

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

2021

FAM/DIV/No. 00039

Family Division

BETWEEN

J.H.W

Petitioner

AND

C.W

Respondent

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Glenda Roker for the Petitioner
Alfred Gray for the Respondent

Judgment Date: 9th November 2022

JUDGMENT

Background Facts

1. The Petitioner, J.H.W and the Respondent, C.W were married on 18th April 2015. There are no children of the marriage. The Petitioner filed a Petition on 25th January 2021 praying for dissolution of the marriage on the ground that the Respondent has treated the Petitioner with cruelty since the celebration of the marriage. The Respondent filed an Answer on 11th March 2021 merely denying the cruelty.

PETITIONER'S EVIDENCE

2. The Petitioner averred that following the celebration of the marriage, the Respondent's attitude towards him changed drastically. The Petitioner related various incidents which he considered cruel which included her speaking to him in a derogatory manner and calling him belittling names and other terms to emasculate him. Thereafter he alleges that they would fight all the time.

3. In his evidence he averred that he had moved in with the Respondent prior to their marriage because his parents had kicked him out of their home because he was a homosexual.
4. He maintained that homosexuality was not accepted and open on Harbour Island or the Bahamas generally.
5. He maintained that the Petitioner was aware of his homosexuality prior to the marriage and that she had accepted him as a homosexual.
6. The Petitioner grew unhappy in the relationship and overtime the parties grew distant and intimacy between them dwindled. The Respondent became confrontational and there were arguments. These arguments revolved inter alia around his not making enough money, and his inability to pay the rent. As a result he began staying out late until the Respondent fell asleep to avoid the arguments.
7. The fights also resulted as a result of his partying with his friends and her non acceptance of his friends. Even though he took care of the home it often was not sufficient for the Respondent. She would call him gay, bi-sexual, and she would kick him out of the house.
8. After a while she would invite him to return and the same behavior would happen again. Sometimes he would be out of the matrimonial home for three months or more.
9. The Respondent used his friends against him. She would manipulate them to get him to change his mind on things which she thinks he should do.
10. He denied under cross-examination that he changed his lifestyle upon marriage. He admitted to dating a man before he went to Canada on holiday. He agreed to having a meeting with this man and the Respondent on his return from Canada.
11. He left the home permanently in August 2019. The counselling sessions were not successful.
12. The Respondent said she was okay with his bi-sexuality yet she called him, disparaging and offensive names inclusive of calling him gay and homosexual and was always trying to demean and control him.
13. The pressures of the relationship and the pressures of his life led the Petitioner to begin drinking which subsequently caused him to react violently towards the Respondent. The Petitioner admitted that on one occasion he destroyed the Respondent's camera equipment.

14. On several occasions Petitioner had to stay with family members when the Respondent had banished him from the matrimonial home. The Respondent would also get her friends and family involved in their private marital issues which left the Petitioner feeling hurt and extremely embarrassed.
15. The Respondent would also threaten the Petitioner which resulted in verbal arguments which placed further strain on the relationship. The Respondent is aware of this. They attempted marriage counseling but the counseling failed.
16. The Petitioner left the matrimonial home in or about August 2019 and the parties have since made no attempt to reconcile or cohabit. The Petitioner alleges that due to the Respondent's behavior he has experienced depression, embarrassment and hurt from the continued stress of the relationship.

RESPONDENT'S EVIDENCE

17. The Respondent has denied all the allegations of cruelty contained in the Petition and averred that she has never been cruel towards the Petitioner. The Respondent alleges that at the time of the marriage she was unaware of the Petitioner's homosexuality which was the cause of the breakdown in the marriage. She further alleged that he admitted to being a homosexual and has since left the matrimonial home to live with another male whom he admitted was his lover. The Respondent also stated that the Petitioner's lover has contacted her to inform her that the Petitioner loves him and not her.
18. The Respondent further alleges that the Petitioner is guilty of acts of homosexuality contrary to the Matrimonial Causes Act Ch. 125 Section 16(1) (e) and that he is seeking a divorce by lying to the Court that she has treated him with cruelty.
19. She averred that the "things" the Petitioner called cruel were her way of helping him build a life of value.
20. She states that all of the arguments were around her helping him and giving him advice. She acknowledged the age difference of 19 years. She stated that it allowed her to help him. She averred her main goal was to understand what he was going through and to help him.
21. She states that she was able to find him a job. She confirmed that he was reported to the police multiple times in Harbour Island and she also confirmed that she asked him to stay away as she was afraid. She had to protect herself as well.

22. She became aware that the Petitioner was an active bi-sexual after one year of marriage, and that it was fine that he would go out with his friends because she cared for him.
23. She never disrespected him for being homosexual, she tried to understand the struggles he was going through as a homosexual.
24. She stated that she never kicked him out of the home because of his homosexuality, but she was trying to help him change the course of his life. She did not try to help him in a rude way, but in a gentle way, but the Petitioner was a proud man and her acts were not well received.
25. Under cross-examination she admitted to putting him out of the home on several occasions. The first time was 2 years after the marriage.
26. She knew he was homosexual one year after the marriage as she saw it with her own eyes. She accepted his lifestyle. She denied calling him gay or homosexual or speaking to him in a harsh manner.
27. She acknowledged that there was a 19 year age difference between them. She accepted his bi-sexuality because she loved him.
28. She denied going to his father to pray the bi-sexuality out of him but admitted that she would go to his father to seek help for him on his issues.
29. The Respondent denied having a dominant personality but accepts that she has very strong values and standards.
30. She states that the Petitioner was not the strongest person and that was why she was there to support him. She denied stifling him or emasculating him.
31. She denied that money was important to her.
32. She stated that the Petitioner was cruel to her but she accepted his bi-sexual life and his homosexuality. She admitted to getting him banned from the United States of America and further denied using any derogatory terms or emasculating him.

ISSUE

33. Whether the Petitioner has been treated with cruelty by the Respondent as defined in the Matrimonial Causes Act so as to justify the granting of a decree nisi dissolving their marriage.

Submissions

34. The Petitioner relies on the interpretation of cruelty as established in **Gollins v Gollins [1963] AER 966** where it was held that cruelty is established where the physical and mental health of the two spouses are normal and the conduct of the Respondent is so bad that the other should not be called to endure it.
35. Further the Petitioner relied on inter alia **Whachell v Blower BS 2004 SC 71** where the court held that intention was not a prerequisite to establishing cruelty, rather the effect of the conduct on the Petitioner.
36. Finally the Petitioner submits that there is no defence pleaded other than a bare denial as established by Turner J in **Mills v British Colonial Developmental Company Limited t/a British Colonial Hilton Nassau 2015 1BHS J No78** in citing **Jessel MR in Anglo-Italian Bank v Wells** who said:-
- “When a Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the Defendant, it is his duty to give judgment for the Plaintiff.”**
37. The Respondent in her submissions simply denies that there was any cruelty when the Court considers the evidence of both parties. The real reason for the Petition she maintains was to find a way out of the marriage to start life with his male friend.
38. The Respondent further submits that the Petitioner does not meet the test for cruelty and should be dismissed.

DECISION

39. The **Matrimonial Causes Act, Ch. 125** sets out the grounds on which a petition may be presented for the dissolution of the marriage. Section 16(1) states:-
- “16. (1) 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.

40. **Section 2** defines cruelty as:-

“cruelty” includes voluntary conduct reprehensible in nature or which is a departure from the normal standards of conjugal kindness on the part of one party to a marriage thereby occasioning injury to the health of the other spouse or a reasonable apprehension of it on the part of 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”

41. The Court has to determine whether the Respondent has treated the Petitioner with cruelty. In order to establish cruelty, the behavior of one party must be so grave that it negatively affects the mental or physical health of the other should they be made to endure the same.

42. Section 19(1) (b) provides statutory considerations for the Court when dealing with cruelty:-

“19. (1) If the court is satisfied on the evidence that the case for the petitioner has been proved and —

(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;”

43. The threshold in cases of allegations of cruelty is making a determination that the conduct of the Respondent has departed from the normal standards of kindness thereby inducing injury to the health of the Petitioner, whether mental or physical based on the particular characteristics of the parties involved.

44. In **Gollins v. Gollins [1963] 2 All E.R. 966** the House of Lords considered the meaning of cruelty and stated that:-

“Whether cruelty, as a matrimonial offence has been established is a question of fact and degree, which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case, rather than by an objective standard, accordingly in cases where the two spouses are of normal physical and mental health, and the conduct of respondent spouse so considered, is so bad that the other should not be called upon to endure it, cruelty is established and it does not matter what was the respondents state of mind, e.g. it is immaterial whether the respondent’s conduct was “aimed at” the other spouse or due to unwarranted indifference attributable perhaps to selfishness.”

45. This Petitioner is a homosexual married to a woman 19 years his senior. He states that she was aware of his homosexuality prior to the marriage. She confessed to knowing of his active homosexuality 1 year into the marriage.
46. The marriage was a short marriage of only five years before proceedings were commenced for the dissolution. The admission by the Respondent that she learned of his “active” homosexuality is telling. I am satisfied by this admission that she knew of his sexuality prior to the marriage as stated by the Petitioner, but she may not have actually seen his sexual activities.
47. As stated in **Gollins v Gollins**, in determining whether or not cruelty has been established, the Court must take into account the particular individual concerned and the particular circumstances of the case rather than adopting an objective standard.
48. The Petitioner never denied his homosexuality, he moved in with the Respondent prior to the marriage. He lived on an island where his sexuality was frowned upon and which would have made his life difficult normally. In addition to this the Respondent admitting to strong old fashioned values and throughout the marriage tried to guide him and to use a colloquial expression tried to “fix” him.
49. She admitted to having discussed with his father about the Petitioner’s problems but denied that she asked him to pray the homosexuality out of the Petitioner. She knew that his father had kicked him out of the home because of his sexuality, yet she went back to him to discuss her husband’s problems. These “problems” stemmed from his sexuality.
50. The Respondent admitted that there were arguments but they were her efforts to “help him”.
51. She admitted that he had been cruel to her but she forgave him. He on the other hand did not forgive her.

52. I believe the Petitioner when he gave his evidence of her calling him homosexual and gay which was a means of degrading him. If she had accepted his sexuality truthfully there would not be any attempts to "fix" him. There would not be any acknowledgement of his 'weakness' and trying to guide him and there would be no need to call him "gay" or "homosexual".

53. Human conflict such as bickering and arguing over finances, etc. is inevitable and can be expected to occur within a marriage. The Petitioner indicated that the Respondent made him feel insecure, and would call him names such as gay and bi-sexual. Given the political climate and culture surrounding homosexuality, it can be accepted that this name calling is cruel. Further bearing in mind the Petitioner would not expect a person who loves him to call him gay or homosexual. Such name calling of this nature can inflict mental harm on a person who is living in an environment where they are unable to embrace and display their true sexuality.

54. In addition to the name calling, she put the Petitioner out of the home on more than one occasion after incidents which resulted from his drinking. Drinking which he admits stemmed from his unhappy relationship with the Respondent.

55. The Petitioner drank and smoked weed because he could not tolerate her treatment of him. As a result of his response to his home environment, the drinking and smoking resulted in his getting into trouble with the authorities.

56. The acceptance by the Respondent of her husband's homosexuality and her encouraging him to go with his "friends" is not normal marital or conjugal behavior. His sexual behavior would also constitute acts of cruelty to the Respondent but she has openly condoned them and stated under oath that she accepts them.

57. In **Saunders v Saunders No 87 of 1994 BHS J** Justice Osadebay refers to **Lauder v Lauder (1949) P. 227** where Lord Merriman stated:-

"I expressly refrain from saying "the definition" of cruelty because several of their Lordships went out of their way to say that it was impossible to give any exhaustive definition of cruelty, while at the same time, in affirming the Court of Appeal they laid down definitely and clearly the limits within which alone cruelty should be found. And, although this exact phrase does not appear in any one single speech but is, as is well known, imported from the decision of the Court of Appeal which was upheld, these limits are always given as being "conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger."

58. In **K v B No 198 of 2013 1 BHS J** Justice Evans states:-

"At the conclusion of her evidence the Respondent indicated that she did not want a divorce and that she thought that if "given a second chance" with

the aid of counseling the marriage could be saved. As a result I gave consideration to the provisions of section 16 (11) of the Act which is set out above. As noted that provisions empowers the Court to adjourn proceedings while attempts at reconciliation are pursued. However, the section is clear that the Court must be satisfied that there is a reasonable probability of reconciliation between the parties.

The Petitioner for his part was firm in his position that the marriage is at an end and that further efforts at reconciliation would not alter his position. The evidence of the Respondent is that she had suggested that the parties attend joint counseling but this was not agreed to by the Petitioner and so it never happened. In my view for any efforts at reconciliation to have a real chance of success both parties must be committed to making the effort and be open to the possibility of change. In these circumstances I was not satisfied that I could properly make an order under this provision and that the matter must proceed to a resolution.

In my view the resolution of this matter is to be found in the definition of cruelty. The question which I must decide is whether the acts complained of by the Petitioner amount in law to cruelty. What then are the requirements necessary to establish cruelty? In *Gollins v Gollins 1964 AC 644* the House of Lords in dealing with the definition of cruelty stated:

“Whether cruelty as a matrimonial offence has been established is a question of fact and degree, which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case, rather than by any objective standard; accordingly in cases where the two spouses are of normal physical and mental health and the conduct of respondent spouse so considered, is so bad that the other should not be called on to endure it, cruelty is established and then it does not matter what was the respondent’s state of mind. E.g. it is immaterial whether the respondent’s conduct was “aimed at” the other spouse or due to unwarranted indifference attributable to selfishness or laziness.”

59. The Respondent wishes to save her marriage but the Petitioner does not. The Respondent is an older person married to a younger homosexual. I am not satisfied that counseling would assist these parties as the issue which is at the core of their problem is the Petitioner’s sexuality which is not an issue that counseling can “fix” or which the Petitioner would be open to “change”.

60. Having considered the evidence of both parties and based on the facts of this particular case and having taken into account the particular individuals concerned, I must determine whether the actions of the Respondent meet the definition, regardless of the intentions of the Respondent.

61. As Hall CJ stated in *Lockhart v Lockhart 1995 BS SC*:-

“136. The inevitable task of trial courts in (contested) divorces and matrimonial matters is to wade through the detritus resulting from the posture of parties (who despite the fact that they must have been “in love” with each other at some time in the past, the unforgiving glare of scrutiny by strangers (which is the trial process), each seeks to monopolize virtue for his/her cause and to demoniac the other party (and this, even if they so choose to embarrass themselves, to the distress of the children of that union reverberating for years to come)) and shift minutiae of truth from the sediment.”

62. I accept that the Petitioner is a homosexual as he has confirmed under oath. I also accept that the Respondent knew this before marriage. It therefore begs the question as to why she married him knowing of his sexual inclination. He may be bi-sexual but he says that he is homosexual. His sexuality is intrinsic to his person. I am not satisfied that his sexuality is a behavior which can be learnt, modified, adapted or changed.
63. I am also aware that the Respondent is considerably older than the Petitioner. In normal circumstances this would not be an issue for my consideration however her age plays a factor in her behavior. She says that she was trying to ‘help’ him change the course of his life by her behavior. Her “helping” him included putting him out of the house on more than one occasion. I also believe the evidence of the Petitioner that she would call him gay or homosexual. I also believe that she did speak to his father concerning his sexuality. This in itself knowing that his father did not accept his sexuality was an act of cruelty.
64. Her denial of having a dominant personality but admitting to having strong values is simply a deflection of accepting that she has a strong personality. I was clearly able to see this in the hearing of her evidence. The strong personality would be reflected in her actions, particularly her interactions with persons who are not “strong” to use her words.
65. Her openly describing the Petitioner as not being the strongest person and her having strong values speaks volumes to the nature of their relationship. Finally the fact that she admitted to getting him banned from the United States is a further act of cruelty and speaks to her deliberate attempt to control his life and him.
66. I do not believe that her stating that she accepts his homosexuality but still wishes to be his wife is an honest statement. There is or must be another reason for wishing to remain in a marriage where you know and accept that your husband will not love you as you should be loved.
67. I refer to **Whachell v Blower BS 2004 SC 71** where the court held:-

“...the court held that bearing in mind that the husband admitted the acts of which he was accused and his answer being essentially that he had no ill intent, that it was nonetheless clear to the court that he had departed from the normal standards of conjugal kindness and had thereby occasioned a reasonable apprehension by the wife of injury to her health, both physical and mental and notwithstanding the protestations of the husband regarding his love for his wife and his lack of intent to be cruel, it was the effect on the wife of his conduct, not the intent of the husband, that was the relevant factor.”

68. The Petitioner has been called disparaging names such as gay and homosexual which have the effect of belittling him. He has been put out of his home on more than one occasion by the very person who says she loves him and accepts him for who he is. He has been banned from the United States because she called the authorities on him. She has reported him to his father who does not tolerate his homosexuality. She discusses his issues with outsiders. These are not the acts of a person who truly loves her husband.

69. I am satisfied that this Petitioner has met the standard based on the facts of this case, and based on a consideration of who this Petitioner is, I therefore grant a Decree Nisi to the Petitioner on the ground of the Respondent's cruelty. The Decree Nisi is not to be made absolute for six weeks. The costs of this action are awarded to the Petitioner to be taxed if not agreed.

Dated this 9th day of November 2022



The Hon. Madam Justice G. Diane Stewart