

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

FAMILY DIVISION

2011/FAM/DIV/FP00039

BETWEEN

NINA MIA FORBES (nee ARANGIL)
Petitioner

AND

ORLANDO FRITZGERALD FORBES
Respondent

AND

SHERYL BROOKS
Co-Respondent

BEFORE: The Hon. Mrs. Justice Estelle Gray-Evans

APPEARANCES: Mr Jethro Miller for the petitioner

Miss Constance McDonald for respondent

HEARING DATES: 2017: May 17 and 18; June 20

DECISION

(Application to set aside decree nisi)

Gray Evans, J

1. The parties were married on 27 November 1993. At the time the husband/respondent was 29 years old and the wife/petitioner 22. There are two children of the marriage born respectively in 1993 and 2004.
2. In April 2011, the wife petitioned this court for dissolution of the marriage on the ground that since the celebration of the marriage with the co-respondent the husband had committed adultery.
3. The wife alleged that in June 2010, she learned that the husband had fathered a child with the co-respondent; that the child, a daughter, had been born on 30 April 2005.
4. In his answer filed on 8 June 2011, the husband admitted the adultery but nevertheless prayed that the wife's prayer for dissolution of the marriage be rejected and the petition dismissed on the ground that the wife had condoned the said adultery.
5. The matter came on for trial before this Court on 18 April 2012 and in a written decision handed down on 16 May 2012 the Court found that the wife had not condoned the husband's adultery notwithstanding they had continued to engage in sexual intercourse after she became aware of the said adultery, and granted a decree nisi to the wife, on the ground of the husband's adultery, such decree not to be made absolute for three months. Ancillary matters were adjourned to chambers.
6. On 9 March 2017, almost 5 years after the decree nisi was granted the wife filed a notice of application for ancillary relief supported by her affidavit of means filed on the same date.
7. Shortly thereafter, on 27 March 2017, the husband filed the summons that grounds this application.
8. In that summons, the husband seeks an order that the decree nisi filed on 29 August 2012 be set aside and the petition dismissed on the ground that before the filing of the petition as well as subsequent to the grant of the decree nisi, the parties have continued to cohabit as man and wife.
9. The husband's summons is supported by his affidavit filed herein on 24 March 2017 in which he avers as follows:
 - 1) I am the respondent herein.
 - 2) On the 25th May A.D. 2015 the petitioner obtained a decree nisi herein.
 - 3) The Judge felt constrained to grant the divorce because even though the petitioner admitted that we were having consensual sexual intercourse she stated that she had not forgiven me for having committed adultery.
 - 4) Almost 5 years later we are still living as husband and wife and our younger child has no idea that we even went through a divorce proceeding.
 - 5) After the decree nisi in 2012 the petitioner and I decided to work on our marriage. She told me I could bring my daughter to our home and she (my daughter) and our son have a beautiful relationship.
 - 6) In July 2015, the petitioner [sic] angry because I said to her that I intended to take my daughter to my sister's funeral [sic] moved out for twelve months.
 - 7) When my father died some sixteen months in advance of my sister, I met some of my aunts and uncles for the first time at age 50. I tried to explain to

my wife that I did not want that to happen to my daughter but she was unmoved.

- 8) My sister's funeral was May 30th 2015 and she refused to attend. After I returned from the funeral she informed me that she was going to Long Island and would be moving out when she returned.
 - 9) I went to Long Island and we spent 3 days together. I returned to Freeport and went off on a 5 days course to the US. When I returned on the 17th July 2015 I found that she had moved out.
 - 10) My wife and I continued to work on our relationship and she returned home just over a year later on August 8th 2016. On November 22nd 2016 we looked at a home which we both decided that we liked and agreed to purchase it.
 - 11) This year I received a letter from her attorney dated the 24th January 2017 re settlement of the Ancillary matters in the divorce. Needless to say I was totally shocked. Even after receipt of the letter nothing has changed between us. We had previously received marriage counseling and we are presently doing so with our Pastor. I regard my marriage as a good one and love my wife and children. It is my honest belief that she wants to be married to me and that the decree nisi represents an obstacle to us having a fully committed marriage.
 - 12) For the reasons above stated I now ask that the decree nisi herein be set aside and the petition dismissed.
 - 13) The above statements are made from facts within my own knowledge and belief in support of my summons filed herewith.
10. In her affidavit in response filed 24 April 2017, the wife avers as follows:
- 1) In 2012 after the judgment was issued in this matter the respondent (hereafter referred to as "Orlando") continued to ask me to reconsider dissolving the marriage but I told him that I would not. He asked me to go with him to meet with a psychologist and I agreed on the grounds that there were no expectations. Having studied psychology I recognized that the process can be beneficial in helping people to heal and find amicable ways of resolving differences. The psychologist recognizing that we were in different places agreed to see us separately. About almost a year into the process I agreed to try a work through our issues and I set the expectations under which I was prepared to continue in the relationship and that if they were not made available I would proceed in dissolving the marriage. Orlando was also invited to table the issues that he wished to be addressed.
 - 2) From the onset of the negotiations Orlando started being difficult. After providing him with my considerations in writing we were supposed to discuss them and for some reason he seemed to feel pressured about agreeing to a time for the discussions and suggested that he didn't want anyone putting a gun to head. The expectations that I put on the table included an end to the extramarital affairs. Whether it was physical contact, texting or otherwise. Another issue was transparency in his dealings with Asia Forbes, his daughter, and her mother, Sheryl Brooks, the Co-respondent. Orlando failed to refrain from his inappropriate behavior with other women. Despite me extending the invitation to include Asia in activities at our place so that it was

easy for him to be transparent, apart from bringing her to Travis' birthday gatherings he refused to even so much as been able to say when he was going to see or spend time with Asia, stating that he just needed to give me his schedule and that should suffice.

- 3) Needless to say this attempt at reconciliation failed. However, a number of other events occurred as I shall now describe, and I didn't return immediately to pursuing this matter. Sometime on about 12th February 2013 in the early hours of morning, while Orlando slept in the Master bedroom and I in one of the other bedrooms I was awoken by the sound of the dogs barking and then aloud thump. When I looked out of the room window the truck (a company truck that Orlando drove) was engulfed in flames. That event would set into motion a string of incredibly frightening and bizarre events that included two of our vehicles and house being shot at and us having to relocate. This went on for months before the suspects were apprehended. In late August 2013 I changed jobs and entered into the field of education and this adjustment consumed much of my focus for awhile.
- 4) During this time Orlando continued to show no change in behavior. His extra marital behavior continued. I would come across text from some women wanting her house keys back, an exchange between him and some woman while he was at a concert with me indicating that they wish they were there together. He invited Sheryl Brooks and her family to his 50th birthday without saying anything or asking how I felt about it. He continued to and still to this date refuse to provide any transparency on how he deals with Asia and Sheryl. In May 2015, when his sister died, he came to me and said that he was carrying Asia to the funeral that his sisters and brothers asked him to bring her and that I was the only one with a problem. I said to him that given that in 5 years he has not been able to be transparent with me and that I was the one in the way of Asia getting to know her family that I wouldn't go. That then became a problem for him and he was upset that I didn't go. I made the decision to move out and in June 2015 I found an apartment and Travis, our younger son and I moved out. While I was vacationing in Long Island Orlando came down to ask me to reconsider and I refused.
- 5) That for months after I had moved Orlando pleaded with me to return home. In May 2016 I told him that I would consider it on the premise that the extramarital behavior had stopped and that there was transparency with the Asia and improvement in family time he was giving Travis. He committed to this. I requested that we have a family meeting with our boys and Asia about what was happening and what our expectations would be going forward. He then became very resistant to this idea claiming that Asia who was 10 at the time was too young and not ready for that and he proposed that we meet with Sheryl Brooks her mother. I didn't make such a suggestion because I was certain that neither she nor Orlando had that level of maturity but I agreed to the meeting. A week later when I asked him about the meeting he said that she didn't want to because she didn't have a problem with Asia coming to the house so the meeting had to be about something else. So I said to him since Asia is too young and not ready and his proposal to meet with her mother was not materializing then I would not be moving back into the house. He pleaded with me to reconsider while asking me what he would need to do. I told him I don't know what he could do if he says his child wasn't ready and I

was not prepared to go back to dealing with the lack of transparency and him living between two families. Orlando arranged the meeting with his daughter 2 weeks later. I made it clear to him that I wasn't coming home to work out whether he should be transparent, or him to stop committing adultery but that I expected that this behavior was behind him and that if it wasn't that this wasn't going to last.

- 6) I moved into the house in August 2016 and it very soon became apparent that this was going to be more same old behavior, text messages suggested that he was seeing someone else, the only effort at transparency with Asia was made by me inviting her to celebrate his birthday and Travis' birthday and all other efforts to see if we can work together was met with resistance. In November he took me to see a house that he wanted to buy and asked if I like it I told him it had one or two issues but it was pretty nice house. About a week or two later I noticed he had a new phone which would make it phone number 3 that he has and so I asked him what was the number for the phone. He told me that the phone doesn't have a number and was bought to view the security camera for the house. Then a few days later I noticed a message pop up on the same new phone. So when he came in I asked him again what was the number for the phone and he said it didn't have a number. Then I asked him for the password for the phone and he asked me to give the phone to him and I asked a few times for him to give the password and he said he need to hold the phone to put his thumb print so I asked him to come and do it while I was holding it he refused. So after a while I returned the phone to him. I then told him that I was done and that if he was going to buy that house do it because he wanted it because when we left this place, we would not be going in the same direction. When he asked if I was going to put my name on it I told him no and reiterated my position.
- 7) I had the conversation with Travis about his father and I getting a divorce from the time I initiated this process. I discussed with Travis that we would be moving when we moved in 2015 and that we were going to give it another try when we returned home. One of the reason that I chose to ask for the house, eventhough it will make it more difficult because Orlando has never been willing to allow me to have the house, was so that I don't have to create any more chaos in Travis' life.
- 8) Orlando has never treated this marriage as if it is a good marriage; from the first year he has sabotaged all efforts to build a good marriage by constantly being in and out of extramarital affairs and refusing to authentically embracing any opportunity to improve it. If having good marriage means that he is the only one entitled to be happy and mine should be a course in suffering then he is being selfish and arrogant.
- 9) On several occasions I have spoken to Orlando with a view to attempt to reach or agree an amicable settlement of property matters and financial support and living arrangements for myself and particularly our minor child, Travis. On each occasion he would simply refuse to agree to even one single thing. His response on each occasion was that he will let the court decide that. I have had my attorney submit to him personally a property settlement proposal which, I am advised, to this date did not receive even the courtesy of an acknowledgement. His refusal continues to cause me personal distress and remaining in the family home was not intended to mean that I wanted to

continue in the marriage, when it was clear that the conduct of Orlando which caused the divorce in the first place had not changed, but to minimize the disruption in my life and that of Travis by continuing a pattern of leaving and returning as had occurred since the Decree Nisi.

- 10) Finally on Thursday, 20th April I was asked to go into the Bank of Nova Scotia in reference to the house referred to in paragraph 6 above which Orlando is in the process of purchasing. There I met an attorney for the bank who wanted to ensure that I was aware of what was happening and to sign stating the same. I explained why I opted not to have my name on it and he explained that in the event of the divorce it would be settled along with all other assets by the Court. I did not wish to give the impression that I wanted to continue in a marriage. I make this statement from personal knowledge and with the hope and expectation that Court will grant me my petition for ancillary reliefs, a decree absolute with costs awarded in trial at the decree nisi, together with all costs incurred at this stage of the proceedings against the respondent.
11. The husband filed another affidavit on 27 April 2017 in which he deposes as follows:
 - 1) I am the respondent herein.
 - 2) Following the judgment issued in 2012 the petitioner and I continued to live together as husband and wife at our residence being #213 Gough Lane Freeport, Grand Bahama with our two children. The home environment despite the given set of circumstance was warm and we both made it our business to ensure that the children were not impacted by the set of circumstances between us. The petitioner and I still loved one another as we do today and spoke at length about the way forward. I accepted full responsibility for damaging the relationship and asked the petitioner to reconsider dissolving the marriage. One Sunday during August of 2012 the petitioner and I were watching television and saw an advertisement by Dr Wayne Thompson about counseling sessions that he was offering in Freeport, I asked the petitioner if she knew who he was and she advised me that he was a very capable psychologist. I then asked her if she would be interested in us talking with him and she agreed, thus began our sessions with Dr Wayne Thompson. Dr Thompson immediately recognized the areas of concern with us and decided that he would work with us individually at the outset and then bring us to a place where we could grow together.
 - 3) The sessions with Dr Thompson proved invaluable for both of us and bit by bit we began to rebuild our relationship. This was an extremely important time in our lives and I made it my business to put time into my family life and my church life. Where the petitioner was concerned I ensured that we had time every day to interact; I knew that this was important for us to rebuild. During the month of December 2012 the petitioner and I had a very determined conversation about how we would grow our relationship. I disclosed all wrongful acts and committed fully to being a faithful, non-abusive husband; a totally engaged and loving father to our boys, and gave the petitioner access to my phones. I felt that this was absolutely necessary if trust was to be rebuilt. The petitioner is also a signatory on my savings and checking accounts and I said to her that she was free to access them as she wished. This remains the case today. The petitioner indicated to me that she was

okay with me bringing my daughter to our home, I certainly recognized and appreciated this gesture as I felt that it was a step in the right direction. I brought my daughter to our home on several occasions; after exchanging pleasantries the petitioner would excuse herself and go into the room. I realized that Nina was still very challenged by the situation and needed time to heal but that the side effect of this action was that my daughter had been made to feel very uncomfortable. I struggle with this immensely and decided that I would focus on building the relationship with our last son and my daughter whom I take out together frequently on the weekends as time allows. Outside of this I indicated to the petitioner that I would pick up and spend time with my daughter on Tuesday and Thursday evenings and that if this schedule was to change that I would advise her. I remained faithful, dedicated, committed and respectful to the petitioner at all times.

- 4) The events that occurred around February 12, 2013 and the preceding three to four months will forever remain with me and the petitioner. I was targeted by an employee whose services were terminated by the company for which I work. This individual in cooperation with two others burnt down the company vehicle for which I was responsible in my yard, attempted to extort funds from me and fired gun shots into my home, into personal vehicle and another vehicle owned by the company that I was using. Needless to say it was a relief when the culprits were finally apprehended. Perhaps the more purposeful aspect of the whole ordeal was that it confirmed and placed to rest the very troubling accusation that was being circulated by some mischief makers within the community; that some distraught husband or fiancé was after me for having an inappropriate relationship with his woman. The petitioner had heard and asked me about the rumors and I advised her that it was utter nonsense. To have been vindicated in such a way was extremely satisfying and paved the way for the petitioner and myself to continue building on our relationship. I took great pride in confirming that I was committed and faithful to her no matter what the circumstances.
- 5) The petitioner and I continued to work on our relationship during the preceding days and weeks that followed. The sessions with Dr Thompson continued to prove helpful and he advised me during one of my sessions with him that the petitioner was indeed feeling good about the direction in which our marriage relationship was headed. He noted that out of some ten areas of concern that Nina originally had that she was feeling extremely positive about some seven of them. A copy of Dr Thompson's report is attached as Exhibit OFF1.
- 6) The petitioner and I embraced opportunities to share time with each other, we went to dinner, we went walking or we simply stayed and spent time at home. A key function of taking a family vacation was embraced since 2012 and we took the opportunity to travel with our two sons to places in the United States beginning with Atlanta, where our oldest son attends college, Florida, Washington DC, Las Vegas and Puerto Rico. During our last family vacation we went to Cuba for a week and had a thoroughly enjoyable time. There was no issue about any inappropriate relationship because there was none. The reference to a text exchanged between myself and a female at a concert is being taken out of context and was addressed by Dr Thompson in one of our earlier sessions with the petitioner present. The female in question was a

platonic friend in a sky booth at a concert that the petitioner and I were attending. I was simply saying to the individual that I wished that I was in the sky booth, but the petitioner took it to mean something else. I none the less apologized to the petitioner for this act. The reference to some woman wanting her house keys from me is unjustifiable and I never invited Ms Sheryl Brooks and her family to my birthday party.

- 7) I recognized very early on that the rebuilding of trust is a key component if we are to be successful and continually seek to ensure that my actions are always above reproach. In July 2015, the petitioner became angry because I said to her that I intended to take my daughter to my sister's funeral and moved out for twelve months. When my father died some sixteen months in advance of my sister, I met some of my aunts and uncles for the first time at age 50. I tried to explain to my wife that I did not want this to happen to my daughter but she was unmoved. This was my reason for taking my daughter to the funeral and it was difficult for me to understand why the petitioner chose not to support me during a very difficult time but opted to move out of our home during July of 2015.
- 8) I continued to be supportive to the petitioner during the year that she was away from home and maintained my sessions with Dr Thompson via Skype and the occasional day trip to Nassau. Dr Thompson advised me to continue to be patient as it was all a part of the rebuilding process. I certainly agreed with this reasoning as it was always my thinking that I had to be committed to the process for as long as it took. Nina and I continued to spend time with each other during the course of the year, and the truth be told I spent more time by her apartment than I did at home. We took the time to understand one another and each other's feelings. Items of importance to her were co-parenting, finances, having a committed monogamous marriage relationship and the development of a program for Asia that would allow for Nina to have a greater level of transparency. I reconfirmed my commitment to Nina regarding these areas and she agreed to return home during the month of August after her lease for the apartment expired. Nina requested a family meeting with our boys and Asia to advise them about our plans which I thought was a good idea. Something of concern to me though, was that the petitioner was adamant that I communicate to the children the circumstances that led to our marriage relationship deteriorating. I was unsure as to how the two younger children would handle this and was particularly concerned about how my daughter, at the tender age of ten, would handle hearing that the two person whom she trusted most in the world had acted in a manner that was so wrong and unacceptable.
- 9) Based on this though I suggested to Nina that it perhaps would be better if the adults had the discussion and indicated to her that I would have a conversation with Ms Brooks in a bid to arrange the same. I had the conversation with Ms Brooks and was unable to get her support, I advised Nina as to this and we decided to go ahead and meet with the children as previously planned. At the meeting I was responsible for doing the communicating and did my best to ensure that all that was said was done in a manner that was not harmful to the two younger children.
- 10) Nina moved her belongings back to our home at 213 Gough Lane around August 8, 2016 and then went on a trip returning home during the last week

of August. The months of September and October proved somewhat challenging as we both had to adjust to being back together in a home environment in addition to dealing with life after hurricane Matthew. Nina was very enthusiastic about getting some projects done and I remember asking her to slow down, that we had time on our side.

- 11) On October 31, 2016 we took our son Travis out to dinner to celebrate his birthday, the three of us had a wonderful time together and in my estimation it represented the point where we begun to click again as a happy union. November was a beautiful month for both of us and Nina confirmed this in a counseling session with our priest Pastor Earl Hepburn on March 14, 2017 which I will speak to in more detail shortly. On November 22nd 2016 we looked at a home which we both decided that we liked and agreed to purchase it.
- 12) Hurricane Matthew damaged our security system and a security technician was brought in to repair it. During his visit he attempted to load the security system onto my Samsung phone but was unable to do so due to the fact that it was an older model that did not have the ability to provide this function. He advised me that I would have to get a more up-to-date phone if I wanted this done. Nina was present during this conversation. I got the phone around the middle of November, had it turned on and got the technician to load the security system.
- 13) On the evening of December 7th 2016, I went by a bar that I operate to ensure that everything was going okay. My work phone was being charged and so I took the new Samsung with me. While at the bar three individuals that I work with, two males and a female, were there hanging out. I sat with them for a bit until they decided to leave advising that they were going down by the fish fry. I remained at the bar until about 9:15 pm and then dialed the lady's phone, I did not receive an answer and so I then texted her asking "what you guys up to", I received no response and so I went home.
- 14) The following morning after returning home from exercising I met my wife with the phone in her hand extremely agitated. Holding the phone in her hand she asked me to open the phone, I simply asked her to give me the phone so that I could open it for her. The security processes was finger print based and required that I place my finger on a button that she was obstructing. Nina eventually placed the phone down and I opened it and saw why she appeared so distressed. The lady from the previous evening whom she knew had responded to my text saying "headed home" this message was clearly readable on the face of the phone. I rested the open phone on the table and proceeded to get ready for work. Nina was extremely upset and left for work in that frame of mind.
- 15) I discussed this matter with Nina on several occasions following the events of that morning but she is of the opinion that I am having an extramarital relationship with this individual which is simply not true. Our Pastor Father Earl Hepburn having heard about the challenges that we were having reached out to us and invited us both to sit with him with a view to working out our differences.
- 16) We had two sessions with him on the evenings of March 14th and March 21st respectively. Both sessions were quite beneficial and provided us with an

opportunity to reflect on our relationship. Father Hepburn was quick to identify the real issue and advise us to take a month, sit down and put together a comprehensive plan as to how we would deal with my daughter moving forward as this was at the heart of the issues that we were having. He noted that both of us had to be involved in the process and take ownership as opposed to just me taking on the situation. By taking this approach it was felt that it would provide the level of transparency needed for Nina and I to have a successful marriage. We departed this session smiling, holding hands as per his instruction with the intent to return on April 25, 2017 with a well laid plan that would allow us to move forward positively.

17) On or around the 30th of March 2017 while my wife and I were out having dinner she advised me that she had obtained a court date and intended to proceed with getting a divorce, I advised her that I was not in agreement with her and that I was of the view that we should continue to work on our marriage relationship. Nina and I love each other very much and we remain emotionally involved. I regard our marriage as a good one despite some ups and downs and feel that together we provide the best set of circumstances for our children and ourselves. It is my honest belief that she wants to be married to me and is pursuing this action based on a false assumption and because she has the decree nisi available to her. I honestly feel that the decree nisi represents an obstacle to us having a fully committed marriage.

12. The contents of the letter from Dr Wayne Thompson, Ph D., MA, MFT, Clinical Psychologist/PgDip Psychiatry, referred to by the husband, addressed to the undersigned, and dated 22 April 2017, are set out hereunder:

“Dear Justice,

This letter is to confirm that the above mentioned couple were clients of mine for marital therapy from August 2012 through June 2016. There were several issues that created discomfort and we were working through them very well until my travels to Freeport were disrupted.

The outstanding issues were as follows:

- Orlando must not make any arrangements to bring his daughter over without consulting with Nina to plan and organize the visit.
- Nina felt unsure of Orlando's ability to stick to the plan and be patient. (Orlando made good improvements with sticking to the plan).
- Nina feels that the sense of entitlement that Orlando has towards her during this process was very disheartening.

Overall, I do feel that tremendous steps in the right direction were being achieved; sadly, we were not able to continue. I feel strongly that both of them do still love each other and the capacity to rebuild was in sight. The lack of strong guidance may have caused things to slip.

Regards,

Dr Wayne Thompson...”

13. It is submitted on behalf of the husband that as the parties continued to cohabit, that is to engage in sexual intercourse, after the wife became aware of the adultery, during the time of the

divorce proceedings, and for the several years since the decree nisi was granted, the decree nisi should be set aside and the petition dismissed on the ground of condonation.

14. The wife opposes the husband's application. She denies that there has been any condonation of the adultery and it is contended on her behalf that the same issue now being raised by the husband was raised during the trial of the petition and rejected by the court. Counsel for the wife submits that if the husband was dissatisfied with the decision five years ago, he ought to have appealed, the same, which, he points out, he did not.

15. Section 19 of the Matrimonial Causes Act, chapter 125, Statute Laws of The Bahamas, provides that if the Court is satisfied that the case for the petitioner has been proved and, where the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at or condoned the adultery, the Court shall subject to section 18 grant a decree declaring the marriage to be dissolved otherwise the Court shall dismiss the petition.

16. It can be seen from section 19 aforesaid that condonation of adultery is a bar to dissolution of a marriage where the ground of the petition is adultery or cruelty.

17. However, once the court finds that the alleged adultery has not been condoned and grants the decree nisi, it appears that the aggrieved party's recourse is to appeal.

18. In that regard, this court, at paragraphs 49 and 50 of its written decision rendered on 25 May 2012 said:

"49. However, I am constrained to accept the wife's evidence, which was unchallenged by cross examination and uncontroverted by the husband during his testimony, that, notwithstanding her behavior after learning of the husband's adultery, she did not intend to forgive and/or reinstate the husband to his former position. I am satisfied that the presumption of condonation on her part has been rebutted by her evidence of her continued warnings to the husband that she had not forgiven him and her continued refusal to withdraw her petition despite the husband's repeated requests for her to do so. Again, that evidence has not been challenged or controverted.

"50. So, as much as I sympathize with the husband, in the circumstances of this case, having heard the wife's dispassionate unchallenged evidence, I am satisfied that she has not condoned the husband's adultery.

19. There is no indication in the husband's summons as to the legal basis of his application, nor does counsel in her submissions say what law the husband relies on for the order he seeks.

20. In that regard, it seems to me that counsel for the wife may be correct that the husband is seeking to do by his summons what he ought to have done by way of appeal.

21. Having perused the Matrimonial Causes Act and its Rules, it seems to me that once a decree nisi has been pronounced, there are only two ways, other than by appeal, in which the court can re-visit the matter.

22. Firstly, by way of a re-hearing under rule 34 of the Matrimonial Causes Rules which provides as follows:

"34. An application for re-hearing of a cause where no error of the court at the hearing is alleged shall be made to the judge. The application shall be by notice of motion, stating the grounds on which it is based, filed in the Registry and served upon the opposite parties (whether they have appeared or not) within six weeks after judgment. The notice shall be a fourteen days' notice and may be amended at any time by leave of the judge."

23. It is clear from that provision that an application under that rule is to be made, not by summons, but by notice of motion, which must be filed and served within six weeks after judgment. In this case, judgment was delivered on 25 May 2012.

24. Secondly, section 61 of the Matrimonial Causes Act provides, *inter alia*, that during what I call the "show cause period" of the six weeks to three months granted by the court for the decree nisi to be made absolute, any person may show cause why the said decree should not be made absolute on the ground that the same was obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, the Court may either make the decree absolute, reverse the decree nisi, or require further inquiry, or otherwise as justice may require.

25. Consequently in my view the only challenge that can be mounted by the husband at this time would be in opposition to an application for the decree nisi to be made absolute, and only because, in my view, the wife waited so long to apply to have the decree nisi made absolute.

26. In that regard, the notice of intention to apply for/proceed with ancillary relief filed on behalf of the wife includes a prayer for an order that the decree nisi be made absolute.

27. I have, therefore, decided to treat the husband's summons as an application opposing the wife's application to make the decree nisi absolute on the ground that the wife has condoned the husband's adultery, both prior and subsequent to the granting of the decree nisi, as evidenced by her continuing to have sexual intercourse with the husband after she became aware of the adultery as well as after the granting of the decree nisi.

28. Indeed the evidence is that although there have been periods of separation on one occasion since the granting of the decree nisi, for as long as a year, the husband and wife continue to live in the same house and to engage in sexual relations.

29. Counsel for the wife uses the same arguments in this application as he advanced during the trial. He argues that there can be no presumption of condonation; that the affidavits of the parties make the case that there is evidence of the total absence of mutuality. Counsel points out that that evidence discloses that the trouble which brought the marriage to the court still plagues the relationship and the various attempts at reconciliation is marked by the number of times it has failed.

30. In his submission, to set aside/rescind the decree will only result in a new petition being filed by the wife.

31. To that submission, counsel for the husband argues that that is the only course available to the wife in the circumstances. However, she pointed out, correctly, that a new petition could not be founded on the "condoned" adultery and she points out that the husband has denied that he has committed any other matrimonial offence.

32. It is clear that while section 61 aforesaid provides for the reversing of a decree nisi, it is only on the ground that the same was obtained by collusion or material non-disclosure at the time of the granting of the decree nisi.

33. There is no allegation by the husband that there was any collusion. And while it can be gleaned or deduced from the husband's application that the wife failed to disclose that she and the husband continued to engage in sexual intercourse even after the decree nisi, in my judgment, the failure to disclose material information to which section 61 aforesaid refers must have occurred at the hearing of the petition.

34. Moreover, having read the affidavit evidence, although not tested by cross-examination, it seems clear to me that notwithstanding the husband's optimism, the wife has not forgiven the husband for his adultery with the co-respondent; the husband does not say that she has or that

she has ever told him that she has forgiven him. Further, it does not, in my judgment, appear that she trusts the husband, and I do not see how a marriage can survive in such a climate.

35. In the circumstances, the husband's application to set aside the decree nisi and petition herein is dismissed with costs to be paid by the husband, to be taxed if not agreed.

36. The parties should now agree a date for the hearing of the notice of application for ancillary relief filed by the wife on 9 March 2017.

Dated this 20th day of June A.D. 2017

Estelle G. Gray Evans, J.