SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO.SLUHMT 2009/0160

BETWEEN

JESSICA OLIVIA PATRICIA MYERS (MATHURIN)

Petitioner

AND

DAVID MYERS

Respondent

Appearances:

Ms. Diana Thomas for the Petitioner
Mrs. Kim St. Rose for the Respondent

---

2010: May 5th, May 11th, July 15th, October 7th,

2011: August 25th

---

# JUDGMENT

[1] WILKINSON, J.: The Petition herein was filed on November 2nd 2009. The Petitioner and the Respondent were married on December 19th 1995. There was one (1) child of the union, a minor, Shakeela Utelca Jade Myers. The Petitioner stated that the marriage had broken down irretrievable because of the Respondent's behavior and she could not be expected to live with him. She sought the following relief:

(i) That the marriage be dissolved.
(ii) That the Petitioner be granted custody of the minor child of the family.
(iii) That the Court declare that it is satisfied that there were no other children to whom section 41 of the Divorce Act 1973 applied and make arrangements that were the best that could be made for the child.
(iv) A declaration that the Petitioner is the sole owner of the parcel of land situate at Degazon in the Quarter of Gros Islet and registered as Block 1250D Parcel 592 together with the house erected thereon.
(v) An order that the Respondent pay maintenance and or a lump sum to the Petitioner in a sum to be determined by the Court.
(vi) An order for settlement or transfer of property in favour of the Petitioner as to the Court seems just.
(vii) That the Respondent be ordered to pay the Petitioner's costs.

[2] In her petition, the Petitioner alleged that the marriage broke down approximately three (3) years prior to her filing the petition when the Respondent started feeling insecure in the relationship and started making accusations against the Petitioner of firstly, being a lesbian and involved in a lesbian relationship and secondly, of maintaining too close a relationship with a gentleman executive at her workplace and with which relationship he was uncomfortable. The Respondent it was also alleged called the Petitioner derogatory names and made both insulting and derogatory remarks to her. He also moved out of their bedroom approximately one (1) year prior to the petition.

[3] The Petitioner further alleged that the Respondent failed to contribute to the household expenses and that during a five (5) year period when she was unemployed, she had to resort to having meals at her parents' home, and she used her savings to cover the household expenses. The relationship caused her severe stress and due to certain statements and actions of the Respondent she also feared for her own physical wellbeing. Things began to come to a head when on September 26th 2009, the Respondent drove away from the matrimonial home at approximately 4.30 a.m. leaving addressed to their daughter a note and the note caused her to fear that the Respondent may have committed suicide. Things came to a head when shortly thereafter, the Respondent asked the Petitioner's brother who was residing with the family to leave the matrimonial home.

[4] In the Petitioner's reply to the Respondent's answer and her answer to his cross-petition she denied much of what he alleged and stated that there was also the matter of lack of conjugal rights between the Parties and which she blamed on the Respondent.

[5] The Respondent filed an answer and cross-petition. In his answer and cross-petition, the Respondent alleged that the marriage had broken down irretrievably and alleged that the breakdown was not his fault but that of the Petitioner. He denied some of the accusations made against him and alleged that it was the Petitioner's undue familiarity with one of the executives at the Petitioner's workplace that caused him to feel insecure in the marriage. He admitted to moving out of their bedroom and said this was as a result of the Petitioner refusing to be intimate with him. He alleged that the Petitioner was secretive about her whereabouts when she travelled overseas without him.

[6] The Respondent also alleged that it was he and not the Petitioner who paid most of the household bills, provided food and further, he contributed significantly to both the buying of the land upon which the matrimonial home was built, and the construction of the matrimonial home. He denied that the Petitioner feared for her wellbeing since he had never been violent towards her. He denied the implication asserted by the Petitioner about his note of September 26th 2009.

[7] His cross-petition said that he could not reasonably be expected to live with the Petitioner and he sought the following relief:

(i) That the marriage be dissolved.
(ii) That the Court make a declaration that the parcel of land registered in the Petitioner's name as Block 1250D Parcel 592 is community property and that the Petitioner do pay to the Respondent the value of his share thereof or in the alternative that the property be sold and divided between the Parties.
(iii) That the Parties have joint custody of the minor child of the family, Shakeela Utelca Jade Myers with care and control to the Respondent and reasonable access to the Petitioner.
(iv) That the Petitioner contributes to the maintenance of the child of the family.

(v) That the Court declares that the only child of the family to whom section 41 of the Divorce Act applied was Shakeela Utelca Jade Myers born on the 13th January 1997 and that arrangements have been made for her welfare and are satisfactory.

(vi) That ancillary matters be adjourned to Chambers.

(vii) Costs.

[8] The Court has observed on several occasions in the past, that Respondents, like this Respondent has done, filed a document described as a cross-petition and inquired after the authority to file such a document. The Court upon review of the Divorce Act[1] (hereinafter 'the Act') and the Divorce Rules 1976 (hereinafter "the Rules") could find no authority to file a cross-petition and to date no authority has been provided by any Counsel to the Court. The Rules provide for the filing of a petition, answer to petition, reply to answer, supplemental petition, supplemental answer and amended pleadings. Perhaps the answer as to why there is no document described as a cross-petition is to be found at section 5 (5) of the Act which provides:

> "5. RESTRICTION ON PETITIONS FOR DIVORCE
>
> (1)…
>
> (5) If in any proceedings for divorce the respondent alleges against the petitioner and proves any such fact as is mentioned in section 4(1), the Court may give to the respondent the relief to which the respondent would have been entitled if the respondent had presented a petition seeking that relief."

[9] Section 4 of the Act is set out hereunder and it is to be noted that section 4 does not address a cross-petitioner.

[10] Therefore, if the Court is satisfied on the facts, it could hold in favour of the Respondent and make any order that it could make for the Petitioner without the need for a cross-petition.

[11] At this juncture and in this instance since in all fairness to Counsel, the Court did not ask Counsel to make submissions on the correctness of filing a cross-petition,

[1] Cap.4.03

the Court will refrain from making a ruling on the cross-petition and proceed as previous Courts have done when a cross-petition has been filed.

## Issues

1. Whether it was the Petitioner or the Respondent, who behaved in such a way so that the other Party could not be expected to live with the other Party and so the marriage has broken down irretrievably.
2. To whom ought custody and care of the child be granted and what if any maintenance ought to be paid until the child is 18 years of age.
3. Whether the Respondent ought to pay the Petitioner maintenance or make a lump sum payment.
4. Whether the Petitioner is sole owner and entitled to the parcel of land at Degazon in the Quarter of Gros Islet or whether the parcel of land is community property.

## The evidence

### Behaviour

[12] Examination in chief was by way of two (2) affidavits from the Petitioner filed November 6th 2009, and July 1st 2010, and three (3) affidavits from the Respondent filed December 16th 2009, July 13th 2010, and July 14th 2010. Both the Petitioner and the Respondent adopted their pleadings into their evidence and were cross-examined.

[13] The Petitioner is employed by a Saint Lucian hotel as its duty manager and gift shop supervisor, and the Respondent is a retired director of music of the Royal Saint Lucia Police Force, and part-time music instructor. The parties married when the Petitioner was twenty six (26) years and the Respondent was forty six (46) years. His first wife, whom he told the Petitioner was the only woman he trusted, is deceased and there were children of his first marriage.

[14] The Petitioner said she suffered in the later half of the marriage from fibroids and sought medical treatment at the Florida and had suffered from a fractured vertebrae. The Respondent said that he suffers from diabetes, glaucoma and back problems. His medical issues are presently covered by the Petitioner's employer's medical plan, and this coverage he anticipates losing when the divorce is finalized.

No medical evidence was presented by either party. The family appeared to have attended church together and at some point in time prayed together at home. The Respondent continues to go to church and attend church connected meetings with some frequency.

[15] During the early years of the marriage they resided at Reduit in the Quarter of Gros Islet in what was the Respondent's first matrimonial home. This house he co-owned with his deceased first wife. The house was subsequently rented when the Petitioner and Respondent moved into the matrimonial home in or about 2006.

[16] The Petitioner said that approximately three (3) years prior to her filing the petition the marriage started to breakdown when the Respondent started accusing her of such things as being a lesbian because she had fibroids for which she sought treatment at Florida, and of being involved in a lesbian relationship with a co-worker. At August 2007, he asked her to swear on a Bible at the airport on her return to Saint Lucia after treatment overseas for her fibroids that she had not been with another gentleman. He thereafter accused her of being involved in too close a relationship with a gentleman executive at her workplace and of going on trips overseas other than for work. Under cross–examination she said that the gentleman executive was her boss for part of the time that she was employed at the hotel and he treated her with respect. She admitted to discussing her marriage with the gentleman executive but said she did this as she needed somebody to talk to. The gentleman executive has since moved onto another job off island. She said that she had introduced the gentleman executive to the Respondent and further, when the hotel was looking for somebody to work as security consultant, she had suggested the Respondent. As part of her job she was required to travel from time to time to Barbados.

[17] On September 26th 2009, the Respondent left the matrimonial home at approximately 4.30 a.m. leaving behind a note which read:

> "Shaleela! Daddy Loves you a lot. Tell Mummy I love her a lot too. It not good to lose you all, but Daddy needs Help. Love to All in the Spirit of God. Loving Father and Husband."

An early morning telephone call to the matrimonial home by the Respondent at approximately 5.30 a.m. followed and upon the Petitioner answering, the Respondent demanded to speak with their daughter who was only twelve (12) years at the time, on at least three (3) occasions despite being told that she was sleeping. The Petitioner fearing that the Respondent was about to do harm to himself she telephoned the Police who went looking for the Respondent. The Respondent in a subsequent telephone call that day said to the Petitioner:

> "If Jesus sacrifice his life for those he loved then he would do the same."

The Respondent later showed up during that day unharmed.

[18] The Parties continued to reside together but at October 2009, the Respondent asked the Petitioner's brother whom he had initially agreed to reside with them to leave the matrimonial home. The Petitioner said that fearing physical harm for herself from the Respondent although she had not experienced any before, she left the matrimonial home and went to reside with her parents. The Respondent said that the reason he asked the Petitioner's brother to leave the matrimonial home was because he was causing disharmony in the home as the Petitioner would prepare meals and make much of her brother while ignoring the Respondent.

[19] The Respondent admitted that in discussions with the Petitioner's uncle about the state of the marriage, that he had said words to the effect that even if he had to "be a prisoner" and that he did not explain what he meant when he was asked. At trial he said the words meant that he felt that if the marriage broke down, then all the responsibility for their daughter would be his. The Petitioner said she understood these words to be a threat against her.

[20] The Respondent did not like the close relationship between the Petitioner and the gentleman executive and felt it was his right as husband to question the relationship, and search the Petitioner's belongings. He said that on one occasion he found a negligeé that the Petitioner had never worn for him and a sexually explicit book that the Petitioner had never shared with him. She said these things

were in an unused suitcase, she never wore the negligeé and she never read the book.

[21] The Petitioner said that she had liked to travel and had travelled for her vacation with or without the Respondent and their daughter over the years.

[22] The Respondent said that on one occasion when the Petitioner had told him that she was travelling for work, he discovered otherwise.

[23] In relation to the note of September 26th 2009, he admitted writing the note. This was not his usual way of communicating with their daughter and when it was put to him that he did not intend to see their daughter again, he said "That is why I put Jesus Christ. You do not put anything negative with Jesus Christ." He said that the exigency on that morning was that he left home to go and get help, and he had left home with his Bible. He got the help and thereafter telephoned their daughter. They spoke twice that day by telephone.

[24] The Respondent admitted that as recently as August 2010, when the Petitioner inquired about taking their daughter to Florida on vacation he told the Petitioner that he did not want his their daughter to be "a hired prostitute like her mother."

[25] The Petitioner said that the continuous accusations and the state of the marriage led her to suffer severe stress and the culmination of both led her to leave the matrimonial home and shortly thereafter file her petition.

[26] Both Parties complained about their conjugal rights.

[27] When the Petitioner left the matrimonial home she left their daughter with the Respondent.

[28] The Respondent said that due to the Petitioner having told him lies about her absences from home he could no longer trust her and therefore he could not reconcile with her.

Custody and care of the minor child

[29] Their daughter, Shakeela Utelca was born January 13th 1997. Both the Petitioner and the Respondent provide for her maintenance and other needs in their own way and within their income limitations. The Petitioner expressed the view that the Respondent was not strict enough with their child and was not teaching her to be responsible for such matters as her personal laundry, or controlling her use of the computer. The Petitioner knew of the late night use of the computer because of the proximity of her parents' home to the matrimonial home. She also said that on occasion when their daughter was rude to her the nature of it she felt was coming from the influence of the Respondent. She has observed that since she left the matrimonial home, their daughter's school grades had declined and she has received several complaints from the school principal about their daughter being late for school.

[30] The Petitioner leaves home at around 7 a.m. for work and finishes at around 8.00 p.m. on at least one (1) day per week when she must attend the manager's cocktail at the hotel. At January 2010, she started part-time studies after work at the National Research & Development Foundation with classes being on Tuesdays, Wednesdays and Thursdays. As a result of the evening classes, she would return home at approximately 8.30 p.m. The Respondent being retired he is the person who transports to and from school their daughter. Their daughter spends more time with the Respondent than with the Petitioner. Their daughter also spends time with her maternal grandparents, one of her maternal aunts and uncle when neither of her parents is available.

[31] The Petitioner said that as part of her planned arrangement to spend more time with their daughter, their daughter could visit the hotel and participate in the hotel's "Teenage Club" supervised activities. The Respondent rejected this suggestion.

[32] There was evidence to suggest that their daughter acts as a courier of messages between the Petitioner and the Respondent, and this is more so since the

Petitioner declared that she no longer speaks to the Respondent because of the derogatory names he calls her and his other insults.

The matrimonial home

[33] Both the Petitioner and the Respondent put into evidence a deed of transfer registered on June 25th 2008, for the a parcel of land measuring 8.803 square feet situate at Degazon in the Quarter of Gros Islet. The land was registered as Block 1250B Parcel 592 and therein the deed it was stated that the consideration on the sale was $26,000.00. The transaction was between the Petitioner as purchaser and Mr. Gregory Mathurin acting by his attorney, Mr. Andre Phillip Mathurin as vendor. Mr. Gregory Mathurin is the Petitioner's father, and Mr. Andre Phillip Mathurin is the Petitioner's brother. As to the deed of transfer not bearing the name of the Respondent, he said that he had no knowledge that the deed had been executed and further that it has been executed without his name. He had made inquiry over time of the Petitioner about the execution of the deed and why was it taking so long, and she never answered him. The land is in close proximity of the Petitioner's parents' home and upon it was constructed the matrimonial home. Construction occurred approximately six (6) years before the deed of transfer was executed.

[34] The Petitioner's position on acquisition of the land is that it was donated to her in 1995 by her father, Mr. Gregory Mathurin. Thereafter, both herself and her Respondent decided to give Mr. Mathurin some money since he was retired. The Respondent denies any such donation. The Respondent's position is that the Petitioner's statement is refuted by the deed of transfer as therein is stated that the consideration on the transaction was $26,000.00 and he had made inquiries about the execution of the deed which the Petitioner refused to answer. Both the Respondent and Petitioner said and are agreed that the Petitioner had at some point $6,000.00, and paid the legal fees by a separate amount and the Respondent gave the Petitioner $20,000.00 for her to give Mr. Mathurin in connection with the acquisition of the land.

[35] Construction of the matrimonial home started sometime between 2000 and January 2002 and completed in or about 2006. It was completed without a mortgage and the property continues to be debt free. The Petitioner said that she used her savings of approximately $25,000.00 and severance pay, gratuity, service charge and pension contributions of about $38,000.00 that she received when Sandals Regency made her redundant to start the construction. The contractor greatly assisted in construction of the house by providing free sand. When the Petitioner ran out of money, she said she asked the Respondent to help and he did so. He paid for the roof to be installed except for the greenheart that she had previously purchased, and certain parts of the roofing structure. He also paid for some of the labour used for the concrete work, and he contributed to the purchase of the cupboards, countertop and other fixtures. He alone purchased the bedroom cupboards. She provided all the furnishings for the house and was able to do this because when they became necessary she was once again employed full-time.

[36] The Respondent said that in addition to the $20,000.00 for the land, he spent a substantial additional sum for construction of the matrimonial home. Some of the additional sums were comprised of $30,000.00 of monies received on the death of his first wife (she died in a motor vehicle accident), and $40,000.00 of his gratuity received on retirement. He said he spent $69,000.00 on labour and approximately another $100,000.00 for fixtures and to pay customs duties.

[37] The Respondent although not a quantity surveyor or land appraiser stated that house which was built for in excess of $200,000.00 was in 2009, was now valued at about $550,000.00.

### Assets and income

[38] The Petitioner earns an income of $2,500.00 before taxes are deducted, has several bank accounts bearing a total balance at July 2010 of $2,549.00 and a credit card which has a debit balance of $7,500.00. She has a life insurance policy with Sagicor Life which at June 2010, had a cash surrender value of $16,918.99. The Respondent added that the Petitioner at May 2008, also earned

approximately $9,000.00 as an events planner/caterer for the Jazz Festival 2008 with which she bought Barbados dollars, she owns $500.00 worth of shares in LUCELEC being half of $1000.00 worth of shares held in their joint names and for which they received a dividend of $65.00 at December 2009, and a share in a joint account which has a present balance of $1,869.99. The Petitioner did not deny the income earned as events planner/caterer. She said that she had not been paid by the Respondent any part of the $65.00 dividend.

[39] The Respondent receives a pension of $1,848.00 per month, earns approximately $1,690.00 from music lessons, receives $600.00 from the rental of the house at Reduit which he co-owned with his first wife (before expenses such as insurance, property tax and maintenance) and has several bank accounts bearing a total balance of $45,139.79. He has a life insurance policy which is only payable on his death, 13,975 shares in Sagicor Financial Corporation from which at October 2009 he received dividends of US$279.50 and US$21.36, owns $500.00 worth of the $1000.00 worth of shares held jointly with the Petitioner in LUCELEC and for which they received a dividend at December 2009 of $65.00. He also owns a half share in approximately 2000 square feet of land situate at Morne du Don and which he said is now occupied by squatters and so there is no income.

[40] The Court did observe from copies of the bank accounts submitted by the Respondent that when compared with the usual activity on the accounts there were what could be described as some significant withdrawals of $12,000.00 between January – February 2010 from one (1) account, and $20,000.00 on another account between February 8th -19th 2010. These items were not the subject of cross-examination and so the Court leaves them alone. No deed of transfers were presented to the Court for either the land and house at Reduit or the land at Morne du Don.

[41] The Respondent owns two (2) motor vehicles and both are in excess of five (5) years old. The motor vehicle licenced PB 5899 was driven by the Petitioner when the Parties resided together.

Law

[42] The Act[2] provides that there is a single ground for breakdown of a marriage today and that is that it has been broken down irretrievably. A Petitioner is required to prove the breakdown by providing facts that support and satisfy one of the 4 matters set out in section 4. Sections 3 and 4 provide:

> "3. BREAKDOWN OF MARRIAGE TO BE SOLE DIVORCE
>
> The sole ground on which a petition for divorce may be presented to the Court by either party to a marriage is that the marriage has broken down irretrievably.
>
> 4 PROOF OF BREAKDOWN
>
> (1) The Court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the Court of one or more of the following facts, that is to say –
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent had behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least 2 years immediately preceding the presentation of the petition;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least 5 years immediately preceding the presentation of the petition."

[43] Both the Petitioner and the Respondent have said that the behavior of each other was the fact on which they relied to prove that the marriage had broken down irretrievably. In Rayden and Jackson's Law and Practice in Divorce and Family Matters[3] the issue of what behavior would suffice was described as:

> " 13.17 Behaviour unreasonable in relation to petitioner. Section 1(2)(b) of the Matrimonial Causes Act 1973 provides that irretrievable breakdown may be proved by satisfying the court that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. (Identical to the Saint Lucia Divorce Act section 2(1)(b))The words "reasonably be expected" prima facie suggest an objective test. Nevertheless, in considering what is reasonable, the

[2] Cap.4.03
[3] Volume 1, 16th ed. 1991, para.13.17 et seq.

court (in accordance with its duty to inquire, so far as it reasonably can, into the facts alleged) will have regard to the history of the marriage and to the individual spouses before it, and from this point of view will have regard to this petitioner and this respondent in assessing what is reasonable: allowance will be made for the sensitive as well as for the thick-skinned: or, as it used to be put in cruelty cases, the conduct must be judged up to a point by reference to the victim's capacity for endurance, and in assessing the reasonableness of the respondent's behavior the court would consider to what extent the respondent knew or ought reasonably to have known of that capacity. The approach has been thus summed up. The Court has to decide the single question whether the respondent has so behaved that it is unreasonable to expect the wife to live with him: in order to decide that, it is necessary to make findings of fact as to what the respondent actually did, and findings of fact as to the impact of that conduct on the petitioner: there, of course, a subjective element has been evaluated but at the end of the day the question falls to be determined by an objective test. It has been said that the correct test to be applied is whether a right–thinking person, looking at the particular husband and wife, would ask whether the one could reasonably be expected to live with the other taking into account all the circumstances of the case and the respective characters and personalities of the two parties concerned. It is the effect or reasonably apprehended effect of the respondent's behavior that has to be considered, behavior of such gravity that causes the court to come to the conclusion that this petitioner cannot reasonably be expected to live with the respondent….

13.18 Behaviour: cumulative effect. … Any and all behavior may be taken into account: the court will have regard to the whole history of the matrimonial relationship. But behavior is something more than a mere state of affairs or a state of mind. Behavior in this context is action or conduct by one which affects the other. It may be an act or omission or course of conduct: but it must have some reference to the marriage.

13.21 Adultery and belief in adultery as "unreasonable" behavior.…Belief in an adulterous association by the respondent, such belief being consequent on the respondent's behavior, may, where the petitioner's belief is reasonable in all the circumstances, even though adultery itself cannot be proved, be behavior on which the petitioner can rely when alleging that he or she cannot reasonably be expected to live with the respondent."

[44] Both the Petitioner and the Respondent claim by way of ancillary relief an interest in the matrimonial home and maintenance for their daughter. The Petitioner in addition, claims either maintenance or a lump sum payment. Ancillary relief is determined by reference being made to both the Civil Code and the Act and the

procedure by reference to the Divorce Rules 1976. The Act at section 53 provides that where there is a conflict between any other law, the Civil Code in this instance and the Act, then the Act shall prevail. Ancillary relief is described in the Act as being:

> "32 COMMENCEMENT OF PROCEEDINGS FOR FINANCIAL PROVISION ORDERS, ETC.
>
> (1)…
>
> (3) In subsection (2) "ancillary relief" means relief under any of the following provisions of this Act, that is to say, sections 21, 22, 23 and 24."

[45] Ownership of the matrimonial property is under consideration for declarations as applied for by both the Petitioner and the Respondent. The Court therefore believes that a starting point in determining ownership is the Civil Code. The Civil Code sets up what is deemed to be separate property and property of the community (community property) in a marriage. The Civil Code provides:

> " 1188. With respect to marriages taking place after the coming into operation of this article there shall be only one kind of community property, namely: legal community, the rules governing which are contained in this Chapter.
>
> 1189. Community commences from the day the marriage is solemnized: the parties cannot stipulate that it shall commence at any other period.
>
> 1190. Legal community is that which the law, in the absence of stipulation to the contrary, establishes between spouses, by the mere fact of their marriage, in respect of certain descriptions of property.
>
> 1191. Legal community may be established by the simple declaration which the parties make in the contract of their intention that it shall exist. It also takes place when no mention is made of it, when it is not expressly nor impliedly excluded, and also when there is no marriage contract. In all cases it is governed by the rules set forth in the following articles.
>
> 1192. (1) The property of persons married in community is divided into separate property and the property of the community.
>
> (2) Separate property comprises –
>
> (a) the property, moveable and immovable, which the spouses possess on the day when the marriage is solemnized;

(b) the income and earnings of either spouse, investments in the name of one spouse, and insurance policies taken out on the life and in the name of one spouse;

(c) property, moveable and immovable, acquired by succession, or by donation or legacy made to either spouses particularly;

(d) compensation payable to either spouse for damages resulting from delicts and quasi-delicts, and the property purchased with all funds thus derived;

(e) fruits, revenues, and interest, of whatever nature they be, derived from separate property, the proceeds of separate property, and property acquired with separate funds or in exchange for separate property.

(3) Property which is acquired by the husband and the wife during marriage in any manner different from that above declared is the property of the community.

1193. (1) Property is deemed to be the joint acquisition of the community unless it is admitted or proved to have belonged to, or to have been in the legal possession of one of the spouses previously to the marriage, or, if acquired in one of the ways set out in article 1192, or to otherwise belong to one of the spouses only.

Provided however, that where property is acquired by one of the spouses while they are living separate and apart from each other by virtue of a separation deed, such property is presumed to be the separate property of such spouse unless it is admitted or proved to be community property.

(2) Where spouses purchase property in their joint names such property falls into the community unless it is expressly stated at the time of purchase that they are purchasing with their separate funds.

1194. Income and earnings are the separate property of that spouse from whose separate property or by whose sole labour they come, without prejudice, nevertheless, to the liability of the spouses to contribute towards the education and the support of the children and the expenses of marriage.

In case of disagreement the judge determines the contribution, if any, to be made by either spouse in accordance with the duties, liabilities, means and circumstances of the spouses.

1195. (1) A deposit in a bank in the name of one spouse is presumed to be his or her separate property, and the bank is not concerned to ascertain whether it is separate or community property.

(2) Money payable to the wife by or through a bank or from funds in court in her name only is presumed to be her separate money.

1196. (1) Gifts and legacies made to one of the spouses do not fall into the community unless there is an express declaration to the contrary;

(2) Gift and legacies made to the spouses jointly, if made by an ascendant of one of the spouses are deemed to be the separate property of such spouse as being acquired under title equivalent to succession: and do not fall into the community unless there is an express declaration to the contrary.

1198. Property acquired during marriage with separate funds or in exchange for separate property is separate property."

[46] The procedure and process to be used for deciding ancillary relief in this suit is found primarily in the sections 22, 23, 24, 25, 28, 42 and 45 of the Act and rules 50 and 75 of the Divorce Rules 1976. The Court was also very grateful for the learning on the application process set out by Edwards J. (as she then was) in Craig Laurie Barnard v. Penelope Ann Barnard nee Bird[4].

[47] The provisions of the Act pursuant to which an application for ancillary relief is made and the matters to which the Court must give consideration before making an ancillary relief order are:

"22. FINANCIAL PROVISION FOR PARTY TO MARRIAGE

(1) On granting a decree of divorce or a decree of nullity of marriage or at any time thereafter (whether, before or after the decree is made absolute), the Court may, subject to the provisions of section 32(1), make any one or more of the following orders, that is to say –

(a) an order that either party to the marriage shall make to the other such periodical payments and for such term as may be specified in the order;

(b) an order that either party to the marriage shall secure to the other, to the satisfaction of the Court, such periodical payments and for such term as may be specified;

(c) an order that either party to the marriage shall pay to the other such lump sum as may be so specified.

(2) Without prejudice to the generality of subsection (1) (c), an order under this section that a party to a marriage shall pay a lump sum to the other party –

[4] Claim No. SLUHMT2001/0131

(a) may be made for the purpose of enabling that other party to meet any liabilities or expenses reasonably incurred by him or her in maintaining himself or herself or any child of the family before making an application for an order under this section;

(b) may provide for the payment of that sum by instalments of such amount as may be specified in the order and may require the payment of the instalments to be secured to the satisfaction of the Court.

23. FINANCIAL PROVISIONS FOR CHILD OF THE FAMILY

(1) Subject to the provisions of section 28, in proceedings for divorce or nullity of marriage, the Court may make any one or more of the orders mentioned in subsection (2)

(a) before or on granting the decree of divorce, or of nullity of marriage, as the case may be, or at any time thereafter;

(b) where any such proceedings are dismissed after the beginning of the trial, either or within a reasonable period after the dismissal.

(2) The orders referred to in subsection (1) are –

(a) an order that a party to the marriage shall make to a person specified in the order for the benefit of a child of the family, or to such a child, such periodical payments and for such term as may be so specified;

(b) an order that a party to the marriage shall secure to a person specified for the benefit of such a child, or to such a child, to the satisfaction of the Court, such periodical payments and for such term as may be so specified;

(c ) an order that a party to the marriage shall pay to a person specified for the benefit of such a child, or to such a child, such lump sum as may be so specified.

(3)….

24. TRANSFER AND SETTLEMENT OF PROPERTY AND VARIATION OF SETTLEMENTS

(1) On granting a decree of divorce, a decree of nullity or marriage or decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the Court may, subject to the provisions of sections 28 and 32(1), make any one or more of the following orders, that is to say –

(a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order

for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;

(b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the Court for the benefit of the party to the marriage and of the children of the family or either or any of them;

( c) …;

(d) an order extinguishing or reducing the interest of either or the parties to the marriage under any such contract or settlement.

(2)…

(3)…

25. FACTORS TO BE CONSIDERED BY COURT

(1) It is the duty of the Court in deciding whether to exercise its powers under section 22, 23 or 24 in relation to a party to the marriage and, if so, what manner, to have regard to all the circumstances of the case including the following matters, that is to say –

(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

(c) the standard of living enjoyed by the family before the breakdown of the marriage;

(d) the age of each party to the marriage and the duration of the marriage;

(e) any physical or mental disability of either of the parties to the marriage;

(f) contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) in the case of proceedings for divorce or nullity of marriage, the value of either of the parties to the marriage of any benefit (for example, a pension)which, by reason of the dissolution or annulment of the marriage that party will lose the chance of acquiring; and so to exercise those powers as to place the parties, so far as it is practicable, and having regard to their conduct, just to do so, in the financial position in which they

would have been if the marriage had not broken down and each had properly discharged his or her financial obligation and responsibilities towards the other.

(2) Without prejudice to subsection (3), it shall be the duty of the Court in deciding whether to exercise its powers under section 23 or 24 in relation to a child of the family and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say –

(a) the financial needs of the child;

(b) the income, earning capacity (if any), property and other financial resources of the child;

(c) any physical or mental disability of the child;

(d) the standard of living enjoyed by the family before the breakdown of the marriage;

(e) the manner in which he or she was being and in which the parties to the marriage expected him or her to be educated or trained; and so to exercise those powers as to place the child, so far as it is practicable and, having regard to the considerations mentioned in relation to the parties to the marriage in subsection (1)(a) and (1)(b), just to do so, in the financial position in which the child would have been if the marriage had not broken down and each of those parties had properly discharged his or her financial obligations and responsibilities towards him or her.

(3) ….

26. …

45. The Court, on making a decree of divorce or of nullity of marriage may, it if thinks fit, on the application of either party made before the decree of divorce or nullity is made, make an order –

(a) if any property of the parties is community property within the meaning of the Civil Code -

(i) directing that either party shall, for such time as to the Court may seem fit, be entitled to the use or usufruct of a part or the whole of such property, or

(ii) declaring either party forfeit to the other of his or her share of a part or of the whole of such property; or

(b) if any property of the parties or of either of them is separate property within the meaning of the Civil Code and the Court is satisfied that the other party has made a substantial contribution (whether in the form of money payment, or services, or prudent

management, or otherwise howsoever) to the improvement or preservation of such property –

(i) directing the sale of such property and the division of the proceeds, after the payment of the expenses of sale, between the parties in such proportions as the Court thinks fit, or

(ii) directing that either party pay to the other such sum, either in one sum or in instalments and either or at a future date and either with or without security, as the Court thinks fair and reasonable in return for the contributions made by that other party."

[48] The procedure for application for ancillary relief is prescribed by the Divorce Rules rule 50 and rule 75.

"50 Application by petitioner or respondent for ancillary relief. (1) Any application by a petitioner or by a respondent spouse who files an answer claiming relief, for –

(a) an order for maintenance pending suit;
(b) a periodical payments order;
(c) a secured periodical payments order;
(d) a lump sum order;
(e) a settlement of property order;
(f) a transfer or property order;
(g) a variation of settlement order shall be made in the petition or answer as the case may be.

(2) Notwithstanding anything in paragraph (1) an application for ancillary relief which should have been made in the petition or answer may be made subsequently –
(a) by leave of the Court, either by notice in Form 15 or at the trial: or
(b) where the parties are agreed upon the terms of the proposed order without leave by notice in Form 15.

(3) An application by a petitioner or respondent spouse for ancillary relief not being an application which is required to be made in the petition or answer, shall be made by notice in Form 15.

[49] In regard to a property order which would be made pursuant to section 45, rule 75 provides:

"75 Application for property order. (1) An application for an order under Part IV[5] of the Act (herein referred to as a "property order") shall be made by summons.

[5] Being section 45 thru to 50.

(2) There shall be filed with the application an affidavit by the applicant verifying the statements in the application and also a copy of the application and affidavit of service on the respondent.

(3) There shall be annexed to the copy of application for service a copy of the affidavit referred to in paragraph (2) and a notice in Form 28 with Form 6 attached.

[50] In Craig Laurie Barnard v. Penelope Ann Barnard nee Bird[6] Edwards J. distilled quite clearly the matter of applications for ancillary relief, matters for considerations when making a determination on ancillary relief and the English position and authorities in relation to the Act. For these reasons I quote her extensively. She said:

> [76] The exercise of the Judge's discretion under Sections 22(1) and 24(1) of the Divorce Act obviously requires the judge to weigh up a large number of different considerations in accordance with Section 25 (1). The decisions show that by a combination of all the powers in Section 22(1), Section 24 and Section 45 it is possible for the Court to make an order transferring the separate property of a spouse to the other spouse.
>
> [77] The case of Griffiths v. Griffiths demonstrates that the same evidence of contributions of a claimant spouse to the improvement of separate property of the other spouse, may be used to fuel an application under section 45(b) and also one under section 22(1)(c) of Divorce Act ([1974] All E.R. 932)
>
> [78] …The husband applied to the court under section 37 of the Matrimonial Proceedings and Property Act 1970, by reason of the improvements he had made to the house. He also claimed a lump sum payment under the English equivalent of section 22(1) (c) of the St. Lucia Divorce Act. The spouses' only capital asset was the matrimonial home which the wife sold for £54,000 (net) following the decree nisi. The court awarded the husband a lump sum of £7,000 and £4,500 for the improvements. The husband appealed and the Court of Appeal by a Majority decision did not disturb this award. CAIRNS LJ however opined that in considering the English equivalent of section 25 (1)(f) of our Divorce Act, the husband's contributions to the welfare of the family should have been given more weight since ""it was entirely, or almost entirely from his means, that the house was provided in the first instance, and he was found by the learned judge to have worked hard to support his family during most of the marriage."(at page 944)

[6] Claim No. SLUHMT2001/0131

[78-A] Roskill L.J. observed (at page 940): When one looks at s 2 (1) of the 1970 Act [similar to section 22(1) of the Divorce Act of St. Lucia] one sees that the Court has power to make anyone or more of the following orders, that is to say as set out in (a)(b) and (c). Under (c) it may "order that either party to the marriage shall pay to the other such lump sum or sums as may be so specified". When one turns to s.5(1)(f) [similar to section 25 (1)(f) of the Divorce Act St. Lucia] (s5 being the overall provision regarding the matters to which the court must have regard including what order to make under ss2 and 4) [Section 4 is the equivalent of Section 24 of St. Lucia Divorce Act],one finds as one of the prerequisites – '(f) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family…'

For my part I do not see why any adjustment required in order to give effect to the undoubted contributions that the husband made cannot be made under s.5(1)(f) more easily than under s.37. Section 37, to my mind, has its own place where it is proper to bring the proceedings under s.17 of the Married Women's Property Act 1882.

[78-B] Continuing at page 942 (paras a to b) Roskill L.J. said that "The purpose for which the house may previously have been conveyed to the wife may in this case (and indeed in other cases) be a material factor: but … I think that one starts from the fact that one has to look at the totality of the family assets. It does not matter who is actually the legal owner of the asset in question"

[85] It seems to me therefore from my analysis of the decisions and English legislation referred to in this judgment, that in the absence of the concept of community of property in England, there is no statutory provision like Section 45 (a) of the Divorce Act St. Lucia in England.

[86] Section 45(a) empowers the Court to dispose of community property by directing usufruct sharing of the community assets by the spouses or that one spouse must forfeit to the other his or her half share of the property.

[87] Consequently, the English doctrine of trusts and their legislation, have made provisions for spouses and children. Section 24(1) of the Divorce Act of St. Lucia, like the English equivalent contemplates only a disposition by a spouse of property of which that spouse is a beneficial owner.

[88] It seems now well settled law that Section 24(1)(a) of the English Act (and the St. Lucia Divorce Act), has given the Court jurisdiction to make transfer of property orders in respect of separate property solely owned by one spouse, as well as other property co-owned by both spouses, whether

it be the matrimonial home as in most cases it is, or any other capital asset of either party.

[90] A share or interest in property seems to be included in the word "property" in Section 24(1)(a), provided the property is not the subject of a settlement, or is not the subject of a limited or unlimited charge.

[92] The Court must approach the question of property transfer, having regard to the whole financial structure of both parties' assets.

[93] The Court should make a transfer order, only in recognition of the claimant spouse's contribution to the accumulation of the family's wealth, and so as to assure so far as practicable the claimant spouses future living standards.

[94] Section 25(1) of the Divorce Act lists the various matters that the judge must focus on, without ranking these matters in any kind of hierarchy. All of them are important and must be regarded. Which one of them will carry most weight must depend upon the facts of the particular case (Pgilowska v. Piglowska) [1999] 1 W.L.R. 1360, at 1370, 1373.

[95] The concept of equality has no place under Section 24(1) of the Divorce Act: (Pv.P) [1978] 3 All E.R. 70.

[96] Where both spouses are capable of maintaining themselves, even for a short marriage, ordering the husband to merely transfer his share in the matrimonial home to the wife is not enough, since the Court must have regard to the wife's standard of living during the marriage, and place her in the position she would have been in had the marriage not broken down, and the husband had performed his financial obligations to her (Potter v. Potter) [1982] 3 All E.R. 321.

97. Finally, in my opinion, the category of separate property referred to in the Judicial Statement of Lord Nicholls in White v. White (See paragraph 75 above) should not be regarded as closed in light of the enacted provisions of the Civil Code specifying what is separate property. This judicial statement also provides me with the authority for saying that apart from community property, or other property co-owned by the parties, the transfer of the separate property of one spouse by the Court to a claimant spouse, unless volunteered by the transferor spouse, ought to be a last resort. In my view, such an order should be considered and made only where the amount at which the future financial needs of the claimant spouse has been assessed is formidable, and the evidence shows that it probably cannot be paid by the other spouse."

## Findings

[51] The first issue of who has behaved in such a way that the other cannot reasonably be expected to live with him or her requires the Court to make findings of fact as to what was done or not done.

[52] The facts show that the Respondent throughout his evidence did not deny much of his behavior about the alleged relationships which were complaints by the Petitioner but rather the Respondent's attitude was that it was the Petitioner's own behavior which triggered and provoked his behavior. Further, the Respondent certainly appeared to believe that as husband he had a right to call the Petitioner the derogatory names that he did, search her belongings, and make allegations that she was a lesbian, was involved in a lesbian relationship, and subsequently involved in too close a relationship with a gentleman executive at the Petitioner's place of employment. Following that behavior the Respondent himself also said that he objected to the way in which the Petitioner treated her brother when he was living in the matrimonial home with his permission, he viewed his brother-in-law's presence as creating disharmony within the matrimonial home because in his opinion the Petitioner made much of her brother and not of the Respondent. The Respondent admitted to leaving the note of September 26th 2009, to the minor child and the telephone calls thereafter.

[53] While Counsel for the Respondent was at pains to emphasize to the Court that adultery had not been pleaded, nor a belief that there was adultery, and it was the Petitioner's close relationship with the gentleman executive which was objectionable, cross-examination by Counsel about dining together at the hotel where both the Petitioner and the gentleman executive worked, trips abroad, the negligee´ a sexually explicit book and discussion of intimate details of the marriage all seemed to say that the Respondent was suggesting that there was more than a close relationship with the gentleman executive. The only matter not cross-examined was that of intimacy.

[54] The Petitioner raised the matter of lack of contribution to the household as part of the Respondent's behavior with which she had complaint. The Respondent said

that he was the person who contributed substantially to the household while the Petitioner used her money to look after herself. Neither the Petitioner nor the Respondent supplied an iota of evidence to support their position. The Court believes that both Parties contributed to the maintenance of the household.

[55] The Court does not believe that it can make a finding that because two (2) persons have a close relationship and which relationship the Respondent finds objectionable that such is sufficient to grant the decree. It's the Respondent's Counsel own statement that they were not alleging a belief in adultery. As the Court sees it, there were accusations prior, and even the brother of the Petitioner seems to have been cause for accusation. Looking at all the facts pertaining to the conduct of both parties, the Court grants the divorce decree on the Petitioner's petition.

[56] In a matter of less than 31/2 years, their daughter will be eighteen (18) years and for all intents and purposes the issue of custody, care and control and maintenance will be at an end. In regards to their daughter, the Court finds that both the Petitioner and Respondent are caring parents and they appear to be doing the best within their own circumstances. Their daughter appears to not have any hobbies or participate in any cultural, social or after school activities. Her school grades are declining. The Petitioner works shift work hours, some days longer than others, is required to travel from time to time because of her job, and is a part-time student. It is not doubted that the additional education would benefit both their daughter and the Petitioner. The Respondent as a retiree his time is flexible and it is he who drives their daughter to and from school and is available at times during the week when the Petitioner is not. It is also a fact that from time to time the maternal side of the family assist with caring for their daughter.

[57] The Court rejects Counsel for the Respondent's suggestion that the Petitioner should change her job so as to accommodate their daughter. If the Court were to take Counsel's suggestion seriously it seems we would see some of the best persons who work shift hours such as emergency doctors, nurses, police officers, pilots, hotels workers and so forth either eliminated or giving up their jobs because

they have the responsibility of children. And let's not forget the "jealous mistress" called law which practice also demands long hours and in the Caribbean the majority of practitioners are female. The Court is of the view that the provision of childcare by parents in today's world and tight economies requires parents to be much more flexible than in the past both to secure income for the family and job experience for stability of income in the future. The Respondent from all accounts with a fixed pension ahead of him one might say he has less of a worry about in relation to his future income.

[58] The Court also finds from the evidence of both the Petitioner and Respondent that their daughter has been placed in a most unfortunate and unenviable position, that of messenger between her parents.

[59] Presently their daughter is residing between the Petitioner and the Respondent under an interim court order made June 2nd 2010. That order provides:

1. That the Petitioner and the Respondent are to share custody of the child of the family, Shakeela Myers until final order in this suit.
2. That the child, Shakeela Myers is to weekly reside with the Petitioner on the Petitioner's days off from work and such residence is to occur from 5.00 p.m. of the afternoon before the Petitioner commences her days off and the child is to be returned to reside with the Respondent by or at 9.00 p.m. on the final day off of the Petitioner.

[60] The Court is minded to make a like order for the next 31/2 years with liberty to apply by either the Petitioner or the Respondent if circumstances should change.

[61] In regards to maintenance for their daughter, the Court will order that each Party is to maintain their daughter when she is residing with them and share equally expenses for school, medicals, and extra curriculum activities.

[62] Pursuant to the Civil Code income, retirement payments, insurance, dividends and monies held in separate accounts are separate property. The Petitioner does not seek a declaration of community property of any of the separate assets held in the Respondent's name but rather she seeks pursuant to section 22 maintenance or a lump sum for herself. In making a determination about whether or not to grant the maintenance or lump sum sought, the Court must have regard to all of the

factors set out in section 25. The Petitioner is twenty (20) years younger than the Respondent and so barring ill-health, it could reasonably be anticipated that she would have at least another twenty (20) years working life ahead of her and would have the possibility of earning substantial income and especially so in light of the additional education which she is pursuing. The Court rejects Counsel for the Petitioner's submission that the Petitioner's job is not secure as there was no evidence to this effect and indeed the Petitioner has now been employed for several years with her present employer. The Petitioner has also not denied that she is able to earn extra income as an event planner/caterer and from which she earned in excess of $8,000.00 in 2008.

[63] The Petitioner said that she was indebted for $7,500.00 on her credit card which has an upper limit of $15,000.00. No evidence was provided as to what the $7,500.00 had been incurred for and so against the background that the matrimonial home is mortgage free, and no other expenses have been laid before the Court, the Court does not feel able to take this debt into consideration for determining whether or not to grant maintenance or a lump sum.

[64] The Respondent on the other hand, is retired and on a fixed pension of $1,848.00, and in economic terms this income could be described as flat. While he is able to provide music lessons at this juncture, the reality is that age and strength are not on his side so as to say he too could work for another fifteen (15) to twenty (20) years. The dividends received by the Respondent from Sagicor Life and LUCELEC when broken down are US$25.00 and EC$5.00 per month respectively and are surely not sufficient to support a monthly maintenance payment or a lump sum payment. As to the $600.00 received from rent, the Petitioner did not deny that the house at Reduit required repairs and that the Respondent was responsible for paying a half-share of the maintenance, insurance and annual property tax. No evidence was produced as to what these sums could be.

[65] Referring again to the age difference between the Petitioner and the Respondent but from a different perspective, the Respondent in addition to being 20 years older than the Petitioner said that he suffers from the degenerative disease

diabetes, glaucoma and a bad back. It is common knowledge that medical costs are continuing to rise and do have a serious impact on resources. The Respondent has said that upon the divorce decree being granted he anticipates that he will lose the benefit of being able to claim for his health care costs under the Petitioner's employer's plan. The Court believes he is correct and so for these illnesses he will need to have some resources.

[66] Looking at the standard of living enjoyed by the Petitioner before the breakdown of the marriage, the Petitioner's evidence was that she supported the household, herself and indeed she was still able to take trips for vacation. It therefore does not appear that the Respondent according to the Petitioner created any particular level of standard of living that the Petitioner will miss because of the breakdown of the marriage.

[67] In all the circumstances, the Court is of the view that the Petitioner has not made out a case for maintenance or a lump sum payment.

[68] As regards the matrimonial home, the Court must first make a finding of whether or not the property is community property or the separate property of the Petitioner. The Petitioner seeks a declaration of separate property and so she is sole owner and while the Respondent says it is community property of which he is entitled to a half share.

[69] The Court has observed that notwithstanding the claims of contribution to the purchase of the land and construction of the matrimonial home thereon, neither the Petitioner nor the Respondent has provided the Court with a single iota of evidence for example copies of plans, invoices, contracts, bank account statements/books or any other supporting documents to show the money that each has alleged that they contributed or its source.

[70] Dealing firstly, with the acquisition of the land, the Parties' evidence supported each other in so far as the Petitioner acknowledged that the Respondent gave her $20,000.00 for her father at or about the same time that ownership of a parcel of land owned by him was under discussion, and the Petitioner said she too gave her

father a further $6,000.00 at the time. The total of $26,000.00 being a combination before the Court of $6,000.00 and $20,000.00 is identical when totaled to the amount set out in the deed of transfer and so strikes the Court as more than coincidental. Further, from all appearances it does not appear that the Respondent had any input and or control in relation to preparation of the deed of transfer and yet the deed of transfer which was executed by the Petitioner, and so presumably she read it, confirms receipt of $26,000.00. Finally, the Court has also observed that the Petitioner's father, whom the Petitioner has said donated the land to her, was not called as a witness at the trial. The Court therefore finds that the Respondent did not gift his money to the Petitioner for her father but rather he did contribute towards the purchase of the land and did so in substantially a greater share than the Petitioner.

[71] As to construction of the matrimonial home the Court finds that both the Petitioner and the Respondent contributed, and the Petitioner confirms this. She says his contribution was a gift. Once again the Respondent denies there was any such gift. There were no particular actions of the Respondent cited to the Court which shows that the Respondent intended his contribution as a gift. There is some dispute as to the sums contributed by the Respondent but he gave a fairly detailed account as to the source of the funds, and the Petitioner also gave the source of approximately $63,000.00. The Court is not convinced that the sums paid towards the construction of the matrimonial home by the Respondent was a gift especially in light of the finding that the money towards the purchase of the land was not a gift. Further, the Court believes that if the Petitioner was seeking a gift of any interest that the Respondent might be perceived to hold in both the land and the matrimonial home constructed thereon then it was necessary for her to prompt for the necessary legal documentation to ensure that it was hers outright especially against the background that the Respondent had children from his first marriage who might survive him. The Court therefore finds that the Respondent's contribution to construction of the matrimonial home was not a gift.

[72] The Court therefore declares that the property registered as Block 1250D 592 together with the house thereon is community property.

[73] At this juncture the deed of transfer is registered in the sole name of the Petitioner with the result that the Respondent is required to make specific application for the relief that he seeks. There being no summons filed by Respondent pursuant to section 45 for what rule 75 describes as a 'property order' i.e. order for sale and distribution of proceeds, the Court is not able to make the section 45 orders sought by the Respondent .

[74] The Court is also restricted when looking at section 24 of the Act. There was no application by the Respondent in his cross petition for a lump sum payment.

[75] The failures of the Respondent necessarily means that notwithstanding that the Court has found that the property is community property the Court's 'hands are tied' by the Respondent's lack of proper procedural applications.

[76] As to the Petitioner's prayer for an order for settlement or transfer of property in favour of the Petitioner, the law requires the Petitioner to describe the property to which she refers in her pleadings. There was no reference to property other than that already referred and dealt with prior.

## Conclusion

It is ordered and declared that:-

(1) The Court holds that the Respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent and that the marriage solemnized on the December 19th 1995 at Pigeon Island in the Quarter of Gros Islet has broken down irretrievably and the Court decrees that the said marriage be dissolved unless sufficient cause be shown to the Court within three (3) months from the making of the decree why such decree should not be made absolute.

(2) The Court orders that there be joint custody and joint care and control of the child of the marriage Shakeela Utelca Jade Myers until she is eighteen (18) years of age and that during the school term the child is to reside with the Respondent from 8.01 p.m. on Sunday evening until 5.00 p.m. on the day preceding the Petitioner's days off and reside with the Petitioner from 5.01 p.m. on that day until 8.00 p.m. on her final day off, and school vacations are to be shared equally. There is liberty to apply by either Party.

(3) The Petitioner and Respondent are each responsible for the maintenance of the child when she is in their care and shall share equally medical, dental, all school related and extra curricular expenses until she is eighteen (18) years of age.

(4) The Court declares that the Court is satisfied that the only child who is a child of the family to whom section 41 of the Act applies is Shakeela Utelca Jade Myers and that the arrangements for the welfare of the child are satisfactory.

(5) The Court declares that the parcel of land situate at Degazon in the Quarter of Gros Islet and registered as Block 1250B Parcel 592 and the building situate thereon is community property.

(6) Each Party is to bear their own costs.

Rosalyn E. Wilkinson
High Court Judge