidence the advancing of the evidence to the Court would amount to the commission of a fresh offence every time the material was communicated. Again, this court feels it is incumbent upon the parties to consider the welfare of the children as their paramount consideration as well and, instead of adding to the litigation, work diligently towards a complete resolution of these proceedings and a move to mend the relationship between them individually towards a healthy co-parenting regime and their respective relationships with their children.

[56.] The Court finds that many of the remaining recordings were made in circumstances where the wife was a party or where her presence and role in the household render them not plainly within s. 27's prohibition. Admissibility of these remaining items at trial would ordinarily remain subject to the ordinary rules on hearsay, relevance, probative value and prejudice and to further rulings at trial. Even in these contested divorce/custody proceedings, the welfare of the children takes precedence and is the paramount consideration for the court. In determining their welfare issue, I've considered whether and how admitting those recordings, that do not contravene the ICA, protects them and/or enures to their benefit. The question whether to risk the possible deleterious effect the airing of the private interactions between them and their parents might have on these children is a balancing exercise that this court is required to answer.

[57.] Central to my decision is the likelihood that admitting these recordings at trial would be more prejudicial than probative. Both parties acknowledge that the children are already adversely affected by these protracted and bitter proceedings between their parents. Admission of the recordings could compound that harm by requiring one or more of the children to give evidence, or by exposing them to recordings of which they are presently unaware and which they may then have to hear. Having regard to these risks to their emotional welfare, I conclude that the prejudice arising from admission far outweighs the recordings' probative value. In these circumstances, I give priority to the welfare of the children. See: Covert Recordings in Family Law Proceedings Concerning Children: Family Justice Council Guide May 2025 pg. 25 and 26.

DISPOSITION

The Court orders as follows:

1. I find that all the recordings involve recordings of private conversations recorded with the use of a listening device.

2. I find that the recordings listed by the husband as Items **1, 6, 10,11 and 14** on the wife's schedule (as particularized in the husband's strike out application) are struck out and excluded to the extent they record private conversations to which the wife was not a party and which are inadmissible under s. 34 and as hearsay.

3. Paragraph 90-92 of the wife's First affidavit and transcript / **Exhibit MSN-1 pages 21 - 22** (to the extent relied upon for paragraph 92) and **Recording 12**, are struck out and excluded from evidence on the grounds they record private conversations to which the Wife was not a party, are captured by s. 27 of the ICA and are inadmissible under s. 34, they are also inadmissible hearsay not falling within s. 39 exceptions. Contrary to the wife's submission, I do not accept that the husband reasonably expected that conversation to be heard.

4. The wife is a party to the recorded conversation in recording **8** and I rule it admissible for trial. Consequently, strike out of **Paragraph 74 / Exhibit MSN-1 pages 13-14** is refused.

5. The remaining recordings**, (2 - 5, 7, 9, 10, and 13)** related paragraphs and transcripts of the wife's affidavit, **MSN -1** pages **8-11, 16-20, 29-30, 49-56** relied upon by the wife on the material before the Court and recordings are all struck out, upon the child welfare principles.

6. The wife's independent evidence of the underlying events in Paragraphs 23 (except for that part which speaks to the recording), **84, 144, 236, 237, 238, 239 and 240** of the First Affidavit contain firsthand evidence of matters the wife says she personally saw and heard, save and except any references to the recordings or transcripts therein, the application to strike out these paragraphs is refused.

7. Save and except for the admissibility of recording **8** at no. 4 herein references to recordings in paragraphs **56, 74, 83, 92, 118, 241, 242, 243** and **245-251** are all struck out as irrelevant.

8. Likewise, the challenged portions of Dr. Jane Haynes' Affidavit include matters arising from her pre-existing therapeutic relationship with the wife and her own therapeutic interactions, not merely reproductions of transcripts. Striking out of firsthand evidence is refused. But, as the husband has not sought to strike out these parts, he only sought to strike out paragraphs **7, 8, 9, 12, 13, 14, 15, 16 and 17, JH 1 and JH 12**, I need say no more about this here.

9. In the Affidavit of Dr. Jane Haynes filed 30 April, 2025 insofar as paragraphs **7, 8, 9, 12, 13, 14, 15, 16 and 17** in respect to No. 8 immediately above, **and exhibits JH 1 – JH 12** rely upon or reproduce recordings and transcriptions which the court has found unlawful or inadmissible; those exhibits are struck out and excluded.

10. The wife is given leave to file and serve an affidavit representative of her First Affidavit excluding the references to the paragraphs which have been struck out, within fourteen (14) days of the date hereof, without introduction of any new facts or evidence outside of what is contained in her First Affidavit.

11. Leave is given for the filing and service of an affidavit representative of Dr. Jane Haynes' Affidavit filed on 30th April 2025 excluding the references to the paragraphs which have been struck out, within fourteen (14) days of the date hereof without introduction of any new facts or evidence outside of what is contained that Affidavit.

12. The Court emphasizes that this interlocutory ruling is confined to the present strike-out application.

13. The paragraphs of the affidavit which correspond with the recordings which have been struck out are also struck out as irrelevant in the circumstances.

14. The Court orders that the husband shall have his costs of this interlocutory strike-out application less the costs of the wife's succeeding to have recording No. 8 and paragraph 74 / Exhibits MSN-1 pages 13-14 declared admissible.

Dated this 16th day of November, 2026

The Hon. Madame Justice C.V. Hope Strachan