

IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

2022/FAM/div/00357

B E T W E E N

I. Z. J. (nee H.)

Petitioner

AND

F. J.

Respondent

Before: The Honourable Justice C.V. Hope Strachan

Appearances: Craig Butler for the Petitioner
Bridget Ward for the Respondent

Hearing date: 8th May, 2023; 17th July, 2023; 5th August, 2023; 16th October, 2023

Matrimonial Causes Act, cross applications for Decree Nisi wife adultery and cruelty; and husband cruelty, condonation, meeting threshold of cruelty, matrimonial causes rules, exercise of court's discretion, need for discretion statement.

RULING

C.V.H. STRACHAN, J

BACKGROUND FACTS:

[1.] The Petitioner, I.Z.J. (nee H) (“the wife”) and the Respondent, F.J. (“the husband”) were married on 26th March, 2002 and after 20 years the wife filed a petition for dissolution of their marriage on the grounds that the husband has committed adultery and has been cruel to her. The husband filed an Answer and Cross Petition on 25th October, 2022 after an application was made for leave to file out of time and the court issued an Unless Order on 6th February, 2023. His prayer seeks a dissolution of the marriage alleging that the wife has been cruel to him. The wife filed a Reply to the Answer and Cross petition on 11th April, 2023. There are Three (3) children of the marriage N.A.A.J. a female born 28th June, 1998 and Y.A.J. a female born 24th June, 2003 who for these purposes are both sui juris, and K.A.J. a female born 8th October, 2010. At the date of the filing of the petition Y.A.J was Eleven (11) years old.

[2.] THE WIFE’S ALLEGATIONS OF ADULTERY AND CRUELTY

[i] Things were good until she found out about the husband’s ongoing sexual relationship with a woman, E.C. with whom he had fathered a child prior to his marriage to her. The relationship continued after the marriage and he fathered a second child by that woman. The wife alleges that she only found out about these children in June 2020 when she went to the police station to lodge a complaint against the husband for abusive behaviour towards their daughter. She says she was shocked to learn this at the station from the mouth of the station attendant officer who mistook her for E.C. the mother of the other children. E.C. had apparently also visited the station to lodge a complaint against the husband previously and the husband’s name was in the system. The wife insists that the husband had never in the many years of their marriage told her about the children. But once she challenged the husband about the timeline he said that E.C. would visit him at his workplace and would show up at the matrimonial home with the children to collect child support. The situation exacerbated an already challenged marriage. The wife no longer trusted the husband and this soured her interaction with the husband.

[ii] The wife alleges that the husband constantly threatened her with physical violence, constant outbursts and expletives. She states that she was hit by the husband in 2007 and in September 2019 the husband forcefully took her cell phone from her and broke it. He bruised her arm and her back. Another incident she complained to the police about happened in March, 2020 and then again in December, 2022. All incidents were reported to the police however no charges were ever pressed because she did not want to. She denied that any of these altercations were instigated by her.

[iii] The wife revealed that the altercation which led to the police report, when the revelation of the other children came about involved their pregnant older daughter. She also

revealed that their younger daughter was so distressed by the husband's behaviour in the home, that she began cutting herself and that intervention from the Women's Crisis Center had to be sought.

[iv] The wife spoke of being in such fear of the husband that she has resorted to sleeping in a different bedroom with her daughter and making sure the door is locked. This began when she vacated the marital bedroom in April, 2022. This was also touted as the time when sexual relations between her and the husband ceased however she admitted that she had continued to "live as man and wife" (engaged in sexual intercourse), until then.

[v] The wife insists that she is in fear for her life, but admits that she did not apply for a domestic violence protection order. She was waiting for her divorce proceedings.

[vi] As it relates to her health the wife avers that she has difficulty sleeping. That she does not take medication for it. She did not go to the doctor because the bruises she suffered were not of the nature to cause her to attend the doctor. She attends doctor only twice yearly for general checkups. She said that she suffered physical, mental and emotional trauma and stress but that she did not have a medical report to speak to that but that she did seek out her pastor for help.

[vi] The wife denied the husbands allegation that she deliberately bleached his clothes. She also denied the suggestion that she instigated arguments and planned or coordinated efforts to get the Respondent out of the marital house. The husband stopped assisting with the finances of the marriage and property in March 2022. She collects the rental income from the multiplex they own. It supposed to be used to pay the mortgage. The mortgage is in arrears now. She intends to catch up.

[vii] Despite the husband leaving the matrimonial home to live elsewhere the husband comes and occupies the master bedroom and has unfettered access to her home notwithstanding that he knows this upsets her.

[3.] THE HUSBAND'S ALLEGATION OF CRUELTY AGAINST THE WIFE

[i] The husband does not deny the adulterous relationship with E.C. and the Two (2) children born from the relationship. Although he insists that the wife knew about the children before the incident in the police station. In fact he says she knew about the children from 2009 – 2010 when E.C. would come to the house carrying on and that at one time the wife threw stones at E.C. That E.C. relocated to Canada in 2013.

[ii] The husband alleges that the wife was very argumentative and provoking. He arrived home on one occasion to find his clothes had been bleached out. He said the wife meddled with Netflix so he could not watch it. He also alleges the wife put bleach in his drinking water

that's why he goes to his sister to eat. Aside from the fact that the wife does not cook for him anymore, he does not trust her to cook for him anymore. He never reported any of these arguments or incidents to the police because the wife would call him a sissy if he said he was going to report it.

[iii] The husband says that the wife was negligent with finances. She gambles and anytime he questioned her about their finances the wife would provoke an argument. The money coming into the family could have been managed better by the wife.

[iv] The wife always interferes when he tries to discipline the children and that the incident with the elder daughter which ended up at the police station came as a result of him telling her that if she was coming in at 3 am in the morning she should stay out. The wife interjected herself into the interchange.

[v] The husband says it was in April 2022 not March 2022 as the wife alleges, that they last slept together. He alludes to the wife refusing him conjugal rights. He pointed out that the wife avoided in giving her testimony saying when he actually moved out. The husband alludes that both his wife and him sleep out of the matrimonial home at times. That he tries to stay away as much as possible. That the wife changed the locks on the front door of the home so he only has access to the back door. That the wife uses "tactics" to get him out of the house so he tries to see her as little as possible.

[vi] The husband says that the wife encourages the children against him even to telling the eldest daughter that her step father would take care of her.

[vii] At first he wanted his marriage to work but after seeing what the wife was trying to do to him he does not see it working. He still has papers from the first time the wife filed for divorce. She always held the threat of divorce over his head.

[4.] THE ISSUES:

- i. Has the husband committed adultery as defined by the Act?
- ii. Has the husband been cruel to the wife as defined by the Act?
- iii. If so has the wife condoned his adultery or cruelty?
- iv. Has the wife been cruel to the husband?
- v. Is the wife entitled to have the marriage dissolved in her favour?
- vi. If so, is the husband entitled to a Decree Nisi to be pronounced in his favour?

THE LAW

[5.] The law governing the application for a Decree Nisi is provided by the Matrimonial Causes Act, Chapter 125, Statute Laws of the Commonwealth of the Bahamas (“MCA”) or (“the Act”) and the Matrimonial Causes Rules (“MCR”) or (“the rules.”) The elements of these offences as they are still known are to be found in the definitions provided by S. 2 of the Act.

s. 2 of the Act – “

“In this Act, unless the context otherwise requires — “adultery” 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 afore-mentioned whereby a strong presumption arises that such sexual act occurred between them;

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

s. 16. (1) of the Act –

“A petition for divorce may be presented to the court either by the husband or the wife on any of the following grounds that the respondent — (a) has since the celebration of the marriage committed adultery; or (b) has since the celebration of the marriage treated the petitioner with cruelty; or (c) has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or (d) has lived separate and apart from the petitioner for a continuous period of at least five years immediately preceding the presentation of the petition; or (e) has, since the celebration of the marriage been guilty of a homosexual act, sodomy or has had sexual relations with an animal: Provided that a wife may also petition on the ground that her husband has since such celebration been guilty of rape.

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.

s. 18 of the Act -

“The court may dismiss a petition for divorce if: (a) it is not satisfied on the evidence that the case for the petitioner has been proved; or (b) it finds that the petition is presented or

prosecuted in collusion with the respondent or either of the respondents; or (c) it finds that the petitioner has during the marriage been guilty of adultery; or

(d) in its opinion the petitioner has been guilty —

(i) of unreasonable delay in presenting or prosecuting the petition; or

(ii) of cruelty towards the other party to the marriage; or

(iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse either deserted or willfully separated himself or herself from the other party before the adultery or cruelty; or

(iv) where the ground of the petition is adultery or desertion, of such willful neglect or misconduct as has conduced to the adultery or desertion.

s. 19. (1) of the Act –

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 accessory to or connived at or condoned the adultery; Court may order respondent or correspondent to be dismissed from suit.

(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 section 18 grant a decree declaring the marriage to be dissolved; and if the court is not satisfied with respect to any of the matters aforesaid; it shall dismiss the petition;

Section 28 (1) of the Matrimonial Causes Rules (“M.C.R.”) (“the rules”) states that:

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

DISCUSSION AND ANALYSIS

[6.] THE WIFE’S CLAIMS OF ADULTERY

There is no more convincing evidence of adultery than the production of a child from that adulterous relationship. The husband has not denied his adulterous relationship with E.C. or the existence of Two (2) children from that relationship and in particular the child born after his

marriage to the wife. He was adamant about when specifically the wife became aware of the children but throughout his response to the charge gave the impression that he had no remorse about his infidelity and the child produced therefrom. I am satisfied that the husbands' failure to challenge the wife's allegations and limiting his response to the time period of the wife's awareness amounts to an admission and creates certainty of the act of adultery having occurred. As opposed to just a presumption as provided in the act the standard threshold of beyond a reasonable doubt has been achieved.

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." [Emphasis added].

THE WIFE'S ALLEGATIONS OF CRUELTY

[7.] The wife's allegations of physical abuse, threats and constant expletives which were persistently occurring since 2019 are acts which are reprehensible in nature and the wife's several reports of these incident's to the police called for the husband to be censured or rebuked. In **Saunders v. Saunders** [2005] 1 BHS J. No. 66 - Copy Citation - Bahamas Supreme Court, Common Side 2004/FAM/div/00429 – *Justice Claire Hepburn* referenced several authorities saying;

"The voluntary conduct complained of must be reprehensible in nature. It must be conduct deserving of censure or rebuke, or must be conduct which in the context of the marital relationship, is clearly blameworthy. It must not be conduct of a trivial nature nor conduct which can properly be described as being part of the fair wear and tear one would reasonably expect in a marriage, **McEwan v McEwan** 919640 108 Sol Jo 198, CA, per *Lord Denning*, or simple manifestations of incompatibility of temperament. **Allen v Allen** [1951] 1st February (unreported) CA (referred to in **Simpson v Simpson** [1951] 1 All ER 955 at 957, 958, DC 11."

[8.] The wife's failure to apply for a Domestic Violence Protection order does not convince me that the husband did not perpetrate acts against the wife which put her in fear and caused her to vacate the marital bedroom and seek refuge in a bedroom with her daughter. The incidents whereby the report of the husband's altercation with the couple's daughter which led to a complaint being lodged at the police station as well as the "cutting" inflicted upon herself by the other daughter, was not controverted by the husband. To me this is indicative of the husband wreaking havoc in the marital home which affected all of the occupants. However much the husband's behavior impacted others in the home, to amount to cruelty, the perpetrated acts must be upon the offended spouse;

In **Lockhart v. Lockhart** [1995] BHS J. No. 37- *Hall J.* cites the judgment of *Willmer, LJ*, in the Court of Appeal in England in **Gollins v Gollins**, [1962], 3 All E.R., 797, 901-902:

"... I would venture to propound the relevant propositions of law as follows:

(1) The conduct complained of must be such as to cause danger to health (bodily or mental) or a reasonable apprehension thereof. This is the basic requirement laid down by the House of Lords in **Russell v Russell**, [1897] AC 395.

(2) The conduct on the part of the offending spouse must be in some sense aimed at or directed against the complaining spouse. This requirement was laid down by this Court in **Kaslefsky v Kaslefsky**, [1950] 2 All E.R. 398, a decision which, so far as I know, has never been overruled and is therefore binding on us. Moreover, the necessity of this element in order to constitute cruelty follows, I think, from the circumstances noted by *Bucknill, LJ*, in **Kaslefsky v Kaslefsky**, at pp 401, 402, that the statute speaks of the offending spouse having treated¹ the petitioner with cruelty. It follows that in order to constitute cruelty there must always be some element of intention in relation to the impact of the conduct complained of on the other spouse. Where the Court finds that the conduct complained of was pursued with an actual intention to injure the other spouse, no further inquiry is necessary. But such an intention may in a proper case be inferred where, for instance, the conduct complained of is persisted in (a) after warning that it is having an adverse effect on the other spouse, or (b) in circumstances in which any reasonable person would appreciate that it was likely to injure the other spouse. For any spouse may be presumed to intend the natural consequences of his own behaviour. Thus, any course of conduct intentionally pursued, provided it has some impact on the other spouse, may in appropriate circumstances justify a finding of cruelty. This concept has, I think, never been better expressed than by *Shearman, J*, in **Hadden v Hadden**, (Dec 4, 1919), 'The Times', Dec 5, 1919, in words specifically approved by *Lord Merriman* in **Jamieson v Jamieson**, [1952] 1 All E.R., at pp 881

I do not question ... that he had no intention of being cruel ... but ... his intentional acts amounted to cruelty.¹

(3) If the two foregoing requirements are not satisfied, the charge of cruelty is not made out and must as a matter of law be dismissed.

[9.] The fact that the wife had difficulty sleeping and that she suffered stress, physical, mental and emotional trauma indicates that she was negatively impacted in her health by her husbands' behaviour. Not attending the doctor about the bruises she suffered because she felt that they were not of the nature to cause her to attend the doctor, causes one to question the gravity of the situation. Moreover, she did not have a medical report to support her health challenges, nor did she have a report from her pastor from whom she had sought counselling help. Therefore her claims comes down to this courts' impressions of her as a truthful witness. I am satisfied that the symptoms she complains are injurious to her health or that it is reasonable to apprehend such injury, from the husband's actions I accept that she was mentally stressed out, traumatized and that the husband did physically abuse her on more than one occasion. Such consequences are certainly not trivial

and are so severe and grim for the marital situation that they satisfy the grave and weighty test inherent in the definition of cruelty;

“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*.)”[Emphasis added].

[10.] **CRW v. SAW** [2010] 4 BHS J. No. 8 - *Hepburn J.*

“To support a finding of cruelty the acts complained of must 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.

[11.] Also *Thompson J.* in **Minns v. Minns** [2002] BHS J. No. 86, Bahamas Supreme Court, Divorce and Matrimonial Side -New Providence - No. 484 of 2001-*Thompson J.* adopted the reasoning of her Learned Brother, *Moore J.* in the case of **Johns vs. Johns** FP69 of 2001 where he states;

"Thus trivial marital misdemeanours will not suffice. I do not apprehend the archaic language "grave and weighty" which was employed by the draughtsman of 1879 to mean anything more than "serious" in today's parlance, and in the light of today's enhanced understanding of the foibles and fragility of human nature. The words "that should such other spouse be called upon to continue to endure it, would be" are clearly of prospective import.

Consequently, if the serious conduct of the offending spouse is likely to be detrimental to the health of the innocent party if that party continues to endure it, this element of cruelty is satisfied. The petitioner does not have to go or to show that having endured the respondent's misconduct over a sustained period of time (he or she) has in fact suffered actual detriment to his or her health. Actual injury to health would a fortiori suffice. But normal wear and tear of married life would not suffice. See **Young vs Young D & M** [2000] No. 134. Freeport, Grand Bahama, Bahamas, and the cases cited therein."

[12.] After taking due account of all the circumstances of the case, I am satisfied that the husband's treatment of the wife is so grave and weighty a nature, that should the wife be called upon to continue to endure it, it would be detrimental to her health. The wife has alleged that notwithstanding that the husband does not live in the matrimonial home presently he persists in entering unannounced, traversing the home, in particular what was the matrimonial bedroom, knowing that this is upsetting to the wife. This scenario indicates the husband is deliberately provoking a situation that is unhealthy to the wellbeing of the wife.

[13.] The husband claims that the wife found out about his adultery and the children he fathered with his paramour since 2009-2010, not in June 2020 as she alleges. His claim that notwithstanding her knowledge of his adultery she continued to live with him in the marital relationship and all that such relationship entails. In so many words he is submitting that the wife condoned his adultery and cruelty. If such is proved against the wife her Petition is subject to dismissal.

CONDONATION

[14.] In **Lockhart v. Lockhart** *Hall CJ* referenced the 10th Edition of Rayden's Practice and Law of Divorce at pp 264-266 and 281-284, which provided:-

"Mere forgiveness of a matrimonial offence, whether expressed orally or by letter cannot amount to condonation, unless it is followed by the reinstatement of the offending spouse in his or her former marital position. Although the best evidence of such reinstatement is the continuance or resumption of sexual intercourse, there may be a resumption of conjugal cohabitation sufficient to constitute a reinstatement without sexual intercourse: Conversely, there may be sexual intercourse not amounting to reinstatement. But nothing short of full reconciliation will suffice; therefore if the guilty party does not consent to be forgiven there is no condonation." (Emphasis added)

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 Nicholls*, 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.

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

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

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.

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.”

[15.] The photograph showing several persons including the wife and the child from the husband’s relationship with E.C., used by the husband to demonstrate that the wife had knowledge and acceptance of his adultery and his offspring, and that it shows she is not unhappy (condonation) does not provide proof of condonation. Beside him not proving whether the photo was taken before or after the revelation at the police station, I refuse to speculate as to the circumstances under which the wife was included in the photo.

[16.] The wife says that the revelation about the adulterous affair and the resultant offspring caused her “*extreme emotional distress and a complete loss of confidence and trust in the petitioner.*” Thereafter she refused to have sexual relations with the husband, as he puts it she

refused him “his conjugal rights”. She moved out of the marital bedroom she shared with the husband and into the children’s bedroom, and she changed the locks on the front door, to bar the husband’s random entry into their home where he was no longer residing, is to my mind a good indication that she did not forgive him for his adultery or his abusive behaviour towards her.

[17.] THE HUSBANDS ALLEGATIONS OF CRUELTY AGAINST THE WIFE

The husband allegations that the wife condoned his adultery since she knew of his adultery and the children he fathered with his paramour since 2019. I say that his position defies credulity since he admitted in his Answer and Cross-Petition that he did not disclose the existence of the children to the wife as he “*did not want to hurt her.*” I prefer the wife’s evidence that the revelation in fact did not happen until the incident in the police station in 2020. It does not escape me that the husband is prone to violence against persons with whom he shares a domestic relationship, his wife, his daughter and his paramour have had to report him to the police for acts perpetrated against them.

[18.] The wife’s cessation of sexual intercourse with the husband is capable in certain circumstances of amounting to cruelty; “persistent and unreasonable refusal of sexual intercourse could amount to cruelty.” **Evans v. Evans** [1965] 2 All ER 78. [Emphasis added].

There is some dispute between the husband and the wife as to whether it was March or April 2022. However the distinction is of no moment to the decision except as it relates to the issue of condonation which will be discussed below. The question then is whether the wife’s refusal was “persistent and unreasonable.” Was she tenacious, stubborn or obstinate in her refusal? It is not difficult to countenance that discovering her husband’s adulterous behavior would prove very disappointing, cause mistrust and the sense of betrayal. The consciousness of possible health implications inherent in a marital indiscretion of the kind engaged in by the husband is obvious and was a part of the wife’s rationale for her refusal. In such situations where communication fails sex is often used to get the message across and I am satisfied that the wife’s refusal in the circumstances was reasonable. [Emphasis added].

[19.] The husband made an allegation of the wife being financially irresponsible and having a gambling habit. There is no dispute between the parties that the he wife manages and collects the rent from matrimonial properties which includes a multi complex. The wife’s response that there are arrears on this property and that she is dealing with it is might first give the impression that she is misusing the money. However, the wife spoke of the time during the pandemic in 2020 when the husband was furloughed from his job and all of the burdens of the financial responsibilities of the family fell on her. The suggestion that it was at this time that the situation with the family finances became troubled. This to my mind is a plausible explanation for the situation. But in any event the husband failed to elaborate on his gambling allegation in any convincing way. Aside from briefly mentioning the word gambling the husband gave no details of any profligacy on the part of the wife. Most importantly he failed to demonstrate how the wife’s management of the

financial matters of the couple proved to be cruel acts perpetrated against him. I am therefore, unable to make any finding that the wife has been financially cruel to the husband.

[20.] As to the allegations of the wife bleaching his clothes. With the knowledge of the vagaries of doing laundry and the possibilities of the application of chemicals on clothing when doing laundry, the husband was unable to convince me that the wife deliberately bleached his clothing, or put bleach in his drinking water. Moreover one of the facts relied on as cruel act perpetrated by the wife is that she stopped doing his laundry. I accept the wife's response to the allegation that she did not bleach the husband's clothing.

[21.] The wife pulling a knife on the husband is an allegation of a serious violent act. However there is a total lack of detail given by the husband about the incident and when asked about the incident the wife simply denied it occurred. The allegation is that the incident happened as a result of a difference of opinion on a parenting issue. The cause of much of the disputes between the husband and the wife were differences in parenting styles. While I refuse to speculate about the details of the incident which I believe occurred, it appears that it arose in peculiar circumstances and was not persistent or consistent behaviour of the wife as required by the Act.

[22.] It is glaringly obvious that in the husband's Answer and Cross-Petition no allegation has been made that the wife's behaviour has in any way occasioned injury to his health or even a reasonable apprehension so that a continuation would be detrimental to his health. In *K v. B* [2013] 1 BHS J. No. 198, per *Milton A Evans J*;

"In arriving at this conclusion I have given due regard to the comments of the learned Chief Justice Sir. Michael Barnett in the case of *S v M* 2009/FAM/DIV/193 as follows:-

"It must be emphasized that not every act or series of acts of conjugal unkindness constitutes cruelty. The acts complained of must be of a grave and weighty nature which has caused or is likely to cause injury to health. Mere rudeness is not cruelty. Parliament has not yet enacted 'unreasonable behaviour' as a ground for divorce and the Court must be astute not to elevate what is simply unreasonable behavior to an act or acts of cruelty. Such would be a transparent form of impermissible judicial legislation." [Emphasis added].

[23.] In this jurisdiction divorces are fault based. All petitions must contain allegations against the opposite spouse of one of the grounds as set forth in S. 16 of the Act, supra. Accordingly a party guilty of one of those marital offences is not permitted to obtain a Decree being themselves guilty of a marital offence. Most notably, when an applicant for a Decree Nisi has committed adultery themselves there is an obligation to disclose the same to the court. Upon the disclosure the court may then exercise its discretion to grant the Petitioner a Decree Nisi notwithstanding his/her own adultery in accordance with rule 4(3) of the M.C.R which states:

s. 4 (3) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages, any claim for costs, and, in appropriate cases, a

prayer that the court will exercise its discretion to grant a decree nisi notwithstanding the adultery of the petitioner during the marriage. [Emphasis added]

[24.] A corollary to the rule is provided by section 28 (1) of the (“M.C.R.”) which states that:

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

The husband has failed to pray for the exercise of the court’s discretion in his answer and cross petition or during the trial of this matter. I accept that this does not negate the court’s exercise of the discretion as;

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

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

[25.] Unfortunately, notwithstanding the obvious culpability of the husband as it relates to his adulterous behaviour, his petition was devoid of the prayer for discretion and unlike the woman in “Lepre” supra he made no attempt at trial to seek the court’s discretion. His failure to invoke the court’s consideration in this regard warrants a dismissal of his Answer and Cross-Petition pursuant to s. 18 and 19 of the MCA.

CONCLUSION AND DISPOSITION

[1] The wife is granted a Decree Nisi on the grounds of the husband’s adultery and cruelty. The Decree is not to be made absolute until Three (3) months from the date hereof. Ancillary matters are adjourned to chambers.

[2] The husband has failed to prove that the wife has been cruel to him. His Answer and Cross-petition is therefore dismissed.

[3] Costs of these proceedings are awarded to the wife to be taxed if not agreed.

Dated the 7th day of May A.D. 2025



The Honourable Justice C.V. Hope Strachan
Justice of the Supreme Court of The Commonwealth of The Bahamas