

**COMMONWEALTH OF THE BAHAMAS**

**2022**

**IN THE SUPREME COURT**

**FAM/div/00757**

**Family Division**

**BETWEEN:**

**A M S**

**Petitioner**

**AND**

**S M S (nee S)**

**Respondent**

**CONSOLIDATED ACTIONS**

**COMMONWEALTH OF THE BAHAMAS**

**2023**

**IN THE SUPREME COURT**

**FAM/div/00017**

**Family Division**

**BETWEEN:**

**S M S (nee S)**

**Petitioner**

**AND**

**A M S**

**Respondent**

**AND**

**UNKNOWN WOMEN**

**Co-Respondent**

**RULING**

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

**APPEARANCES:** Mrs. Marylee Braynen-Symonette of Counsel for the Petitioner

Ms. Nerissa Greene of Counsel for the Respondent

No appearance of the Co-Respondent

**HEARING DATES:** 16<sup>th</sup> May 2023; 6<sup>th</sup> June 2023

**ADULTERY – CRUELTY - CONDONATION – EFFECT OF MENTAL CONDITION  
ON BEHAVIOR – STATUTORY BARS TO GRANT OF DECREE NISI.**

1. The matters before the Court involve Two (2) actions which have been consolidated. Petition Fam/div/No. 00757 of 2022 filed by A M S (“the husband) against S M S (nee S) (“the wife”) on the grounds that since the celebration of the marriage his wife has been cruel to him and a Petition being Fam/div/No.00017 of 2023 filed by the wife against the husband on the grounds that her husband has been cruel to her since the celebration of the marriage and that he has since the celebration of the marriage committed adultery with unknown women. The alleged respondents to the wife’s petition against the husband are unknown women.

## **BACKGROUND**

2. The couple were married on 5<sup>th</sup> July 2014 when the husband was a bachelor and the wife, a spinster. After the marriage they lived and co-habited at #94 Seabreeze Lane, New Providence. They had Two (2) children within the marriage, J S born 23<sup>rd</sup> March, 2019 and I S born 18<sup>th</sup> January, 2021. The marriage subsisted for 7 1/2 years before the husband filed his petition.

3. The Husband is a self-employed businessman and at the time of the hearing of the petitions lived at Davis Street in New Providence. The wife is employed as a school teacher at Queen’s College (a high School) and lives at #94 Seabreeze Subdivision, New Providence. Both parties are domiciled in The Bahamas and have never been before any other court in connection with their marriage prior to their respective petitions.

4. The husband’s petition was filed on 21<sup>st</sup> December 2022 wherein he alleged the following grounds:

*“Since the Celebration of the marriage the Respondent has treated the Petitioner with cruelty.*

### **Particulars of Cruelty**

- a) *The Petitioner has endured mental abuse at the hands of the Respondent. The Respondent’s abuse stems from her insecurities, excessive control and mental disorders; resulting in emotional trauma the Petitioner has experience in the marriage.*
- b) *Throughout the marriage relationship with the Respondent, the Respondent demanded to have total control of the Petitioner’s whereabouts at all material times. The Respondent’s excessive need to control has caused the Petitioner much stress and anxiety.*
- c) *As a result of the Respondent’s controlling and impulsive behavior, the Respondent has been diagnosed as having bipolar disorder, which has resulted in attempts by the Respondent to physically harm the Petitioner and herself. The Petitioner recalls the Respondent attempting to run him over with her vehicle because he did not answer his cellphone when in fact; the Petitioner was at the basketball court at Grace Community Church playing ball with adverse youths in the community. The*

*Respondent controlling and impulsive behavior has caused the Petitioner much stress and anguish.*

- d) The Respondent's insecurities have accelerated in the pass years, in which the Petitioner repeatedly questions the Respondent about his love for her. Should the Petitioner refuse to answer the Respondent; the Respondent became in raged and physical toward him. This caused the Petitioner much stress and anxiety.*
- e) The Petitioner recalls an incident that occurred on 8<sup>th</sup> May 2022, which the Petitioner and the Respondent were arguing on whether the Petitioner loved the Respondent and the level of love and commitment the Petitioner has shown the Respondent in the relationship. The said argument was sparked by a gift the Petitioner bought the Respondent for Mother's Day. The argument was continuous which started at 9 o'clock in the morning and did not end until 2 p.m. in the afternoon. In order to break the constant arguing the Petitioner took the initiative to invite the Respondent out for the evening at Imax Cinema. The Petitioner made arrangements with his parents to look after the said children of the marriage. After the said movies, the Respondent was not satisfied but continued arguing over the fact that the Petitioner did not order her anything to eat.*
- f) When the Petitioner and the Respondent arrived at the Petitioner's parents' home to collect the children, the Respondent hopped into the driver's seat. The Petitioner became concerned, and the Respondent began to drive in a very erratic manner. The Petitioner became terrified as the Respondent began speeding and then slowing down abruptly, shouting at the Petitioner, and telling the said children that "the Petitioner did not love her or them". At one point the Respondent stopped the vehicle to get out the vehicle and another time, she would open the vehicle door to jump out of the moving car. The Petitioner attempted to hold the door closed by reaching across the Respondent's body, so she wouldn't jump out the vehicle. The Respondent's behavior terrified the Petitioner and caused the Petitioner much stressed.*
- g) When the Petitioner and the Respondent arrived to the matrimonial home, the Respondent laughed finding the entire incident funny stating "don't worry I was not going to hurt you." The Petitioner remained in the vehicle to ensure that the children of the marriage were safe. As the Petitioner attempted to enter the matrimonial home, the Petitioner saw the Respondent rummaging through the knife drawer, where she found a big chef's knife and came charging towards the Petitioner with the knife in the view of the children. The Petitioner quickly slammed the door shut, as the Respondent came charging and demanding the Petitioner to let her out. The Petitioner told the Respondent to calm down. The Respondent later went around the back and came at the Petitioner again with the knife, with the said children of the marriage still in the vehicle. The*

*Respondent was in a state of rage that it was evident she wanted to harm the Petitioner. The Petitioner became so afraid of the Respondent's behavior that the Petitioner did not sleep the entire night knowing that he and the Respondent was in the similar space. The following morning the Respondent contacted her parents packed her personal belongings and moved out of the matrimonial house.*

- h) The Petitioner has become so concerned regarding the Respondent's behavior that the Respondent has expressed to the Petitioner much concern and stress not knowing whether the Respondent is serious or just seeking attention from the Petitioner.*
- i) The Petitioner recalls waking up and the Respondent would be standing over him with piercing stares. The Respondent's behavior has placed the Petitioner in fear of the Respondent as the violent tendencies are a major concern. The Petitioner is fearful for his life and that of the said minor children of the marriage.*
- j) As a result, the Petitioner and the Respondent have attempted pre-marital and post marital counselling, in addition was referred to a specialist in Jacksonville Florida, United States of America for a weekend of intense therapy. After opening up to the psychiatrist about the marital problems it was suggested that both the Petitioner and the Respondent attend couples counseling. During counseling both the Petitioner and Respondent outlined their concerns, the Petitioner's fear for his life and that of the children of the marriage. The Respondent acknowledged that there are mental issues she is facing.*
- k) After the said counselling sessions, the Respondent moved back into the matrimonial home in opposition to the Petitioner's agreement. In light of the Respondent relocation to the home, the Petitioner moved out in fear of his life and safety. Nonetheless, continued to come to the matrimonial home to spend time with the said children of the marriage."*
- l) The Petitioner accepts that the marriage is over and cannot continue to endure the abuse at the hands of the Respondent, as it would be detrimental to his health.*

*5. There is no hope of reconciliation between the parties.*

*6. The Petitioner has not in any way been an accessory to, condoned or connived at the Respondent's cruelty herein before stated.*

*7. That the Petition is not presented or prosecuted in collusion with the Respondent.*

*WHEREOF THE Petitioner prays that; -*

- 1. The marriage to the Respondent be dissolved;*
- 2. That there be a Declaration pursuant to Section 73 (1) (b) of the Matrimonial Causes Act, Chapter 125 Statute Laws of The Bahamas;*
- 3. That the Petitioner be awarded Custody of the minor children in the Ancillary Relief proceedings;*
- 4. That each party to the proceedings to pay their own Costs; and*
- 5. Further or other relief as may be just;*

8. The Wife was served with this Petition on 22<sup>nd</sup> January 2023 however by that time, she had already filed a Petition on the grounds of cruelty and adultery in which she made the following allegations against the husband.

*“8. Since the Celebration of the marriage the Respondent has committed adultery with various different women in this jurisdiction and in the United States of America.*

#### **PARTICULARS OF ADULTERY**

- i. Around or about September 2019 the Respondent while in a counselling session admitted that he had unprotected sexual intercourse with several different women, namely escorts and strippers in Las Vegas and Florida, and thereby infecting the Petitioner with a sexually transmitted disease.*
- ii. In or about September 2019 the Respondent further informed the Petitioner that he was in a sexual relationship with one of his co-workers, known to the Petitioner as Galy.*
- iii. The Respondent constantly and cold-heartedly told the Petitioner that he was in love with Galy and that his love for her was comparable only to the love found in the bible. The Respondent callously tortured the Petitioner about his intimate relationship with Galy and taunted the Petitioner consistently about how much he desires Galy and their shared intimacy.*

#### **ALTERNATIVELY**

*9. Since the Celebration of the Marriage the Respondent has treated the Petitioner with cruelty.*

#### **PARTICULARS OF CRUELTY**

- i. The Petitioner repeats 8 (i-iii) hereof.*
- ii. The Respondent throughout the marriage was excessively and purposely mean spirited and harsh towards the Petitioner.*

*The Respondent was so consistent in his unreasonable criticism of the Petitioner, her actions and opinions that the Petitioner became extremely withdrawn and fearful of expressing herself to the Respondent or at all.*

- iii. *During the Petitioner's pregnancy with the parties' first child the Petitioner and the parties' unborn were so ill that the Petitioner and the unborn child had to receive medical care including invitro surgery in the United States. During this period the Respondent offered the Petitioner little to no support whatsoever. This caused the Petitioner great stress and distress.*
- iv. *A few weeks after the birth of the parties' first child the Respondent coldheartedly informed the Petitioner that he did not want to be in the marriage. This caused the Petitioner extreme stress and distress particularly as the Respondent knew the Petitioner's greatest fear was that he would leave.*
- v. *Since around or about May 2019, the Respondent on an almost daily basis taunted the Petitioner by repeatedly telling her that he did not want to be with her or in the marriage. The Respondent then started to viciously tell the Petitioner that he hated her. On each occasion, the Petitioner cried uncontrollably however, the Respondent showed the Petitioner no compassion whatsoever.*
- vi. *The Respondent, openly and without any regard whatsoever for the Petitioner or her feelings not only carried on his relationship with "Galy" but more over he mercilessly taunted the Petitioner with their acts of adultery and his love for Galy. The Petitioner was so devastated and broken by Respondent consistent and callous taunt that she was made to feel worthless and that her life was not worth living.*
- vii. *When the Petitioner became pregnant with the parties second child, the Respondent led the Petitioner to believe that he had discontinued his adulterous relationship with Galy and wanted to work on the marriage. In or about January 2021, the Petitioner discovered that the Respondent had not given up his adulterous relationship. The discovery so devastated the Petitioner that she went into early labor with the party's second child. The Respondent showed the Petitioner no consideration or kindness.*
- viii. *After the birth of the party's first child the Petitioner could not work as the child was born with a birth defect. The Respondent offered the Petitioner little or no help with the child, choosing to spend an inordinate amount of time away*

*from the matrimonial home without informing the Petitioner as to his whereabouts. The Petitioner lived in daily, constant fear of the Respondent carrying out his threats to abandon her.*

- ix. The Petitioner's mental health after the birth of the parties' second child was so adversely affected by the Respondent's treatment towards her that she was diagnosed with anxiety and postpartum depression. Notwithstanding, the Respondent being aware of the Petitioner's diagnosis, the Respondent continued to relentlessly taunt the Petitioner with his affair and totally disregard her wellbeing by telling her he hated her and that he wanted to be with Galy.*
- x. On or about 8<sup>th</sup> May, 2022, Mother's Day, the Respondent mendaciously gave the Petitioner a purported Mother's Day gift of a colouring book with coloring pencils, while taunting the Petitioner with a \$500.00 gift he bought for himself. The Petitioner was deeply distressed by the Respondent's mean spiritedness, which was compounded by the Respondent throughout the day threatening to leave the Petitioner and go to Galy. The Petitioner crying uncontrollably and hysterically begged the Respondent not to leave her., becoming so fearful of the Respondent leaving her that she told the Respondent she would puncture his car tires to prevent him from leaving her. This caused the Petitioner so much distress that when the Respondent insisted that she and the children go to her parent's home for a while the Petitioner agreed.*
- xi. The Petitioner and minor children moved to her mother's house in or about 9<sup>th</sup> May 2022 and the following day, 10<sup>th</sup> May 2022, when the Petitioner went to the matrimonial home to retrieve some clothing for the minor children, the Petitioner discovered that the Respondent had removed and packed all her belongings that were in the second bedroom and had converted the bedroom to a gym. This caused the Petitioner distress.*
- xii. The Petitioner returned to the matrimonial home in or about October 2022, only to be told by the Respondent that he was in love with Galy and that they were in a relationship. This caused the Petitioner great stress and distress.*

*10. There is no hope for a reconciliation.*

*11. As a result of the Respondent's treatment towards the Petitioner her mental health has been adversely affected and her self-esteem greatly diminished. The Petitioner continues in therapy for anxiety and depression caused by the Respondent's consistent and relentless cruelty towards her.*

*WHEREFORE THE PETITIONER PRAYS that:-*

- (1) That the marriage be dissolved.*
- (2) Custody and maintenance arrangements be made for the minor children.*
- (3) Financial provision orders.*
- (4) An order for property adjustment and/lump sum payment be made.*
- (5) There be a declaration pursuant to Section 73 of The Matrimonial Causes Act, Chapter 125.*
- (6) That Respondent do pay the Petitioner's cost of and occasioned by these proceedings.*

9. This wife's Petition was served on the husband on 13<sup>th</sup> February 2023, and he responded with an Answer and Cross Petition filed on 6<sup>th</sup> March, 2023. In the husband's Answer and Cross Petition he in a roundabout way, admitted to the adultery which he termed "indiscretion" but iterated his denial of adultery with the woman referred to during trial as "Galy" and the cruel acts which the wife had enumerated in her Petition. The Husband also expanded on the allegations of cruelty set out in his Petition, to now include assertions that within Two (2) weeks of the marriage ceremony (*and before he made any admission of adultery*) the wife started accusing him of having a secret family, that the wife's mental problems probably pre-dated the marriage and were as a result of childhood trauma that he was not aware until after the marriage and that the wife was constantly threatening to leave him if she did not get her way or he did not repeatedly proclaim he loved her when she demanded.

10. The wife's opportunity to respond to the husband's Petition was taken by filing an Answer and Cross Petition on 17<sup>th</sup> March 2022 in which she placed reliance upon the allegations in her Petition and reiterated her prayer that the marriage be dissolved.

11. Given that both the husband and wife are seeking divorce decrees from this Court it must be determined if either or both succeed on their respective petitions considering the allegations contained in their pleadings and their testimonies before this court. The evidence contained in the husband's pleadings must satisfy the Court, that his wife was cruel to him entitling him to dissolve the marriage as opposed to her or in fact at all. The wife must prove that her husband has either committed adultery further or alternatively whether her husband has been cruel to her since the celebration of the marriage thus entitling her to a decree of divorce instead of her husband or at all. The factual matrix discerned from the wife's case also demands the Court's inquiry into whether the alleged adultery or cruelty by the husband has been condoned or condoned to by the wife.

12. One of the most glaring, undisputed facts which this Court is immediately made cognizant of, through the evidence of the husband and wife is the non-consummation of the marriage for a period of three and half (3 1/2) years. While both parties admit to the fact of the non-consummation neither clearly explained the reason. The husband suggested that the wife was fearful of the very act of sexual intercourse while the wife admitted her fears and suggested that the husband was impatient with her lack of knowledge of what to do during their failed attempts, the suggestion was that he was unkind to her for being unable to complete the act of



sexual intercourse. There was also the suggestion advanced by the husband that some form of psychological trauma from a previous time may be the cause.

13. This marriage was off to a rocky start, and it was not until three and a half (3 1/2) years had passed that the couple through a counselling session in Jacksonville Florida, were able to consummate the marriage. What became evident was that almost immediately there were significant challenges to the fledgling marriage which would come to play a role in the failure and the ultimate demise of the marriage.

14. It should be noted that neither the husband or the wife has relied on this period of non-consummation as grounding or supporting any allegation in their respective petitions, although the fact of non-consummation in a marriage is a ground which in certain circumstances may entitle the party offended to a decree voiding or avoiding the marriage on the grounds of desertion.

#### **ALLEGATIONS OF ADULTERY BY THE WIFE**

15. Sometime after the consummation of the marriage during a joint counselling session of the husband and wife, the husband admitted that he had committed adultery during the marriage with prostitutes and call girls "the initial adultery." At first hearing this evidence it was expected that the husband would say that the adultery took place during the period of non-consummation, when given human nature the temptation to engage in such activity would seem more likely, however the evidence of the husband and wife is that the period when the confessed adultery occurred was after the marriage had been consummated.

16. Adultery is defined in Section 2 of the **Matrimonial Causes Act, Chapter 125** "the Act" as:

*"...includes 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 aforementioned whereby a strong presumption arises that such sexual act occurred between them;"*

17. In the Supreme Court of New Hampshire in the case of **David G. Blanchfloer and Sian E. Blanchflower 150 N.H. 226, 834 A.2.d 1010** Nadeau, sought to give the plain and ordinary meaning of adultery stating:-

*"The plain and ordinary meaning of adultery is "voluntary sexual intercourse between a married man and someone other than his wife or between a married woman and someone other than her husband." Webster's Third New International Dictionary*

***30 (unabridged ed.1961). Although the definition does not specifically state that the "someone" with whom one commits adultery must be of the opposite gender, it does require sexual intercourse."***

18. The fact that the husband was led to admit his adulterous relationships with prostitutes and call girls demonstrates that the husband knew and accepted that he had acted outside the scope and boundaries of his marriage obligations of fidelity to the wife who upon such confession was entitled to a Decree of divorce without more should she have chosen to pursue it at that stage of the marriage.

19. The Court accepts the unchallenged and uncontroverted evidence of the wife that the husband did commit adultery with call girls and strippers (unknown women).

20. However, the evidence of both the husband and wife is that the wife continued to live with the husband notwithstanding his confessed indiscretions. On 23<sup>rd</sup> March 2019 the wife gave birth to their first child in Palm Beach, USA and their second child Two (2) years later.

21. The wife has also accused the husband of having a separate adulterous relationship with an employee by the name of Galy. The husband's admission of a non-sexual or platonic yet close relationship was made to the wife sometime in 2019, after the initial adultery. He described the relationship as emotional not physical. The Court observed that he was unequivocal about the fact of his activities with prostitutes and call girls during the counselling session in 2019 yet firm in his denial about an "adulterous" relationship with Galy. He also vehemently denied repeatedly that he did not taunt his wife about Galy and was unshaken even in cross examination on that issue.

22. The continuation of the marital relationship obviously led the husband to believe that his wife had forgiven him initially. The way he put it was ***"the admission was made in an attempt to "fix" our marriage but it made it worse."*** His counsel has submitted the same on his behalf while the wife's counsel has submitted that the adultery if forgiven was revived by the husband's subsequent act of adultery with a person named Galy. Whether she forgave her husband or not is a question of fact and must be examined in light of the wife's behavior after the admission was made. One fact to be considered is the wife's admission during trial that ***"in the beginning I think I had forgiven him. Over time I, withdrew my forgiveness as he continued to seek out Galy."***

23. The husband's admitted adultery, notwithstanding initially and seemingly being forgiven by the wife had serious repercussions. The wife's already existing mistrust of the husband, (i.e., accusations that he had another family) obviously intensified and manifested

itself increasingly over the course of the marriage. One way was through constant interrogations as to his whereabouts throughout the day and what the husband describes as attempts to control him and the constant demands that he profess his love for her and the constant dwelling on his alleged affair with his employee, Galy.

24. The wife did not believe the relationship to be non-sexual. However, no one offered a timeline as to when the alleged affair with Galy would have started. The evidence suggests that the initial adultery occurred in 2018 while the alleged adultery with Galy took place sometime after in 2019. While these accusations formed much of the substance of the wife's petition it is notable that Galy was not named as a woman-named in the wife's petition. Consequently, this person did not appear as part of the divorce proceedings before this Court.

25. It is clear that the woman named Galy is well known to the wife and had it been intended to pursue the matter against her she could have been named a woman-named to these proceedings, and while the Act does not require the wife to name the alleged adulteress in her petition it would be incorrect to describe Galy as an unknown woman as opposed to an unnamed woman. In any event this Court must determine whether the act of adultery occurred rather than a mere suspicion.

26. Such decision is required to be made according to the standards established many years ago and which have maintained throughout modern day jurisprudence. **Genesi v Genesi [1948]P. 179** held that adultery must be proved with the same degree of strictness as is required to establish a criminal charge, which is **"beyond a reasonable doubt."** Then Tucker L.J. in his expose using the authority of **Lord Merriman P. in Churchman v Churchman [1945] P. 44, 51**; ***"The same strict proof is required in the case of a matrimonial offence as is required in connexion with criminal offences properly so called."***

27. The totality of the wife's allegations against the husband as it relates to the adulterous affair with Galy is that Galy was employed by the husband in his business, so he was afforded the opportunity of spending a great deal of his time with her. That despite the fact that the husband let Galy go from his employ he nonetheless continued a relationship with her. Further, that the husband admitted to the wife that he was "in a relationship", "that "he loved Galy and his love was comparable to the love found in the bible", that he was always giving Galy a ride home." The wife further stated that the husband spent a lot of time on the telephone talking to Galy, in an intimate way. Her allegations that the husband constantly taunted her about his relationship with Galy was outrightly denied by the husband. This was an obvious contrast to his voluntary confession surrounding the call girls and strippers. The alleged Galy affair was clearly a serious issue for the wife which persisted despite the husband's consistent denials of a sexual affair. **In totality, I do not find that the wife has proven that the husband committed adultery with Galy according to the requisite standard which is beyond a reasonable doubt.**

28 However, the suspicions created by the husband which led to the wife's belief that he did commit adultery with Galy is pertinent to the wife's alternative plea that the husband was also cruel to her.

## 29. ALLEGATIONS OF CRUELTY BY BOTH PARTIES

Section 2 of the Act defines cruelty as:-

*"... voluntary conduct that is 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 that other spouse and being conduct which after taking due account of all circumstances of the case, would be considered to be so grave and weighty a nature that should such other spouse be called upon to continue to endure it, would be detrimental to his or her health."*

30. Both the husband and wife have made allegations of cruelty and have given numerous incidents and situations which occurred during the course of the marriage which when objectively considered were at the very least unkind gestures between marital partners and at the most sufficiently egregious as to entitle the other party to a divorce on the ground of cruelty.

31. Aside from the allegations in the husband's and wife's pleadings it was enlightening to observe them in the witness stand. The husband's demeanor was calm, firm and resolute in his position that the marriage was over. His actions towards a wife who he himself admitted had existing fears and challenges psychologically when he married her were demonstrably contrary to expressing love and support to an already fragile wife. By his own words in testimony he said:

*" I only told her once I wanted to leave "*

*" Yes insecurity was pre-existing at the beginning of the relationship.*

*" I'll agree I knew my wife loved me desperately "*

## 32. THE HUSBAND'S BEHAVIOUR

Having admitted that he wanted out of the marriage it is not difficult to envision an escalation in the husband's negative and abusive behavior towards his wife. While it is easy to imagine that any casual mention of Galy by the husband to the wife would impact the wife negatively at this point in the marriage, constant taunts, if uttered with the frequency that the wife has alluded to would be totally devastating, given her fragility. This would have been sufficient to

increase the level of his wife's anxiety and insecurity. I prefer the wife's evidence that the husband in his quest to force an end to the marriage did taunt the wife about his relationship (whatever it may or may not have been) with Galy.

33. Continuing the communication with Galy by phone and on the computer and going to a dance at Galy's church (not denied by the husband) did little to dispel the wife's belief that the affair was sexual in nature and that her husband loved Galy. Coupled with being told at the same time by the husband that he did not want to be in the marriage did little to dispel the wife's anxiety about the relationship. The wife's description of how she was treated by the husband before, during and after the birth of their seriously ill first child certainly was counter to what would've been expected of a loving caring husband on such an important occasion in the couple's life. Instead, the wife painted a picture of loneliness during the traumatic events associated with the birth of their first child. The obvious failure of the much needed support from the husband obviously took a toll on the wife.

34. The birth of the second child ended in postpartum depression and undoubtedly contributed greatly to the bi-polar diagnosis she received not long after. Of course, this was denied by the husband who seemed to believe that paying the hospital bills and arranging a shower was sufficient support in what must have been a traumatic situation for a young mother. Moreover, once the wife returned to their home in Nassau, the impression given in evidence and uncontroverted by the husband was that she was left alone most of the time (certainly during the day) bearing the brunt of looking after the two (2) children, one of whom is a special needs child. The overall impression was that the wife had little social life and was stuck at home while the husband worked in his own business and engaged in a number of social activities including church related activities, basketball and computer.

35. The question is does this behavior as described satisfy the definition of cruelty prescribed by S.2? A determination of this issue will be indicated after the guiding principle of cruelty are expounded hereinafter.

### **36. THE WIFE'S BEHAVIOUR**

The wife's demeanor in the witness box was tentative, and of a nervous and timid disposition. As she gave evidence, she exuded the insecurity that the husband spoke about in his pleadings. There was evidence of supreme dependency on her husband for self-esteem and approval. Her weak responses elicited while in the witness box belied the picture painted of her, by her husband, of a wife prone to violence who is manipulative, suffocating and controlling. However, both the picture the husband painted, and her own evidence portrayed a nagging wife obsessed with her husband. An obsession she admitted to. She also herself admitted on more than one occasion that she became enraged when her husband refused to tell her that he loved her and the children or when she did not know his whereabouts or when he refused to tell her his whereabouts.

37. She also admitted to the incident where she drove the car onto the court at Grace Gospel Chapel while her husband was playing basketball although her account differed as to her approach during that incident. She also admitted to the incident on Mother's Day although her account as to the severity of the incident differed from her husband. She admitted:

"I recall me driving and husband in passenger seat. Don't recall me driving erratically. I did not run into home. I grabbed a knife to puncture his tires. I was angry because he bought a BMW without my knowledge."

These were denials based on the husband's account of the incident which was patently opposite to the wife's.

38. I am satisfied that those incidents occurred in the way described by the husband and that the rage which the wife admitted that motivated her actions on this occasion manifested itself during other incidents. For instance the husband spoke of being physically attacked by the wife and was put in mortal fear for his life through several antics to gain his attention. While the wife's actions may easily be qualified as abuse, the question remains as to whether in all of her particular circumstances her behavior can be deemed cruel in the sense of what is required by the statute as the definition of cruelty.

39. **Hepburn J in CRW v SAW [2010] 4 BHS J. No. 8 – spoke to what is necessary for proof of cruelty as per the definition in the act:**

*"To support a finding of cruelty the acts complained of must [be] satisfy the "grave and weighty" test. This test is long standing. It was first propounded in 1790 by Sir William Scott in Evans v Evans 1 Hag. Con. 35 at 37. It has never been challenged and is now a part of our law.*

*Cases founded on mere trivialities and incompatibility do not satisfy the grave and weighty test. Nor do cases in which there is no evidence of injury to health or reasonable apprehension of injury. (See Gollins v Gollins [1964] AC 644 at 686-687 per Lord Pearce.)*

40. Moreover the act requires that -

*"the acts complained must be such that should such other spouse be called upon to continue to endure it, would be detrimental to his or her health."*

The husband's petition and testimony at trial speaks to some physical but predominantly mental abuse suffered at the hands of the wife. No evidence of having attended a physician of any kind (other than a marriage counselor) to deal with the mutual problem of the non- consummation of the marriage and other problems was presented on his behalf. The threats of physical harm together with corresponding actions to him and the inclusion of the children during these episodes paints a convincing picture of behavior meted out at the hands of his wife which

without more could meet the threshold of cruelty. However, it has been established that the circumstances of such abusive behavior may be excused and/or mitigated by mental illness.

41 The wife's admissions that during the marriage she was diagnosed with depression and bi-polar disease brings her case squarely in line with the "Gollins" requirement of evidence of injury to health or a reasonable apprehension of it. While there was no medical evidence to support the wife's contentions, the husband did not deny the existence of the conditions nor that the wife was diagnosed during the currency of the marriage.

#### **The Effect of Illness (Psychological) on the Wife's behaviour**

42 The wife gave evidence that she was diagnosed with depression and a bi-polar disorder for which she takes medication. The possible effects of her alleged conditions is pertinent to evaluating whether her actions were voluntary. Neither the wife or the husband gave the court the benefit of a medical report or a medical expert (psychologist or psychiatrist) to establish whether the wife's personality or behavior was adversely affected by the presence of these medical conditions. However, the Court takes judicial notice of the fact that bi-polar conditions are psychological/mental conditions usually requiring treatment and/or medication to control.

43. The effect of a mental condition of a wife Respondent in divorce proceedings for cruelty was decided in **Squire v Squire [1947] 2 All ER 529**. There, the Court sought to establish whether a wife's grave illness affecting the husband's health and professional efficiency amounted to cruelty. In this case medical reports reflected that the wife was diagnosed with several illnesses which were progressively getting worst. This resulted in the husband having to accede to an overwhelming amount of requests by his wife preventing him from sleep at times.

44. The question for the Court was whether the wife's conduct, arising as it did from the illness met the threshold of cruelty as defined by the matrimonial statute. This case determined that to meet the legal standard the wife's behaviour towards her husband had to be deliberate, malignant, and intentional. Finnemore J, in dismissing that Petition stated:-

*"All those cases emphasize, as I think all the cases before 1937 laid down the fact that cruelty must be deliberate, malignant, and intended. I do not think that to negative intention, willfulness, deliberation or malignity, it is necessary to go so far as to say that the accused spouse was insane, but where the court is satisfied that there was no deliberate adopted intention, as I find in this case, but, owing to illness, in the course of illness and arising out of illness, there were certain conduct and demands made on the other partner to the marriage which were heavy and became impossible, I do not think there is deliberation, malignancy, or intention...so as to amount to cruelty."*

*Then in Saunders v Saunders ([1965] 1 ALL E.R. 838 at page 846 – quoting Sir Jocelyn Simon -*

*“In order to establish the requirement of voluntary conduct, the petitioner must prove that the act or omission relied upon was the result of the exercise of the conscious will of the respondent. Thus, acts that are involuntary will not suffice: nor would acts for which the respondent is not mentally competent. It is a contradiction in terms to describe as cruel the conduct of a person who does not know what he is doing. The word "cruel" carries with it implications of guilt which can no more be imputed to such a person than to a sleepwalker. Swan v Swan [1953] 2 All ER 854 at p. 857 per Hodson L.J.; Palmer v Palmer [1954] 3 All ER 494. If a spouse does not know the nature or quality of the acts alleged as cruelty, they cannot be relied on as establishing treatment with cruelty. Further, if a spouse knows the nature or quality of the acts, it is a defense for him to prove that he does not know that they are wrong. The onus of proof is on the person alleging insanity, and the burden is the same as that which rests on the plaintiff or defendant in a civil case. Brittle v Brittle [1947] 2 All ER 383.”*

45. The wife’s contention that she suffered from the medical disorder and that she in fact takes medication for it does not rise to the level of insanity but her condition was not refuted by the husband, in fact he tended to agree with her that she suffered from the alleged conditions. There is a significant difference between this case and “Squires” because of the absence of expert evidence from a medical professional/practitioner which armed the court with the appropriate information needed to decide the issue. I am satisfied (not only because of the verbal assertions by the wife but also from observing her demeanour in the witness box) that her psychological condition does not rise to the level as the “Squire” wife or that her actions towards her husband were involuntary or that she was so mentally incompetent not to know the nature of what she was doing.

#### 46. FINDING – HUSBAND’S CRUELTY ALLEGATION

**In light of the husband’s treatment of the wife during her pregnancy of their first child, the treatment by telling her he wanted out of the marriage and the subsequent taunts surrounding Galy among other things, all done with the knowledge of her fragility and her obsession with him, meets the threshold of behavior that is of so grave and weighty a nature that he has occasioned injury to her health (mental) and she should no longer be called upon to endure it. The husband has been cruel to his wife.**

#### 47. FINDING – WIFE’S CRUELTY ALLEGATION

**Concomitantly, and in light of the facts presented of the wife’s behavior towards the husband, the obsessive behavior, the nagging, the fits of anger, the propensity to threaten**



or inflict physical violence, the irrational episodes which included the children are also sufficiently of so grave and weighty a nature that a reasonable apprehension of injury to the husband's health is easily contemplated. He should also not be called upon to endure this from his wife. The wife has been cruel to her husband.

48. **CONDONATION BY THE WIFE**

The Court must equally address the issue of condonation by the wife of the husband's adultery with call girls and strippers. Counsel for the wife argued that notwithstanding the wife's forgiveness of the husband for those initial acts, that adultery was revived by subsequent marital offences committed by the husband.

49. Section 16 (4) of the Act states:-

*On a petition for divorce it shall be the duty of the court –*

*(a) To inquire, so far as it reasonably can into the 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.”*

50. Section 19 (1) of the Act states:-

*“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.”*

51. 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.*

52. 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 work 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"*

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

54 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.”*

55. As mentioned herein previously, the wife gave evidence that she thought she had forgiven the husband, but over time she withdrew the forgiveness when the husband continued to seek out Galy.

56. During cross examination of the husband, he did not controvert the assertion put to him in relation to “Galy” not denying that he would have conversations with Galy on the phone and the relationship between them was “emotional.”

57. A decision as to whether or not the wife condoned the husband’s adultery with strippers and call girls is to be decided on a balance of probability. In **Blyth Appellant v Blyth Respondent [1966] A.C. 643** it was held inter alia that *“there is no statutory requirement that the absence of condonation must be proved beyond reasonable doubt. In matrimonial cases, as in other civil cases, the proof must be by the preponderance of probability, the degree of probability depending on the subject-matter, so that in proportion as the offence is grave. So the proof should be clear.*

58. Applying the Blyth standard, and in light of the foregoing authorities I find on a balance of probabilities that the later acts of the husband’s attitude and behavior towards his wife concerning Galy, were at the very least a breach of conjugal kindness (Durant), making decent married life together impossible (Richardson) which revived the initial adultery with strippers and call girls, thereby setting aside the wife’s *conditional* intention to forgive the husband (condonation).

## **Statutory Bars to a Grant of Decree Nisi**

59. The Court in deciding matters must be satisfied that both parties have met the procedural requirements under the Act. The husband failed to pray for the court to exercise discretion in his favour, granting him a Decree Nisi of divorce. As such he failed to adhere to the mandates of the Matrimonial Causes Act.

60. **Section 18.** The court may dismiss a petition for divorce if;
- (c) it finds that the petitioner has during the marriage been guilty of adultery or
  - (d) (ii) in it's opinion the Petitioner has been guilty of cruelty towards the other party to the marriage;

61. **Section 28 (1)** of the Act states:-

*“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.”*

62. The Court cannot ignore the statutory guidelines when determining matters of this nature. No prayer for discretion was included in the Husband's petition and no application was made during the trial. The husband never denied the adultery with the call girls and strippers. This evidence being uncontroverted left the only possible conclusion that could be reached in the circumstances i.e. those acts of adultery did occur and cannot therefore be ignored by the court.

To use the words of Sawyer J in **McMinns v McMinns [1993] BHS J. No.28** which I adopt for these purposes:

*“I think it is incumbent upon me, before leaving this judgment, to say something about the practice in divorce proceedings as it appeared in this case.*

*In the past I have pointed out to various counsel the provisions of Rules 28 and 30 of the Matrimonial Causes Rules regarding the filing of discretion statements and the standard of proof where cruelty or adultery are put forward as the grounds for the petition. Those rules as well as the other rules under the Act are part of the law of this country*

*and as such are meant to be observed by those who practice in these courts. They cannot simply be ignored or treated as an inconvenience because in this country - unlike, eg. the United Kingdom and some Caribbean countries - the grounds for divorce are still quite serious matters and the conduct of the spouses may be an important consideration when matters affecting the distribution of property are to be considered.*

*Further, because of the very nature of marital discord, it is at times almost impossible to arrive at any sensible decision as to what really happened so that unless both parties conscientiously seek to bring all the relevant facts before the court, justice can never really be done.*

63. There are oftentimes repercussions of failure to follow the requirements laid down in statute and in the present circumstances the failure to adhere to the provisions of S.18 and 28 is fatal to the Husbands petition. As such, the Court dismisses the Petition of the husband.

64. A Decree Nisi is therefore granted to the wife, on the ground that since the celebration of the marriage, the Respondent has committed adultery with unknown women and has treated her with cruelty.

65. That the Husband is to pay the costs of and occasioned by the wife's Petition to be taxed if not agreed.

Dated the <sup>m</sup> 27 day of September, A.D., 2023



C.V. Hope Strachan, J.