IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FAM 287 OF 2012

BETWEEN:

CE

Petitioner

AND

BE

Respondent

Appearances:	**Mr. Edwin Gomez of Ritch & Conolly for the Petitioner** **Mr. Delroy Murray of Murray & Westerborg for the Respondent**
Before:	**Hon. Justice Williams**
Heard:	**9 April 2015, 22-23 October 2015**
Written Submissions Received:	**6 & 10 November 2015**
Draft Judgment Circulated:	**2 March 2016**
Date of Judgment:	**7 March 2016**

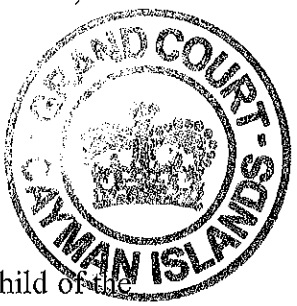
HEADNOTE

Family Law – Divorce – Nullity – Decree – Non-consummation and duress - Distinction between void and voidable marriages - Non-applicability of doctrine of approbation to void marriage - Applicability of doctrine of approbation to nullity suits relating to voidable marriages in the Cayman Islands - Requirement of wilful refusal of Respondent to consummate for non-consummation ground to be established - Statutory bar to decree on s.8(3)(b)-(f) grounds.

JUDGMENT

The Application

1. The Petitioner, CE, born on 14 May 1934 and 81 years old, seeks an order that his marriage be declared null and void pursuant to s.8(1)(c) of the Matrimonial Causes Law (2005 revision) ("the Law') on the basis that he married BE, the Respondent, who is 41 years old, under duress.



Procedural Background

2. The parties were married on 20 December 1995. The parties had one child of the family, GE, born on 16 January 1990, so she is now aged 26 years old. On 7 October 2011 BE filed "an application for judicial separation" in Cause No. FAM 227/2011. CE filed his Acknowledgment of Service on 19 October 2011 in which he indicated an intention to defend. On 7 September 2012 BE filed a Summons in which she sought leave to amend the Judicial Separation Petition to a Petition for the Dissolution of Marriage. On 28 September 2012 Chief Justice Smellie made the order sought by BE. The Amended Petition was filed on 14 November 2012 and served on CE on 28 November 2012. On 27 January 2013, in the absence of a notice of intention to defend and an Answer, the Chief Justice proved the Petition.

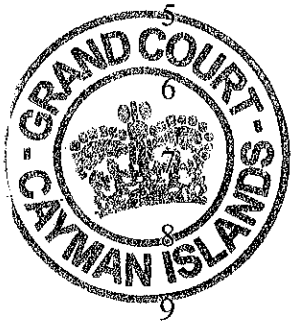
3. On 8 November 2011 CE sent a written "Reminder" to BE stating that her claims in the separation application were serious and he suggested that she ended "*her board of residence*" at the property. On 1 March 2012 CE filed a Writ of Summons and Statement of Claim naming BE as the Defendant and alleging libel

and perjury. A Defence was filed to that on 16 March 2012. The Notice of Hearing was issued on 14 June 2012. That action was struck out by the Chief Justice on 28 September 2012 as he found there to be no reasonable cause of action. CE stated in oral evidence that at that hearing "*the corruption started*" as he claimed that only the Chief Justice and Mr. Murray were in the room when the Chief Justice made the order. He stated that this was because "*birds flock together*" and that there is a lot of "*corruption in government from the top down.*" He clarified that what he meant by "*birds*" was "*them Jamaicans*" and that "*as far as I know you (Mr. Murray), the Chief Justice and Mrs. Ebanks are Jamaican.*" He went on to say that "*the three Jamaican flock together in the Chambers, I think that is right.*" And he reconfirmed his view that "*my opinion is yes, that is when the corruption started.*" Mr. Murray indicated to the Court that all the parties were in the Court when the Chief Justice made his ruling. This is not the only time during the hearing that CE made outlandish and unsubstantiated comments, but by doing so it brought into question his credibility when I considered evidence relevant to the issue of duress.

4. On 13 November 2012 CE served a notice on BE requiring her and GE to vacate the FMH[1]. BE states that, as a consequence of threats of physical harm if she did not vacate the property which she says were made to her by CE, she left the FMH on 24 November 2012.

[1] Although BE had vacated the FMH in 2010, in August 2012 CE permitted GE, GE's husband and BE to live in the property.

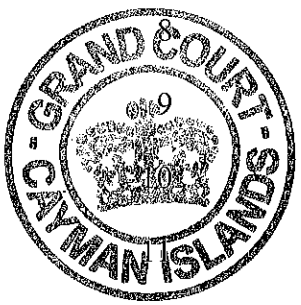
5. On 11 December 2012 BE filed a Summons seeking interim spousal maintenance, leave to file a caution against the former matrimonial home ("the FMH") and an order transferring that property back into CE's name. These orders were sought because, upon inspection of the Land Register, BE became aware that on 8 October 2012, only a few days after having been served with her Summons to amend the Petition, CE had transferred the property into the name of his daughter from a previous relationship. It is likely that this was a sham transfer effected at that time by BE to disguise the asset.



6. On 14 February 2013 the Court granted an interim injunction forbidding CE from instructing or encouraging any other person from aiding and abetting in the registration of dispositions and the making of entries in relation to the property and adjourned the balance of the Summons for a return date hearing on 15 March 2013. On the return date no order was made in relation to the injunction application as a caution had been lodged and the interim spousal maintenance application was adjourned to a date be fixed.

7. In the meantime, on 31 December 2012, which was shortly after BE had filed her Summons seeking interim financial relief and orders in relation to the FMH, CE issued his "Application for Nullity of a Marriage by Duress" in Cause No. FAM 287 of 2012. In that pleading he contended that the parties did not have a husband/wife relationship and that he told the wife that he was gay after she

requested that she wanted to become pregnant. At paragraph 2 of the pleading he said the marriage was for no other reason than to secure a better life for his infant child. He stated that he had been unsuccessful in an application made to the Court to adopt the child in 1991 and that the mother had refused his request to grant him custody for the child. He said in the pleading that the marriage was one of duress as it was forced upon him by the Government of the Cayman Islands as the Chief Immigration Officer had indicated to him that GE would be unable to remain in the jurisdiction. CE stated that he waited until December 2012 to make the application because by then GE had reached the age of 21 and had completed her studies, as he feared that an earlier application might have affected her entitlement for financial assistance with her education fees.



8. On 14 January 2013 BE filed a summons seeking dismissal of CE's application as an abuse of process. When the parties appeared before me on 15 March 2013 the Court indicated that the application to strike out the nullity petition should be heard first. Leave was granted to CE to file an affidavit in response to the application to strike out. I directed that the application to strike out and the nullity hearing should be listed for a three-day hearing.

9. On 19 June 2013 Mr. Murray made submissions in relation to the application to strike out, but I adjourned the matter part heard hoping that CE would heed my, and the Chief Justice's, earlier advice that he apply for legal aid and obtain legal

representation. When the matter came before me on 9 July 2013, the proceedings were adjourned to 10 September 2013 as CE had just been granted legal aid. At the hearing on 10 September 2013 the Court was informed that CE had been unable to instruct an attorney and the applications were further adjourned to 15 November 2013. On 15 November 2013 CE still did not have representation and he presented to the Court a poorly drafted and confusing Amended Petition.

10. Thankfully at the hearing on 19 March 2014 Mr. Gomez appeared on behalf of CE. Mr. Murray, preserving his position in relation to the costs of the strike out application, sensibly indicated that he would not oppose the Amended Petition prepared by Mr. Gomez being filed and served by 26 March 2014. The Court went on to give case management directions. Further directions were made at hearings held on 4 September 2014 and 2 February 2015.

11. CE's Amended Petition for Nullity of Marriage was filed on 24 March 2014. At paragraph 3 CE conceded that the parties had lived together "*as husband and wife*" at a property in West Bay until the early part of 2010. It is accepted that the parties are the biological parents of GE who was born prior to the marriage, but CE pleads that no marital intercourse has taken place between the parties. In the Petition CE states that GE, who was born in Jamaica and did not have Caymanian status, came to Cayman with BE. CE restated in the Petition that in 1991 he made

an unsuccessful application to adopt GE[2]. CE's case is that, following GE's arrival in Cayman in 1990, up until 1995 he was making enquiries with the Department of Immigration to ensure that she could remain in the Islands and during that period he renewed her visitor's permit approximately fifteen times. His case is that he made the application to adopt GE upon the advice of Mr. Orett Connor, the then Chief Immigration Officer and that when he was unsuccessful in that application, rather than marrying BE, he asked her to grant him custody of GE, which she refused to do.

12. In the Amended Petition, as developed by him in his evidence, CE stated that in early to mid-1995 he was informed by Mr. Gerry McGuire, the then Chief Immigration Officer, that BE and GE, who was at the time aged four years of age, could no longer reside in the Cayman Islands. CE said that he (i) feared losing access to GE; (ii) feared for GE's safety and welfare if she had to return to Jamaica as he had financially supported her and he believed that BE did not have the means to look after GE; and (iii) believed that GE was at risk of harm if she were forced to leave. He stated that he married BE in December 1995 due to these concerns and as a consequence he married under duress and was not at the time consenting to the marriage.

[2] Application made on 26 March 1991 and hearing was on the 10 May 1991.

13. Although not particularised in the Amended Petition, in CE's Note in Accordance with PD No. 11/2014 for the hearing, or relied upon as being a ground for nullity in the Skeleton Argument or in the Written Closing Submissions filed on behalf of CE, at paragraph 8 of the Amended Petition CE contended that there was no "*marital intercourse*" during the course of the marriage between the parties. In the Written Submissions the issue as to whether the parties had sexual intercourse after marriage was not addressed as a separate ground for nullity, but was raised to counter BE's assertion that there was an intimate relationship and that such a relationship rebutted CE's case that he married her under duress. This may be for good reason, Mr. Gomez having come into this long running case in its latter stages and then having had an opportunity to review his client's evidence and consider how it relates to the statutory requirements under the Law for this ground to be established.

14. BE filed her Answer to the Amended Petition on 17 April 2014. In her Answer she stated that the parties had lived together as husband-and-wife until 12 November 2011. BE plead that marital intercourse had taken place between the parties and that CD had married, not under duress, but of his own free will and personal choice.

The Law - Non Consummation

15. The relevant sections of s.8.3 of the Law provides:

"A decree of nullity may be pronounced by the court in respect of any marriage or purported marriage on the ground that-

(a)...
(b)...
(c) the marriage has not been consummated by reason of the wilful refusal of the respondent to consummate the marriage[3];
(e)...
(f)...

Provided that, in the cases specified in paragraphs (b)-(f) the petitioner was, at the time of the celebration of the marriage, ignorant of the facts alleged in the proceedings were instituted within one year from the date of the marriage:..."[4]

Conclusion - Non Consummation

16. For reasons I will elaborate upon later herein, I am satisfied on the balance of probabilities that the parties did have sexual intercourse following the marriage ceremony. However, even if I am wrong, on CE's own evidence (some of which is set out at paragraph 17 to 20 below), the reason why he says the marriage was not consummated was due to his willful refusal rather than BE willfully refusing any request from him for such intimacy. That being the case s.8(3)(c) could not be relied upon in a Petition for Nullity in which he is the Petitioner.

17. CE stated that they only had sex on one occasion, that being the time when GE was conceived prior to the marriage. He said that he only agreed to have sex on

[3] My emphasis by underlining.
[4] My emphasis by underlining.

that occasion as he did not wish BE to believe that he was "*gay*" and then go on to spread the word in the community that he was "*gay*", because he had told her he was "*gay*" on an earlier occasion to discourage her when she said that she wished to become pregnant.

18. In his affidavit sworn on 28 December 2012 CE stated:

> *"Never once, at any one time, did I ever think of having sex with her. Furthermore, never once, at any one time, did the thought of marriage enter my mind. In fact, her womanly appearance (i.e. sex appeal), did not, and still do not appeal to my desire. I've conveyed this to the respondent on several occasions, one of which can be affirmed in the respondent's affidavit..."*

19. At paragraph 13 and 14 of his affidavit sworn on the 13 May 2014 CE reiterated the reasons why he only had sexual intercourse with BE when GE was conceived. He added at paragraph 15:

> *"Until that time I had never, at any time, contemplated having sexual intercourse with the Respondent and I have not had sexual intercourse with her since that one time. Moreover, I had not, at any time, contemplated marriage with her. To be clear, I have never been physically attracted to the Respondent and only ever saw her as a friend."*

20. At paragraph 36 of the same affidavit CE stated:

"At no time, on or after the marriage, did the Respondent and I have sexual intercourse in the Cayman Islands, Jamaica, the USA or any other country. Although we lived together, we slept in separate bedrooms. On the rare occasion that the respondent slept in my room, it was because my room was more comfortable and cooler but we always slept in separate beds. I was not physically attractive[5] to the Respondent so I had no interest in being intimate with her."

21. In any event, having regard to s.8(3) of the Law, CE cannot rely on this ground for a decree of nullity because, on his case, he was not ignorant of the facts alleged at the time of the celebration of the marriage and the proceedings were not instituted within one year from the date of the marriage. He is statutory barred.

The Law – Duress

22. Mr. Murray and Mr. Gomez referred the Court to a number of case authorities. As there appears to be no case precedent in the Cayman Islands on point, I feel it appropriate to conduct a full review of the case law in this Judgment which may offer some guidance for future cases.

23. Before doing so, it is important to clarify the distinction between a void and a voidable marriage. D. Tolstoy ably did that in his article headed "Void and

[5] "*Attractive*" is CE's wording, should be attracted.

Voidable Marriages" published in Volume 27 of the Modern Law Review July 1964 No. 4 at page 885 when he stated:

> *"A void marriage is one which, owing to the presence of an impediment at the time of the ceremony, will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it; the decree in the case of a void marriage is in essence a declaration that no marriage had come into existence and any person having sufficient interest in a declaration of nullity can petition for a decree at any time, even after the death of one or both parties. A voidable marriage is one that will be regarded by every court as a valid, subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction, which can be done only at the instigation of one of the parties during the lifetime of both parties. Thus, in the case of a void marriage, no valid marriage ever comes into existence and the parties to it never acquire the status of husband and wife, whereas in the case of a voidable marriage the parties acquire that status and a marriage is valid unless and until annulled during the joint lives of the parties at the instance of one of them. It follows, therefore, that if one party dies without a decree of nullity having been pronounced the voidable marriage cannot thereafter be questioned, but it is forever valid."*

24. Having regard to the detailed submissions made by Mr. Gomez on the doctrine of approbation, it is important to highlight a further distinction between a void and voidable marriage. In a voidable marriage a petitioner's conduct could amount to

approbation of the marriage and preclude him from disputing the validity of the marriage[6], but the doctrine does not apply to a void marriage. In ***D v D (Nullity: Statutory Bar)*** [1979] 70 Fam Law Dunn J. stated at 73D:

> *"At common law approbation, insincerity, or ratification of marriage as it was variously called, constituted a discretionary bar to relief in respect of voidable marriages.[7]"*

25. This distinction is also made clear in Rayden on Divorce 10th Edition published in 1967 in which the editors state at paragraph 48 on page 306:

> *"A plea of insincerity, which is also sometimes referred to as a plea of approbation, is based on the doctrine that in nullity suits relating to voidable, as distinct from void[8], marriages, even where the ground for avoiding the marriage is established, there may be facts and circumstances which would render it inequitable and contrary to public policy to grant a decree."*

26. Before reviewing and considering the application of the cases on lack of consent and duress, it is necessary to highlight the differences between the relevant legislation in the Cayman Islands and in England and Wales. In the Cayman Islands if a party is induced to go through a ceremony of marriage by duress, without any real consent to the marriage, it is void and may be declared void.

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[6] This position was changed in England and Wales by the Nullity of Marriage Act 1971 s.3 (1), which was repealed and replaced by s.13 of the Matrimonial Causes Act 1973. The common-law doctrine of approbation was expressly removed and replaced by the statutory bar contained in section 3(1) N.M.A and then by the test/bars in s. 13 M.C.A - see Dunn J. in ***D v D (Nullity: Statutory Bar)*** [1979] 70 Fam Law at 76G. Despite the more general wording in s.15 of the Law, the doctrine of approbation has not been specifically removed by legislation in the Cayman Islands and is arguably still applicable.

[7] My emphasis by underlining.

[8] my emphasis by underlining.

Section 8(3)(a) of the Law provides that a decree of nullity may be pronounced by the Court in respect of any marriage or purported marriage on the ground that such marriage is void. There is no time limit imposed for presenting the petition for nullity after the marriage ceremony on this ground. The doctrine of approbation does not apply as the marriage would be void. Section 8(1) of the Law outlines when a marriage is void and its relevant parts provide:

> *"(1) For the purpose of this section a marriage is void if –*
>
> *(a)...*
> *(b)...*
> *(c) the parties were not virtually consenting thereto by reason of duress, fraud or incapacity of mind."*

27. The approach taken when lack of consent due to duress was raised was the same in England and Wales until 1971. Prior to 1971, at common law, the lack of consent by duress would render a marriage void. There was no time limit for presenting a petition of nullity on this ground. The change came about in 1971 as s.1(a) of the Nullity of Marriage Act 1971 provided that:

> *"Lack of consent, whether in consequence of duress, mistake, unsoundness of mind, or otherwise, is henceforth a ground upon which a marriage is voidable, not void."*

28. The Nullity of Marriage Act 1971 was repealed by the Matrimonial Causes Act 1973[9] ("the Act"). Section 12(1)(c) of the Act provides that the marriage would be voidable if either party to the marriage did not validly consent to it in

[9] See Schedule 3.

consequence of duress. Pursuant to ss.13(2), (4) and (5) of the Act proceedings on this ground must ordinarily be initiated within three years of the marriage. When considering and applying the approach taken by the courts in the English cases, I bear in mind that prior to 1971 lack of consent then rendered a marriage void, rather than voidable. An analysis of the cases from England and Wales will show that in the earlier cases (mostly pre-1971) the courts favoured an objective approach, whereas in more recent times they have mostly commended a subjective approach. One explanation for the apparent change in approach may be that a stricter test was considered desirable when the consequence was a void marriage with no time bar applying.

29. A good starting point of my review is to determine what it is that a party must consent to. The case of ***Vervaeke (formerly Messina) v Smith and Others*** (1983) 1 A.C. 45 illustrates what the law's attitude is to the institution of marriage, namely that the seriousness of the institution of the marriage should be upheld as a matter of public policy. In ***Vervaeke*** a marriage to an Englishman was entered into to obtain English nationality and therefore avoid the petitioner wife from being deported from England and enable her to continue her work as a prostitute despite her having one hundred convictions for soliciting. The parties separated immediately after the ceremony, never intending to live together as man and wife. It was a marriage into which both had the capacity to enter and which was validly celebrated under the Marriage Acts. Sixteen years later the petitioner raised the

issue of the validity of the marriage as she would only inherit from her second husband if the marriage to him was valid due to the first marriage being void for lack of consent. The second "husband", an Italian, died on the date of their marriage ceremony and he had considerable assets in England. She was unsuccessful in the English courts, a decree of nullity being overturned by Ormrod J. as the evidence upon which she had obtained it was found to be false. She went on to obtain a decree of nullity in the Belgian Courts and then unsuccessfully sought, in the House of Lords, to have the same recognised in England or a declaration that the marriage between her and the second "husband" was valid. In his ruling Lord Hailsham approved the following remarks of Ormrod J. relating to public policy and the institution of marriage, which I view as being equally applicable in the Cayman Islands:

> *"Where a man and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife... . ...if the parties exchange consents to marry with due formality, intending to acquire the status of married persons, it is immaterial that they intend the marriage to take effect in some limited way or that one or both of them may have been mistaken about or unaware of some of the incidents of the status which they have created. To hold otherwise would impair the effect of the whole system of law regulating marriages in this country, and gravely diminish the value of the system of registration of marriages upon which so much depends in a modern community.*

Lord Merrivale in Kelly (Orse. Hyams) v. Kelly, 49 T.L.R. 99, 101 said:

> *'In a country like ours, where the marriage status is of very great consequence and where the enforcement of the marriage laws is a matter of great public concern, it would be intolerable if the marriage of law could be played with by people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it.'"*

30. I turn now to a review of the case law. As mentioned, in the earlier cases which were decided at a time when a marriage would be void rather than voidable for lack of consent due to duress, the Courts in England and Wales applied a more objective test.

31. In ***Silver v Silver*** [1955] 1 W.L.R 728 a German woman wanted to continue living with an English man who she discovered was already married. In order for her to live with this man who had returned to England she entered into a marriage with that man's stepbrother, but she never lived with the stepbrother. After the marriage, she lived with the English man for 23 years. After his death, she wished to remarry and she sought a decree of nullity on the ground of lack of consent. Collingwood J. found that when the circumstances of a marriage are solely for the purposes of representing themselves as married parties for immigration reasons, and the parties had no intention to live as man and wife, that alone did not vitiate the consent to the marriage. The nullity decree was rejected and the court held

that the required element of duress was absent. It is important to note that this was a sham marriage as the parties had no intention of consummating it or to live together as man and wife. It is different to a marriage under duress. Similarly, in ***Sheldon v Sheldon*** (1964) Times, July 8 a petition for nullity based on her own incapacity was dismissed where an Italian petitioner entered a marriage because she feared that she would be sent back to Italy as she was not carrying out the work designated in her permit. Karminski J. stated that:

> *"...it could be said that public policy demanded that the course afterwards should not be made too easy for those who went through a ceremony of marriage in order to defeat the immigration laws."*

32. In ***Silver*** Collingwood J. referred to the observations of Karminski J. in ***H v H*** [1953] 3 W.L.R. 849. In that case the woman wished to leave her homeland of Hungary because of the political situation there. In order to obtain a foreign passport she married her cousin who was a French citizen. She and her cousin were late-teenagers at the time and they separated straight after the ceremony. The Court ordered a decree of nullity as there was found to be an element of fear on the part of the wife to the extent that it negated her consent to the marriage. Karminski J. stated that the marriage would have been valid save for the duress, namely the desire to flee the political situation in her native country. He stated that, in a case where it is alleged that the petitioner's consent had been vacated by

fear, firstly the presence of a fear of sufficient degree to vitiate consent must be shown and secondly that the fear was reasonably entertained.

33. In ***Buckland v Buckland*** [1967] 2 All E.R 300, the petitioner, who was in the Armed Forces stationed in Malta, was falsely accused by the respondent's father of having had unlawful sexual intercourse with his daughter. His solicitor and his superior officer advised him that he was likely to be convicted for having under-age sex and that if he did not marry the girl he would end up being sent to prison. He married the girl and it was held that his fear had been brought about by the unjust charge made against him by the girl's father and that this was aggravated by the advice from his solicitor and the senior ranks. The Court found that he was entitled to a nullity decree as the fear of incarceration vitiated his consent to marriage and Scarman J., referring to effect of Karminski J.'s ruling in ***H v H***, set out the following three stage test at 302D:

> *" ... in a case where it is alleged that the petitioner's consent to marriage has been vitiated by fear, it must be shown, first, that fear of sufficient degree to vitiate consent was present; and, secondly, that the fear was reasonably entertained. ...a third proposition may be stated to the effect that, even if the fear is reasonably entertained, it will not vitiate consent, unless it arises from some external circumstance for which the petitioner is not himself responsible.*
>
> *The conclusion which I have reached, on the facts in the present case, is that the petitioner agreed to marry the girl because he was afraid, and that his fear was brought about by an unjust charge*

preferred against him either by the girl and the girl's father, or by the girl's father alone. The fear which originated in this way was greatly strengthened by the advice given to the petitioner by his own solicitor and by his superior officer. I am satisfied that when he presented himself in the church for the marriage ceremony, he believed himself to be in an inescapable dilemma - marriage or prison: and, fearing prison, he chose marriage. Accordingly, basing myself on the view of the law expressed by Karminski J. in H v H...., I have come to the conclusion that the petitioner agreed to his marriage because of his fears, and that his fears, which were reasonably entertained, arose from external circumstances for which he was in no way responsible. Accordingly, in my judgment, he is entitled to a declaration that the marriage ceremony was null and void."

34. In ***Szechter v Szechter*** [1971] 2 W.L.R. 170 the test in ***Buckland*** was elaborated upon with Sir Jocelyn Simon P. expressing a view that this instant case seemed stronger than in ***Buckland***. The petitioner and respondent were Polish citizens and were married in Poland when it was under Communist rule. The reason for getting married was so that the petitioner wife, who had been arrested by the Polish security police for anti-state activities, would be released from prison and they could emigrate together. The wife had been sentenced to 3 years imprisonment and when in custody she received very poor treatment. She was suffering from deteriorating very poor health. The respondent husband, an academic at Warsaw University who was not much loved by the totalitarian authorities in Poland, divorced his wife and married the petitioner and they became domiciled in

England. The petitioner wife petitioned for nullity. The President stated that it would not be sufficient if consent was given to escape a disagreeable situation such as penury or social degradation. He stated that the threat of immediate danger to life, limb or liberty was needed and he found that in ***Szechter*** that was present and that the marriage would be annulled. The test was an objective one, requiring that the fear must be one which was reasonably entertained. The President stated at page 297H:

> *"In order for the impediment of duress to vitiate an otherwise valid marriage, it must, in my judgment, be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party is not himself responsible) to life, limb or liberty, so that the constraint destroys the reality of consent order reached wedlock."*

35. It is worth mentioning that even post-1971, in the case of ***Singh v Kaur*** 11 Fam Law 152, the Court of Appeal approved the approach outlined in the above line of cases, referring to the case of ***Singh v Singh*** [1971] 2 All ER 828 which followed the thinking in ***Szechter***. In ***Singh v Kaur*** a 21-year-old Sikh male petitioner sought annulment of his marriage on the grounds of duress. He had always lived at home and his parents threatened him that, if he continued with his refusal to marry and did not go through with the arranged marriage, he would bring disgrace on his family, lose his employment in the family business and would have to leave the family home. The Court of Appeal affirmed the judge's

refusal to grant a decree of nullity finding there had been no threats to the petitioner's life, limb or liberty. Ormrod L.J. stated:

> *"...one can see that, through our English eyes, he is in a position but, at the same time, he has to make up his mind, as an adult, whether to go through with the marriage or whether to withstand the pressure put upon him by his family. It is quite clear that this court cannot possibly ... hold that this marriage is invalid by reason of duress unless it can be shown that there were threats to his life, limb and liberty. Quite clearly, the evidence falls far, far short of that. There was no threat of that kind and ...it would be a very serious matter if this court were, even if it could in law, to water down Sir Jocelyn Simon's test ...Because there are many of these arranged marriages, not only in the Sikh community in this country but in other communities who adopt this custom, and it would be a serious thing for this court to introduce any less rigorous burden of proof in these matters than that which the court decided was right in the case of Singh v Singh..."*

36. As mentioned, in post-1971 cases the Courts in England and Wales, on a whole, have preferred a contradictory subjective approach or test to determine if the consent is valid. In ***Hirani v Hirani*** (1982) the Court of Appeal felt that the test in ***Szechter*** was rather narrow as it concentrated on threats of imminent danger. Ormrod L.J. considered the passage in Butt J in ***Scott v Sebright*** (1986) 12 PD 31, reviving a subjective approach which had not been followed by the courts when they applied an objective test. Butt J stated:

"The Courts of Law have always refused to recognise as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage must be tested and determined in precisely the same manner as that of any other contract. True it is that in contracts of marriage there is an interest involved as above and beyond that of the immediate parties. Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no way alter the principle that all the grounds on which this, like any other contract, may be avoided. It has sometimes been said that in order to avoid a contract entered into through fear, then the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that this is an accurate statement of the law. Whenever from natural weakness of intellect or from fear ... whether reasonably entertained or not ... either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person or stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case."[10]

37. In ***Hirani*** the petitioner was a 19-year-old Indian Hindu who lived with her parents. Her parents disapproved of her relationship with an Indian Muslim and

[10] My emphasis by underlining.

made an arranged marriage for her to the respondent who was a Hindu. The petitioner was dependent upon her parents, and informed that if she failed to go through with the arranged marriage that she would be thrown out of their home. The petitioner feared that she would have nowhere to go and nowhere to live. The marriage was not consummated and after six weeks the petitioner left and petitioned for decree of nullity on the grounds of duress exercised by her parents. At first instance the court refused to grant a decree, finding that there was no duress as there was no threat to life, limb or liberty. The Court of Appeal analysed whether the petitioner had given consent out of genuine fear irrespective of whether other people would have been stronger and held that the parents' threat of homelessness had invalidated the petitioner's consent.

38. In his judgment Ormrod L.J. did not comment on the line of cases which endorsed an objective test, save to expresses his belief that Sir Jocelyn Simon P. in ***Szechter*** had not intended there to be a requirement for the court to find threat to life, limb or liberty in order to find duress and that the President was "*merely contrasting a disagreeable situation with one which constituted a real threat..*"[11] This was interesting and a new view for him to express, as in his judgment in ***Singh v Kaur*** delivered in the previous year, Ormrod L.J. had felt it to be *"a very serious matter if this court were, even if it could in law, to water down Sir Jocelyn Simon's test."*

[11] Page 234 in ***Hirani.***

39. At page 234 in ***Hirani*** Ormrod L.J. referred to the statement of Lord Scarman dealing with duress and its effect on a contract in the Privy Council case ***Pao On v Lau Yiu Long*** [1980] AC 614 at page 635, namely:

> *"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent."*

40. Ormrod L.J., like Lord Scarman, quoted the following dictum of Kerr J. in ***The Siboen and the Sibotre*** [1976] 1 Lloyd's Rep. 293 at p.336:

> *"They must be present some factor "which could in the law be regarded as a coercion of his will so as to vitiate his consent.""*

41. Ormrod L.J., when allowing the appeal and pronouncing the decree in ***Hirani***, suggested that the Court should ask whether the threats constituted undue pressure overbearing the person's will, which is a more subjective test, stating on page 234:

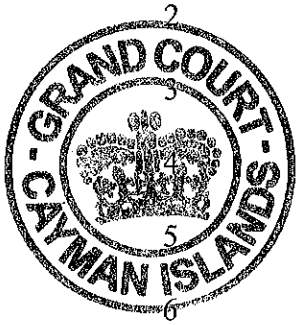
> *"The crucial question in these cases, particularly where a marriage is involved, is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual."*

42. The Court of Appeal's approach in ***Hirani*** provided redress for the increasing problems arising from forced marriages in England and Wales, recognising the effect of blackmail and psychological duress. The approach and test in ***Hirani*** was specifically applied by Coleridge J in ***P v R (Forced Marriage: Annulment:***

Procedure) [2003] 1 FLR 661. In that case a British Pakistani girl was taken by her family to Pakistan to attend a relative's funeral. Whilst there, she was forced to go through with a marriage to a cousin arranged by her parents under threat of violence and under the belief that she would not be allowed to return to England if she did not marry, in circumstances where she could not escape due to illness, lack of funds, lack of knowledge about where she was and due to close supervision. After some months she managed to persuade the cousin to permit her to return to England and she used that as an opportunity to issue a petition for nullity, which Coleridge J. granted. The court was satisfied that she had not consented to the wedding and that consent had been vitiated by force, both physical and emotional from her various family members and particularly the significant emotional pressure brought to bear whilst in (for her) unfamiliar Pakistan.

43. In his written submissions, Mr. Gomez places great emphasis on the case of ***NS v MI*** [2006] EWHC 1646 in which Munby J. (as he was then), although cautioning himself against the risk of stereotyping and imposing one's own cultural beliefs on others, recognised the problems surrounding forced marriage and adopted the subjective test. He drew a clear distinction between arranged marriages which "*are lawful*", are to be "*supported*" and "*respected*" and forced marriages which are "*intolerable*" and "*utterly unacceptable.*" So when I consider ***NS*** and apply it to the circumstances in the matter before me I am conscious that, unlike in ***NS***,

it is not a the case involving a forced marriage and that Munby J. stated that in forced marriage cases the court "*must not hesitate to use every weapon in its protective arsenal*" and "*must bend all its powers to preventing it happening.*" Munby J. found that the marriage was voidable on the ground of duress as the wife had been forced into it. He granted a decree of nullity.



44. The petitioner in ***NS***, at age 16, was taken from the United Kingdom, where she had been born and raised, to a remote part of Pakistan. She had been led to believe that the visit was for a holiday, but she realised that in reality its purpose was for her to marry her cousin. Her mother refused to confirm or deny her suspicions. She remained in Pakistan for quite some time, her passport having been retained by her mother until she returned to the United Kingdom. Her parents informed her that she would only be able to return to United Kingdom if she went through with the marriage, and they threatened to kill themselves if she did not marry her cousin. To no avail, she asked the respondent not to marry her and to let her return to the United Kingdom. The marriage went ahead, it was not consummated, and five months later she returned to the United Kingdom and presented her petition.

45. Munby J. referring to the line of cases including ***Szechter***, ***Singh v Singh*** and ***Singh v Kaur*** stated that "*at one time*" an individual would only establish the ground of duress if he could show that a threat of immediate danger to life, limb or liberty existed. He observed that this was "*... no longer the law, if it ever was.*"

He highlighted the approach advocated by Ormrod L.J. at page 234 in ***Hirani***[12] and the fact that it was applied by Coleridge J. in ***P v R.*** Munby J. went on to set out a number of helpful subsidiary points in his judgment. As the matter before me appears to the first case in which the Grand Court has been asked or has been required to conduct a detailed review of the law in relation to making a decree of nullity on the ground that the marriage is void due to duress, I make no apology for now replicating in full herein the portion of Munby J.'s judgment containing his analysis of his raised subsidiary points as they may guide others in the future. Munby J. outlined the subsidiary points as follows:

> *[32] The first is that, as Sir Jocelyn Simon P pointed out in Szechter (orse Karsov) v Szechter [1971] P 286, at 297, although in the nature of things the source of the fear and the agent of duress will generally be the other party to the marriage, this is not necessarily so.*
>
> *[33] The second is that there are, of course, many ways in which such duress or coercion may be brought to bear, a point illustrated by the well-known passage in the summing up of Sir JP Wilde to the jury in Hall v Hall (1868) LR 1 P&D 481, at 482. That was a probate case, but the point is equally applicable in the present context:*
>
> > *"Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and*

[12] As set out in paragraph 39 above.

> *quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes, is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of someone else's."*

[34] To this I would only add that, as Lindley LJ observed in a famous passage in Allcard v Skinner (1887) 36 ChD 145, at 183, 'the influence of one mind over another is very subtle'. Moreover, one has to have regard to the relationship between the parties. As I remarked in Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, at para [78], where the influence is that of a parent or other close and dominating relative, and where the arguments and persuasion are based upon personal affection or duty, religious beliefs, powerful social or cultural conventions, or asserted social, familial or domestic obligations, the influence may, as Butler-Sloss LJ put it in Re T (Adult: Refusal of Treatment) [1993] Fam 95, [1992] 2 FLR 458, at 120, and 477 respectively be subtle, insidious, pervasive and powerful. In such cases, moreover, very little pressure may suffice to bring about the desired result.

[35] The third point is this. The test is a subjective, not an objective, one. As Butt J said in Scott (Falsely Called Sebright) v Sebright (1886) 12 PD 31, at 24:

> *"It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear – whether reasonably entertained or not – either party is actually in a state of mental incompetence to resist*

> *pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger."*

[36] The fourth point is that although the standard of proof is the ordinary civil standard of the balance of probability, due regard must of course be had to the principle expounded by Lord Nicholls of Birkenhead in the well-known passage in his speech in Re H and Others (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, [1996] 1 FLR 80, at 586 and 95–96 respectively that the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. And the court must be careful to ensure, particularly perhaps where a nullity suit is undefended, that a proper case is being put forward and not one contrived to enable a spouse to escape from a perfectly lawful and proper marriage which has turned out to be irksome. As Butt J observed in Scott (Falsely Called Sebright) v Sebright, at 24, and if the language is slightly old-fashioned the point remains important at least in this context:

> *"Public policy requires that marriages should not be lightly set aside, and there is in some cases the strongest temptation to the parties more immediately interested to act in collusion in obtaining a dissolution of the marriage tie. These reasons necessitate great care and circumspection on the part of the tribunal, but they in no wise alter the principle or the grounds on which this, like any other contract, may be avoided."*

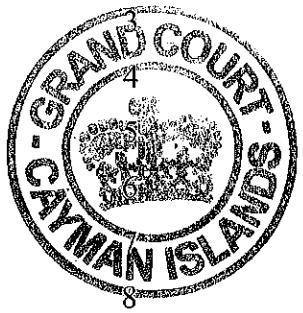
[37] The fifth point is this. The court must be alert to the possibility of forced marriage – something more prevalent than some would care to admit – and robust in its response to it. But we must always equally be careful not merely to distinguish been

arranged marriage and forced marriage but also to guard against the risk of stereotyping. As I said in Re K, at para [93]:

> *"We must guard against the risk of stereotyping. We must be careful to ensure that our understandable concern to protect vulnerable children (or, indeed, vulnerable young adults) does not lead us to interfere inappropriately – and if inappropriately then unjustly – with families merely because they cleave, as this family does, to mores, to cultural beliefs, more or less different from what is familiar to those who view life from a purely Euro-centric perspective."*

[38] The sixth and final point is this. Rule 2.28(1) of the Family Proceedings Rules 1991 provides that the hearing of a nullity suit 'shall be ... in open court' and that, subject to certain exceptions, 'any fact required to be proved by the evidence of witnesses at the trial ... shall be proved by the examination of the witnesses orally'. So in a case such as this the petitioner has to establish her case of duress by oral evidence in open court. In the present case there were no difficulties because, although I sat in open court, neither the respondent nor anyone else from either family was present – nor, indeed, was any member of the public – and the petitioner was entirely happy to give evidence in the usual way. But as Mr Gupta pointed out, there may be cases of this kind where a petitioner will be reluctant to give evidence if, for example, members of her family are present. He suggested that in such cases the petitioner, like vulnerable witnesses in other forensic settings, should be able to give evidence from behind a screen or by video link. I can see the force in what Mr Gupta is saying and am sure that, in an appropriate case, the court would do whatever it could to afford the petitioner proper protection whilst at the same time safeguarding both the interests of the respondent and, indeed, the

wider public interest in the proper administration of justice. I say no more on the point which, as I have said, did not in fact arise in the present case, save to emphasise one practical matter. If special arrangements are to be sought in any particular case, the court must be alerted to the issue in good time, and before the day of hearing, so that it can have a proper opportunity to consider whether the request should be granted and, if it is, adequate time in which to make the necessary practical arrangements."



46. The subjective approach appears to be the one that is now usually followed in England and Wales. Although the matter before me is not a forced marriage case, and although the marriage would, unlike in England and Wales, be void rather than voidable due to lack of consent from duress[13] and recognising that arguably there may still be two conflicting approaches, I am satisfied that the more prevalent subjective approach is the one that should be the preferred in the Cayman Islands, both as a matter of precedent and as a matter of policy, albeit the latter especially in forced marriages. In relation to it being a matter of precedent, as pointed out by Munby J. at paragraph 29 in ***NS***, the requirement that the petitioner must show a threat to life, limb or liberty was itself a departure from earlier authorities, whilst highlighting that the approach he advocated was reflected in ***Scott v Sebright***.. Accordingly, the petitioner need not show threats of a specific type. The question for the Court is whether the threats, pressure, or whatever it is such to destroy the reality of consent, overbears the will of the

[13] See page from Butt J. in pre-1971 case of ***Scott v Sebright*** set out at paragraph 36 above.

individual. At the same time, it is still important to recognise the importance of the institution of marriage set out by Ormrod L.J. in ***Varaeke***[14] and by Butt J. in ***Scott v Sebright.***[15]

Application of the Law and the Facts

47. In the present case, the real issue is whether the facts satisfy the test. To repeat again the remarks of Butt J. in ***Scott v Sebright*** earlier emphasised by me:

> *"The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case the question here is whether the fact disclosing evidence bring this case within the rule."*

48. There is a conflict of evidence as to the circumstances leading up to and post the ceremony. As the parties' credibility is relevant, findings concerning their differing evidence about events post the ceremony may go to that. A number of affidavits sworn by CE were filed, the majority of them at a time when he was representing himself. BE has also sworn and filed a number of affidavits. At the outset of the hearing the Court was informed that BE would not be relying upon the Affidavit of Jean Manderson.

49. CE's evidence is that the parties first met in 1987 when he was in Jamaica with his then wife's sister. On the second occasion that they met on that trip, BE said

[14] See paragraph 29 above.
[15] See paragraph 36 above.

that CE asked her for a kiss on the lips, but she refused. CE said that when asked by him she said that she wanted to visit the Cayman Islands and he gave her his contact details. BE said that he simply gave her his contact details but she did not contact him. He said that after the trip he received a call from BE's friend, who was also a friend of his daughter. He said that BE was with the friend and he told her that if she wanted to visit Cayman he would pay for her flight ticket. BE said that this conversation was in December 1987, but she spoke to him as her friend had said that he was asking for her. BE says that it was during this conversation that he invited her to come to Cayman and that she told him that she could not come until after Christmas. CE stated that she first came to Cayman in December 1987 for three to five days. BE said she came for a week and that there was no intimacy on this trip. CE met her at the airport and let her stay at his house with his then wife and his sister in law. He said her trip was cut short because he had to fly out to the USA for medical treatment.

50. BE said that a few weeks later her friend's mother contacted her to say that CE wanted her to contact him. She phoned him and he said that he was divorcing his wife and wished her to visit him after the divorce. The certified Divorce Certificate from the Florida Court shows that the marriage was dissolved on 14 March 1988. She said that from then until 1989 she visited him frequently and sometimes for up to two months. BE's exhibited passport pages illustrate that she visited eleven times, namely in December 1987, March 1988, April 1988, May

1988, June 1988, September 1988, November 1988, April 1989, February 1989, June 1989 and November 1989. I accept her evidence about these dates and I note that after the first visit in December she did visit until 16 March 1988, which was two days after the divorce in Miami, consistent with her indication that she would not visit until after his divorce had been completed. During these visits CE would collect BE upon her arrival at the Airport and she said that she would always stay with him and that they began to share physical intimacy and a relationship developed between them. At paragraph 22 of her affidavit sworn on 19 April 2013 she commented:

> *"From the time the Petitioner invited me back to the Cayman Islands after the completion of his divorce up until November 2010 he and I have shared continuous physical intimacy and conjugal relations. We slept in the same bed and in the same bedroom."*

She stated that from time to time he told her that he wanted to get her pregnant and she overheard him telling his friends he wanted to "*knock her up*". CE denies that.

51. CE said that in mid-1988 he received another phone call from Jamaica and he had a further conversation with BE who told him that she wished to visit. It is quite clear that by mid-June she had already had five visits to Cayman; this is not consistent with CE's evidence that he did not hear from her and she did not visit

from December until mid-1988. CE said that "*months later*[16]" she came for a short visit and he put in place the same flight and accommodation arrangements as on her first trip. CE said that after hurricane Gilbert had devastated Jamaica in September 1988 he received a further phone call from BE. He said he again purchased her flight tickets and provided financial assistance for her lodging and food on this occasion. Her visit was extended a few times by the Immigration Department and he also paid for airline tickets on more than two occasions. CE tried to give the impression that they did not have a relationship or close friendship as he wrongly claimed that, apart from the December 1987 visit and the second visit, it was not until Hurricane Gilbert that she frequently came to Cayman. This is right because her visit on 22 September 1988 was her sixth visit staying with him in the Cayman Islands. The frequency of the visits she had with him are consistent with her evidence that they had a more intimate relationship, and I prefer her evidence on this point.

52. At paragraph 11 of his affidavit sworn on 13 May 2014 CE wrongly contended that he and his wife divorced in 1989.[17] He said that BE came for her third visit to Cayman. CE contends that during this visit she informed him that she wanted to get pregnant and he, to discourage any sexual advances, told her that he was "*gay.*" BE denies that she told him that she wanted him to get her pregnant, but

[16] Paragraph 9 of CE's affidavit sworn on 13 May 2014.
[17] Certified Divorce Certificate shows it was 14 March 1988.

added that she would not have minded if she had done because she was in love with him. Interestingly CE said during his evidence in chief that:

> *"She came back about pregnant and I said I guess I will try and help you. She not catch me like Moses wife Jacob. There was some relationship at that point. I cannot elaborate. I not remember."*

In his evidence he stated that he was aware that there were marriages of convenience taking place between Jamaicans and Caymanians, *"sometimes for as little as a packet of cigarettes and sometimes for as much as CI$10."* CE's rather alarming evidence is that he only then had sexual intercourse with BE to discourage her from believing his defensive and untrue remark that he was gay and so that she did not spread in the community that he was homosexual. BE's evidence is that, before she fell pregnant, BE took her to see a Jamaican doctor in the Cayman Islands to find out if she could conceive. The doctor told them that they should come back at a later date when he would carry out the necessary tests, but they did not go back to him as she discovered that she was pregnant before the appointed date.

53. CE stated that shortly after the visit BE returned to Jamaica and she later telephoned him to tell him that she was unwell and alluded to the fact that she was pregnant. BE said that, when they had spoken on the phone and she had told him that she felt unwell, CE told her that she should go and see a doctor to have a pregnancy test, which she did. BE conceded that up until then CE had not told her

that he wished to marry her, but he did tell her that he loved her "*and that she was the first woman who'd showed him love.*"

54. In his evidence CE states that a few months later BE visited him in Cayman Brac where he was working. He said that it was during this trip that she confirmed to him for the first time that she was pregnant. CE said he could see that she was pregnant, as she was "*showing*". He stated that he suggested that she should return to her family in Jamaica until the child was born and that he would register himself as the child's father. GE was born in Jamaica on 16 January 1990. CE went to Jamaica shortly thereafter and registered himself as the GE's father. He said that at that time he:

> *"went a little shack they living in. I sat down one area and I look through the pieces of wood slats right through. ...I look for the outhouse and I not see it around the place either. When see that I thought no, not for my child. I want to get my child, my children grow up in home with all modern facilities basically, running water, light, phone and TV and what not. I not want G to be less."*

CE made arrangements for BE and GE to come and live with him from March 1990 in the Cayman Islands as he felt that BE was not in a financial position to raise GE by herself in Jamaica. BE stated that they "*lived as a family unit from then on until these proceedings were filed.*"

55. CE stated that he was concerned about GE's entitlement to remain in the jurisdiction. In 1990 he consulted with Mr. Orett Connor, who he said advised him to obtain an adoption order to formalise GE's status. As a consequence, CE made an application to adopt GE on 26 March 1991, but the Court refused to grant the order at the hearing on the 10 May 1991. BE said that CE did not inform her that GE could not remain as she was Jamaican and that someone at the Immigration Department had advised him to adopt her. BE said that initially she agreed to let him adopt GE, but after the Court told her that she would "*lose*" the child she changed her mind. CE stated that after the adoption hearing BE refused his request to give him custody of GE. CE told the Court that "*unfortunately I was more than damn upset about the situation.*" When Mr. Murray put to him that BE had a right to refuse, CE unattractively replied:

> *"What about my rights? My rights as a Caymanian father supersedes that of a Jamaican mother, exactly."*

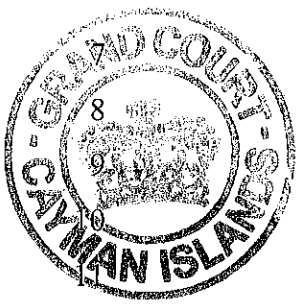
This exchange encapsulates in one sentence CE's domineering view of BE and the lack of respect he now has for her.

56. As GE's status had not been confirmed, CE stated that he had to obtain a number of extensions to her visitor's permit. CE said this happened until 1995 when Mr. Gerry McGuire informed him that GE and BE could no longer reside in the Cayman Islands. CE, towards the end of his examination in chief, said that he saw

the Chief immigration Officer as being "*incompetent, stupid, ignorant*" and there was:

> "*nothing good I can say about him as I was upset with his decision made knowing it to be contrary to the law.*"

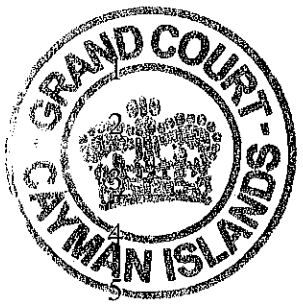
CE told the Court that upon receiving this news:



> "*My reaction was if (I) had dynamite, I would (have) put it in his office. I not tell him that, I was very upset and concerned about the situation. I not think what happened to my child, I look (at) her not being prepared, mother not do for her. She probably go to Jamaica and starve to death.*"

CE said that upon being told this by Mr. McGuire he "*became frantic*" for the reasons set out in his Amended Petition at paragraph 10 herein. CE added that he believed that the property in Jamaica where GE would live was a wooden shack which he felt was uninhabitable and in a deplorable condition. He felt that GE would be "*sent off to an unknown world without any chance of proper care or survival*" and that all he saw "*was a child who would be deserted no one able to take care of her.*" He said that he feared that he would "*probably not see her (GE) again as (he) had no idea where the respondent would be going.*"

57. CE said that he believed that, if he married BE, s.17(3)(b) of the Immigration Law 1984 would provide a means for GE to remain in the jurisdiction as s.2 of the Legitimation Law (Revised) stated that:



"Any child born before the marriage of his or her parents or whose parents have intermarried or shall hereafter intermarry shall be deemed on the marriage of such parents to have been legitimated as from the date of such marriage shall be entitled to all the rights of the child born in wedlock."

58. CE claims that, based on his knowledge of the Law and being *"profoundly devastated the decision taken by the Department of Immigration*" and feeling that he had exhausted all avenues open to him to ensure that GE could remain here under his care, he got married as a last option. He said that he only did so due to his abovementioned concerns for GE and as such he did not consent to marriage as he *"was induced to go through the ceremony by reasons of duress."* CE stated that after he received the news from Mr. McGuire he related his concerns about GE to BE and his view that there is no alternative but for them to marry if GE was to remain in the Cayman Islands. In his affidavits CE characterises the marriage as being "*a marriage of convenience"* entered into with the sole aim of protecting his daughter by preventing her from being deported.

59. CE also states that he told BE that he "*did not love her*" and that she had "*always been fully aware that the only reason for the marriage was to stop (GE) from being deported."* In cross-examination CE told the Court:

> *"This is far as I remember I said to (BE) I will have to marry you as Immigration is down on me. I not think I told her all of this exactly, she knew I having problems, she also knew that the law,*

child have to take the nationality of the mother. In final analysis I told (BE) I have to create a marriage to keep (GE) on the Island. I not recall if she responded. But apparently she went along with it."

During her evidence in chief BE told the Court that in 1995 CE told her about the deportation and did say that they had to get married. She then added that CE told her that he was in love with her and that she was in love with him. BE said that if she had not been in love with him she would not have married him. She then conceded in cross examination that:

"I marry because I love him. I not know his reason. He is saying we have to get married. I not know what his reason was. I can't object to his position that he only getting married to keep GE in the jurisdiction. We both could not get married and less likely to marry him."

At paragraph 21 of her affidavit sworn on 19 April 2013 BE stated:

"When I told the petitioner that I could not go through with his adopting a child if it meant that I would lose he said, "Okay Beverley, then we will have to get married then. I will have to marry you." We both then decided to get married. I agreed to marry him because I loved him."

At paragraph 26 of the same affidavit she stated at the time of the marriage:

"I knew nothing of his discussion with the Immigration Department outside of what he told me. He did not tell me that Immigration had told him that he had to marry me if he wanted child to stay on the

island. He said to me that the child could stay on the island if he adopted her."

60. CE stated that, prior to the marriage, BE presented a written Agreement dated 7 December 1995 to him, written in her own words, in which she confirmed not to make a claim against any of his assets. This document was sworn before a justice of the peace. During cross-examination he said that he told BE that:

"I want to, before anything could happen, you have to write this agreement for me CE, so you can get your paper and pen and start writing."

This is consistent with her evidence that he told her that she had to sign a "*prenuptial paper*" and that he dictated and told her to write out the corrected version in her own handwriting." CE expressed his view that the written agreement "*solely created a marriage of convenience.*" Putting aside the issue as to whether the Agreement contains his or BE's words, the document in fact does not support a contention that this was a marriage of convenience, but that a normal marriage was being entered for proper reasons, with the normal consequences in relation to assets then acquired being envisaged. The opening paragraph states BE's name and birth date and goes on to say "*and in love with (CE) of West Bay*[18]*. We plan to get married.*" Apart from mentioning that the parties were in love and intended to get married, there is no reference to the marriage taking place for immigration purposes or to secure GE's residence in the

[18] My emphasis by underlining.

jurisdiction. The Agreement illustrates an understanding by the parties that if they get married no claim will be made by BE against assets acquired by CE prior to the marriage, as they should be preserved for his children. Interestingly the second paragraph on page 2 of the Agreement provides that if they do get married and acquire assets after the marriage those assets will be "*divided according to Law.*" The literal and plain reading of this part of the Agreement is that it will be governed by laws relating to married couples. The real purpose of the Agreement, namely to protect his financial interests, emerges from the following passage from the transcript of his cross examination, namely:

> "*This is a copy of the agreement. I intend to achieve with agreement, believing marriage in Cayman is a racket. Because of racketeering in marriage, appears to me people get married today and day before that they all look enrich selves financially, whether only for Cayman status or citizenship mean they be better off marry a Caymanian. Law technically supports it.*"

CE went on to say that the document protected him in "*all suits of law*" and that the document was "*not important for duress*" and that the only reason he mentioned it was because he was directed to it by Mr. Gomez. His involvement in its drafting becomes clearer from his statement made when looking at a draft copy of the Agreement which contains, in his handwriting, detailed written requirements and significant amendments that:

> "*This (is) her handwriting. I not dictate that, she wrote a lot on her own. I think I did write something like this to change, this I think I*

said you should write it like this, technically both involved in drafting this."

61. The marriage ceremony was conducted by the same Justice of the Peace who had witnessed the Agreement. CE said that the ceremony took place at the Justice of Peace's house and interestingly the Marriage Certificate is blank as to the location, save to say it occurred in West Bay. It appears that he was the CE's Marriage Officer of choice. I deliberately do not name the Justice of the Peace in these proceedings as he has not been afforded the opportunity to address the serious allegations about his handling of the marriage ceremony which CE alleges outlines. In his affidavit sworn on 27 March 2013 CE stated:

> *"The appellant affirms that in response to the marital questions put to him by the marriage officer during the marriage of convenience were answered in the negative."*

During examination in chief he was afforded the opportunity to clarify this and he said that when he was asked by the Marriage Officer:

> "*Whether I do or don't take her to be my lawful wife – I told the marriage officer that I don't take her as my wedded wife."*

As I was so alarmed by what he had said I gave CE an opportunity to confirm this part of his evidence and he replied that the Justice of the Peace:

> *"was way back in different fields of Government, he been marriage officer quite a while. The fact is much going on in Government we Government members not agree with. Much in to the government*

that people not know or want to admit there is much owing on (which) no one want(s) to be associated with, such as this. This is part of going on in Government, that he married me. We know what we want and believe we should have, because discrepancy with the Government positions taken are because he may want to agree with me to say I asked the Government for adoption of my child and they refuse.... If you think I said I do, then no problem, I know what I did and what I say....I not say no when he asked me if I take it to be my lawful wedded wife I said, I don't."

CE went on to say in examination in chief that:

"*All my Cayman people in Cayman are friends. We talk amongst ourselves, we translate, we do everything in the group and talk about it. I go to marriage officer and make the complaint to him and say my problem is this. (That is that) it appears I have to create a marriage of convenience to care for my child.*"

During re-examination he stated:

"*Me and (named Justice of the Peace) are Caymanian, we get around talk about all go on in country, this and that who are the things that is how we do it. We know before get words out what is going on, we not need go through in typing as we know. I believe he aware that G be deported, very very likely. At ceremony when asked do you take her to be your wife, I said "I don't." And not want to exaggerate now what he said. I not intending to hear me say I don't, I not be that cunning. Maybe he not hear me say I don't. Maybe my speech not clear enough, same as last day in court with this protest. Looking at it today you can get anything you want if you have money.*"

These are further examples of outlandish comments which are unsubstantiated, and again his making such statements brings into question CE's credibility when I consider the veracity of wider evidence, including the evidence relevant to the issue of duress.

62. CE stated that they all lived together on Fountain Road, until GE and BE left when the former got married in 2010. He stated that after the marriage they did not share a bedroom save for occasions when BE slept in a separate bed in his room which was more comfortable and cooler. He reiterated on a number of occasions that they did not have sexual intercourse during the marriage.

63. CE contends that the reason why he presented his Petition for Nullity before 31 December 2012 was not because BE had applied for dissolution of the marriage only a month earlier, on 28 November 2012. He said that he issued it on 31 December 2012 as GE had reached the age of 21. However, I note that GE had reached that age back on 16 January 2011, at which time BE had only made an application for judicial separation. When asked by Mr. Gomez why he had delayed CE said:

> *"I alone doing everything, only so much I can do in 24 or 12 hour span. When I get around to it, have time. I want to make telephone calls that I can't make today. Time just did not allow it."*

CE highlighted that on 1 August 2011, prior to making that application, he had already written to Linda Evans, the Chief Immigration Officer. BE said she became aware of that letter in August 2011 when she returned from a trip from Jamaica. In her application for judicial separation, BE indicated that in March 2011 she became aware of an earlier letter written by CE to the Immigration Department in which he expressed his views about the marriage being one of convenience and she was concerned about the consequences of him doing that. There are letters addressed to Linda Evans from CE exhibited to the affidavit sworn by BE on 19 April 2013, which she said she found hidden in a book in the property. In the letters CE makes it clear that he seeks to "*have the marriage null and void*". In the pleadings BE also said that CE had informed her that he wished to sue the Immigration Department and that she should support his statement in that action. In his letters to the Immigration Department CE stated that the marriage had been one of convenience to protect his daughter, who was no longer responsible for as she had married. He said that the marriage was due to decisions made by the then Chief Immigration Officer who he felt was in breach of "*1994 immigration directives.*" CE contended that BE was wrong to state that he had written to the Immigration Department in November 2010 after she told him that the marriage is over, and that he only wrote as a consequence of her filing the "*letters*" for a judicial separation. Interestingly at paragraph 24 - 25 of his affidavit sworn on 27 March 2013 he indicates that BE has an ulterior motive due to her knowledge of his wealth and that she seeks to deny his first full children of

the same. It is clear that in March 2013 CE was troubled by what might happen to what he viewed as his sole property as a consequence of marital breakdown. When considering his evidence, including the delay in issuing his petition many months after GE's 21st birthday, the content of his letters to Linda Evans and the transfer of the matrimonial home to his daughter from a previous relationship it is evident that he was positioning himself in relation to the end of the parties' relationship. I am also satisfied that he has presented the nullity petition to preserve his asset, which really was his main concern when entering the marriage as evidenced by the Agreement he dictated to the wife.

Conclusions

64. I accept that when marrying, CE recognised that one of the benefits would be the regularisation of GE's immigration status. There is no independent evidence concerning the position purportedly being taken by the Immigration Department. Mr. Franz Manderson, the current Deputy Governor, has no recollection of the exchange which CE said he had with the then Chief of Immigration. What is clear, even on his own evidence, that CE's decision to marry was not a rushed one, it was well thought out by BE.

65. Even accepting that a discussion of this nature had taken place, I would still have to satisfy myself that the information received by CE overbore his free will when he made the offer to get married. It is clear that it was his suggestion that they

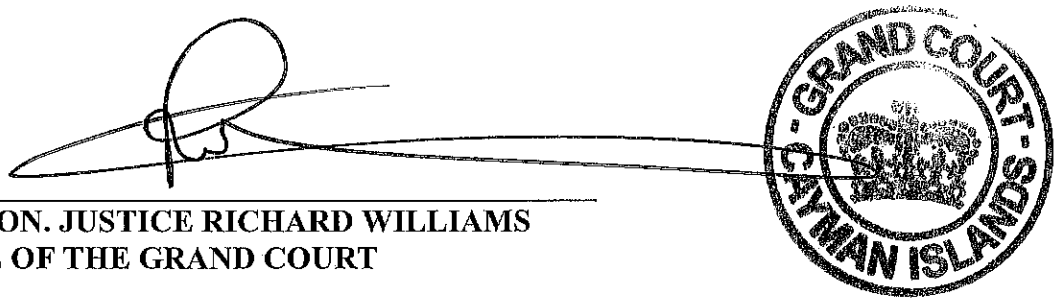
marry. At the time of the marriage it was clear that he was able to think lucidly about the consequences of the marriage as he required BE to write out an Agreement containing his requirements and which was designed to preserve his premarital assets. As already mentioned, that same Agreement mentions a marriage due to love and one in which assets accrued after the marriage would be dealt with according to the law. When I consider the effect on him I do not accept his evidence, which I find to be unreliable for reasons already stated herein. It is evident that the long relationship they had, although characterised by the wife has been "*bitter-sweet*" was not a loveless marriage lacking intimacy. I prefer the wife's evidence in relation to this factual issue and I have particular regard to the nature of the relationship that they had prior to the marriage. They clearly formed a more intense relationship soon after CE's divorce and BE visited and stayed in his house frequently before the birth of GE, as evidenced by the passport stamps. Although I have applied the subjective test, it is still important that the importance of the institution of marriage is maintained. A marriage is not void simply because a party, or both parties, entered into it with the ulterior motive of circumventing immigration requirements. For a decree of nullity there must be coercion or duress that overbears the will of the individual.

66. I am satisfied that CE being a person of full age and of sound mind went through the ceremony of marriage in the presence of witnesses. A nullity degree is not to be granted lightly. He has not provided clear and cogent evidence to reasonably

satisfy me on the balance of probabilities that his will was overborne to the extent that his express consent was not real consent. The duress had to be present when he actually married, although it can result from conduct prior to the marriage.

67. On the facts before me, I am not satisfied to the required standard of proof that CE's consent was not real by virtue of duress when he married BE. Although CE may have been concerned about immigration issues, his evidence is insufficient to establish that when CE married BE, he was under such a level of oppression that his consent was not his own.

68. I therefore make the order that CE's Petition for decree of nullity be dismissed.



THE HON. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT