

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHMT 2010/0045

BETWEEN:

JANICE RITA MITCHELL

Claimant

AND

SEBASTIAN JULIEN MITCHELL

Defendant

Appearances:

Mrs. Celia Edwards Q.C. and with her Ms. Karina Johnson for the Petitioner
Mr. Dwight Horsford for the Respondent

2013: January 18

DECISION

- [1] **HENRY, J.** The parties were married in New York City on the 15th November 1991. Their divorce was made final in October 2010. The petitioner now seeks a property adjustment order in regard to what she describes as the matrimonial home and an order for lump sum payment.
- [2] There are no children of the marriage. However the petitioner has one adult daughter and two boys and the Respondent has two adult sons as well.
- [3] The allegations alleged by the parties do not paint a picture of a traditional marriage. The husband and wife did not regularly reside in the same country. The husband admittedly worked and resided in the United States of America most of the time, while the wife was regularly resident in Grenada. But this picture is also

not one that is unfamiliar to the Caribbean culture. Quite often one spouse may reside abroad for various reasons. Although often physically separated, the marriage may still subsists. This is the essence of the petitioner's allegations.

Petitioner's Allegations

- [4] According to the petitioner, after the marriage in 1991 she returned to Grenada, while the respondent continued residing and working in New York in the construction industry. She alleges that they opened a boutique which she ran and a restaurant. According to her the respondent would go back and forth working in the USA, while she ran things in Grenada.

- [5] Petitioner alleges that the couple wanted a home but no bank would lend the respondent money to buy the land. So she approached the National Commercial Bank and borrowed \$10,000.00 in March 1998. This sum, she asserts, was used to buy the land. It is her evidence that unknown to her the respondent put the deed in the name of his mother, Matilda Hazzard.

- [6] With regard to the state of the land when purchased, petitioner's evidence is that the land was briar bush, and that the respondent and herself cut it and burnt it with old tyres to clear the same so they could start their home.

- [7] The house she states was built without a mortgage and in stages. It took them about nine years to build. The house consists of two floors: upstairs where the respondent lives and three rental apartments downstairs.

- [8] With regard to the funds used to build the home, the petitioner's evidence is that the respondent would go to America to work and send money for her; that he then would come to Grenada, supervise the men, while also working himself, then he would go again. According to petitioner, she assisted by carrying sand, gravel

and blocks, clearing goods from customs, paying the men and running their other businesses. Petitioner also states that she purchased a quantity of plants from Mirabeau Farm Center which she planted on the land. Now the land, she states, has many fruit trees. In addition she planted dasheen, cabbage, peas and rotational crops.

[9] According to petitioner, a second piece of land, next door to the first, was purchased by them. Her evidence is that again, unknown to her the respondent put the deed in his mother's name.

[10] After the marriage broke down, petitioner's evidence is that respondent closed the joint account and took all the money, leaving her totally dependent on him for everything. Finally, the day of Hurricane Emily in 2005, she states that she had to flee the matrimonial home as a result of threats of physical violence from the respondent. About this time, he also closed down the various businesses they had without consulting her and instead opened 'Sugar Daddy' restaurant, from which she has been excluded. The respondent, she states, currently operates the restaurant from two locations.

[11] The petitioner states that she is 51 years old and has given the respondent and the marriage the better part of her life, love and effort. She now finds herself in the position of having to start from zero, again. She therefore prays the court to make the orders prayed for.

[12] Two witnesses gave evidence on behalf of the petitioner: Carlos Peters, petitioner's son and Cecilia George.

[13] The evidence of Carlos Peters is that he has lived with his mother for most of his life and has worked in some of the businesses the parties had together. He states that the respondent usually resided in the United States and so it fell to his mother

to run the businesses; that she would clear the goods on the port sent by the respondent from New York. With regard to the house at Woodlands, his evidence is that when the respondent returned to Grenada he met the house being built by the petitioner.

- [14] The evidence of Cecilia George is that she has known the parties for over fifteen years. She says she knows that they had various businesses together. She names specifically the boutique "Can't Touch This" and a restaurant "Eat Your Heart Out". According to her evidence the petitioner worked in all the businesses. With regard to the house in Woodlands, her evidence is that she knows when the home was being built. The respondent, she notes, would be in and out of Grenada, while the petitioner stayed in Grenada running the various businesses and supervising the house while it was being built. She recalls specifically that petitioner would go on the port and clear goods and materials.

Respondent's Allegations

- [15] Respondent paints a different picture. The respondent admits that the parties were married in the United States of America in 1991. He states however, that they lived together for only about a month after the wedding then petitioner returned to Grenada.
- [16] Respondent states that petitioner relocated to Grenada. He only relocated to Grenada just before Hurricane Ivan struck. His return he says was due to ill health. He could no longer continue employment in the construction field as he used to do.
- [17] Respondent states that in about 1999, he opened a restaurant/business known as 'Eat Your Heart Out' and a Boutique called 'Can't Touch This'. According to him, the petitioner controlled and operated the restaurant and a gentleman, Mr. Samuel

Nicholas, managed the Boutique. His evidence is that he took no income from the restaurant; that all its earnings were the petitioner's for he gave it to her for her income. As for the Boutique, his evidence is that the petitioner never ran or operated that business.

[18] The respondent labels as untrue the petitioner's allegation that they wanted a home, but that no bank would lend money to the respondent. He asserts that they rented two apartments from one, Davis John in Woodlands. One was the petitioner's home, because he, the respondent, was still permanently resident in the US. Further, he denies that he and petitioner ever decided to buy land together because they were separated and living apart from each other for most of the marriage.

[19] With regard to the \$10,000.00 the petitioner alleges she borrowed for the purchase of the land, Respondent states that he has no knowledge of any such transaction. He states that he is however aware that the petitioner used to traffic in cosmetics and clothes which she used to sell. He recalls that the petitioner would travel to New York to purchase Avon products and other items to send to Grenada.

[20] He is emphatic in stating that the petitioner bought no land in Woodlands or anywhere else that he knows of. Neither did the petitioner borrow any money for and/or gave him any money to buy land on her behalf or for both of them jointly.

[21] His evidence is that the first property mentioned by the petitioner, the deed to which is exhibited to her affidavit as 'B', is familiar to him. He says that that property is one of the properties owned and bought by his mother, Matilda Hazzard, now deceased. He states that he took no part in the purchase of the said property as the petitioner asserts. He further states that he was in the United States when his mother bought the property the petitioner is now attempting to claim an interest in.

- [22] Respondent also denies clearing the land with the Petitioner or burning bush from the land. He says he has no knowledge of any such acts, and reiterates that the land in question was purchased by his mother.
- [23] With regard to the construction of the house, the respondent's evidence is that the earth and foundation works were done in 1999, and that the petitioner had nothing to do with the matter at all. According to him, his son Julien Mitchell, who is an Architect by profession, drew and designed the plans for the building and he financed the construction of the house in phases, completing it in 2003. It is his position that the petitioner had or took no part in the construction of the house. Neither did she assist in any material or preparatory fashion in its construction.
- [24] He labels as untrue and incorrect the petitioner's assertion that in order to build the house he would work in America and send money for her; or that he would on visits to Grenada supervise the men who were building. He denies that he ever, even once, sent money for the petitioner to build any house as alleged.
- [25] Respondent denies any knowledge of petitioner's purchase of plants or of her planting trees and rotational crops on the land. He states that any fruit trees found now on the property would have been planted by him in recent times. According to him, he knows of no time when the petitioner planted trees on his mother's property in Woodlands.
- [26] In response to the petitioner's claim that she worked as hard as the respondent did to raise their standard of living, the respondent states that he has no knowledge of that claim. He says that between the time of their marriage in 1991 and the year 2004 when he relocated to Grenada, he was permanently resident in New York and came to Grenada on occasion. He declares that he and the petitioner were not living together at all.

- [27] With regard to the purchase of the second parcel of land, the respondent states that the land was purchased by his mother with input of his eldest son, Julien Mitchell. Again he is adamant that he was not involved in the purchase of the land, neither did he contribute any funds towards its purchase. His position is that the petitioner has no interest in this parcel of land at all.
- [28] He states that the property at Woodlands was not the matrimonial home for the couple; that it was not owned by them nor did either of them have an interest of a proprietary nature in it. Furthermore, that he did not force the petitioner out of the house during Hurricane Ivan as alleged. According to his evidence, in 2004 he permitted the petitioner lodging in an apartment of the house after she was put out of a house where she lived with another person. When Hurricane Ivan destroyed the roof of the house, he told the petitioner that she could not stay at the house any longer. Further that it was his son Julien who paid to repair and replace the roof on the house.
- [29] With regard to his income, he states that the business 'Sugar Daddy' is owned by his two sons; that there is only one outlet located at the Sugar Mill in Grand Anse; that the business takes in \$1,500.00 to \$2,000.00 profit, but in recent times, the business is barely breaking even. He further states that he has no real property in his name or jointly with the petitioner. He has a Suzuki van for which he pays the bank \$1,300.00 per month. He also owns a 1966 Nissan Laurel which he purchased in 2000. His evidence is that he practically lives off the business; that he eats and drinks from the restaurant with assistance from his two sons in the United States. He therefore prays that the court not grant the orders sought by the petitioner.
- [30] No witnesses were called on behalf of the respondent.

The Law

- [31] In an application for a property adjustment order or for an order for the payment of a lump sum, section 25 of the Matrimonial Causes Act 1973 still 'rule the day'. This section sets out the matters the court shall have regard to when exercising its powers on an application under sections 23, 24 or 24A. In particular section 25 (2) (a) requires the court to consider the income, earning capacity, property and other financial resources which each party to the marriage has or is likely to have in the future. Among the other matters, section 25 (2) (f) also specifically requires the court to consider the parties contributions.
- [32] In these matters the search is always for what are the requirements of fairness in a particular case¹. The court in **Miller** endorsed the view that a husband and wife are for all practical purposes equal partners in marriage and therefore when the partnership end, each is entitled to an equal share of the assets of the partnership unless there is good reason to the contrary.
- [33] The Court of Appeal in **Charman v Charman**² reiterated that 'the sharing principle' meant that property should be shared in equal proportions unless there is good reason to depart from such proportions. Secondly, the principle of equal sharing should apply to all property, whatever its source. The fact that property was non-matrimonial was likely to provide a reason to depart from equality. Thirdly, special or stellar contributions remain a ground justifying departure from equality in exceptional circumstances. Such contribution can in principle take a number of forms: it can be non-financial as well as financial.

¹ *Miller v Miller* [2006] UKHL 24

² [2007] EWCA Civ 503, [2007] All ER (D) 425

Respondent's Submission

- [34] The respondent submits that the petitioner claims an interest in the property based on alleged contributions she made financially and materially. Therefore, her claim is based on constructive trust "born out of a common intention that she should have such an interest". He cites the case of **Roberts v Roberts**³. He submits that in any event, it is clear that constructive trust is the more appropriate tool of analysis in most matrimonial cases, especially in the type of claim involved in this present matter.
- [35] He further submits that sections 23, 24 & 25 of the Matrimonial Causes Act are concerned with property of each of the parties and property or financial assets of either of the parties or 'family assets'. Therefore the **Miller v Miller** considerations are not applicable here. The House of Lords decisions, he states, are premised on the existence of property and or assets held by either party or both when section 25 exercise or considerations are engaged. Respondent urges that no such evidence of the existence of any matrimonial assets is in issue here. There is no evidence that the Woodlands property is owned by the respondent. He submits that the contrary is true as evidenced by the Deed. Petitioner, he insists cannot establish affirmatively that she contributed to the construction of the house and the acquisition of the land.
- [36] With regard to the petitioner's claim of \$10,000.00 loan for the purchase of the land, his submission is that no credible evidence of such has been given. No cogent evidence or documentary proof of the purpose of the loan was tendered. The only evidence before the court is that she borrowed \$10,000.00 and drew down on it. The court is not permitted to speculate that it was used for the purpose alleged.

³ High Court Suit No GDAHMT1995/0075 per Barrow J (Ag)

- [37] The peculiar situation here, he says, is that the property claimed to be shared by the wife is in the name of a deceased party who has devised it to a 4th party. There are therefore third party interests involved which the application does not and cannot appropriately deal with.
- [38] The respondent also submits that there is no evidence of fraud or fraudulent conveyance, and that same is not to be presumed.
- [39] With regard to the sufficiency of the petitioner's affidavit, respondent submits that he has provided particulars of his property and income in accordance with Rule 2.58 of the Family Proceedings Rules 1991. Petitioner has failed to set out these particulars as required. He therefore submits that there is very little that this court may utilize to determine the ancillary relief claim in favour of the petitioner. He therefore asks that it be dismissed.

Analysis and Finding

- [40] The respondent has challenged the ability of the court to make a property adjustment order due to the absence of certain evidence, the court is required to consider in making such an order. His submission is that petitioner has failed to put before the court the income, earning capacity and property of the petitioner, being information to which the court pursuant to section 25 (2) must consider on this application. He says that the court is therefore not in a position to make the requested order.
- [41] He refers the court to the case of **Roberts v Roberts**, where Barrow, J on finding certain inadequacies in the application for property adjustment order, declined to make the order. The Judge stated that because the fundamental purpose of a property adjustment order is to adjust the financial position of the parties, it was

indispensable that the 'pre-adjusted position of the parties should be known. In the absence of that knowledge the court is ignorant and would be unable to have regard to the matters that section 25 of the Act says it should. Both parties in Roberts had neglected to give full particulars of their current income or property.

[42] Although Barrow, J. declined to make the property adjustment order he did grant other relief. He stated that it is a cardinal principle that there should be avoidance of multiplicity of proceedings. Therefore, in accordance with the overriding objective of dealing with cases justly, he proceeded to determine the issue that the parties litigated. He took this course, he said, notwithstanding the conceptual difficulties that the framework of the litigation presented and notwithstanding that there could be no full exercise of the powers that a court ought properly to exercise on an application for a property adjustment order.

[43] I accept that the petitioner did not have a section in her affidavits headed 'income' or 'Property' as did the respondent. I accept that there ought to have been such headings setting out her income and however little or much she currently owns. But her affidavits evidence is that on the day of hurricane Emily she was forced to flee the matrimonial home. In paragraph 22 of her January 27, 2011 affidavit, she states that she was forced to beg lodging at the home of one of the sisters from her church; that it was only with her recent employment that she has started renting a room out of which she lives and that today she has no bed in the room which she rents. The essence of her affidavit is that she has no assets, save the interest she is claiming in the Woodlands property.

[44] I will adopt the rationale of Barrow, J. and in the interest of dealing with the case justly and to avoid multiplicity of proceedings, I will proceed to determine the issue the parties have litigated. I do not think this will prejudice the respondent since his position is that there are no family assets.

- [45] Section 24 of the Matrimonial Causes Act 1973 empowers the court to make a property adjustment order on the granting of a divorce. Among the orders the court can make is “an order that a party to the marriage shall transfer to the other party... such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion.”
- [46] The petitioner’s prayer is for an equal share of what she alleges to be the former matrimonial home. The deed exhibited by the petitioner shows, however, that the property was purchased in the name of Matilda Hazzard, mother of the respondent, who in her will has devised it to respondent’s sons. The petitioner’s submission is that despite the name on the deed, the property was acquired by the joint effort of the petitioner and respondent during the course of the marriage. The respondent flatly denies having made any contribution to the acquisition of the property, and has resisted any attempts to label the property ‘matrimonial’ in relation to them.
- [47] The first issue to be determined therefore is whether either party contributed to the acquisition of the property at Woodlands so that it can fairly be said that either or both have an interest in the said property.
- [48] The petitioner has asserted contributions both financial and non-financial in nature. With regard to her alleged financial contribution of \$10,000.00, which she alleges was obtained from a bank loan, a copy of the repayment schedule from the bank was exhibited. It shows a loan in the amount alleged was made to the petitioner on 10th March 1998. The purpose of the loan was not indicated on the document. However, her evidence is that the respondent had asked her to obtain a small loan to purchase the land, since he was unable to, due to a bad credit history. It was in response to this request that she says she approached NCB Bank and was able to obtain the said loan, which according to her was used to purchase the land at Woodlands.

- [49] The copy of the deed shows the date of purchase as 4th May 1998.
- [50] At first, the respondent flatly denied taking any part in the purchase of the land, adding that he was in the United States when his mother bought the property. However, on cross-examination he admitted some involvement in the transaction. Despite his claim that he was in the United States when the transaction was done, he admitted that it was he who located the land and who negotiated the price. But he continues to maintain that he took no part in 'the buying of the property'.
- [51] In cross-examination he denied that while in New York it was petitioner who supervised the construction and kept things going. For the first time he asserted that it was his brother, Nimrod Hazzard, who supervised the construction of the house, and also assisted in the actual building of the house. This information was not in his affidavit, nor was it put to the petitioner on cross-examination. Further discrepancies and contradictions were evident on cross-examination. In his affidavit he clearly stated that his son, the Architect, drew the plans for the building and that he financed the construction of the house in phases, completing it in 2003. However, under cross-examination his evidence is that the house was not completed in 2003. He claims that when he returned to Grenada in 2003 the house was not completed; he stayed in a room. Then he left and returned in 2004 because of illness and from that point he lived in the house.
- [52] In further cross-examination respondent asserts that he and the petitioner ceased to live together as husband and wife around 2003. But even this evidence seems to contradict his affidavit evidence. At paragraph 17.1 he had stated that between the time they got married in 1991 and the year 2004 when he relocated to Grenada, he was permanently resident in New York; that he only came to Grenada 'on occasion' and that he and the petitioner 'were not living together at all'. Yet in cross examination he admits living with the petitioner as husband and

wife in Grenada in more than one location, including, Motley Hill and Davis John apartments in Woodland.

[53] All in all I found the respondent's evidence to be contradictory and unreliable. He certainly was not candid with the court. I did not find him a credible witness. He sought to mislead the court as to the true nature of the relationship between himself and the petitioner during the marriage and to paint a picture of limited contact and involvement with her. I do not accept this. On the contrary, I have found that when one examines the various aspects of their married life, they were well intertwined, despite the fact that respondent worked and resided in New York much of the time. They conducted businesses together. They operated not one, but two joint bank accounts in Grenada: one at Scotia and one at Capital Bank International. They also shared residences. Whenever, the respondent was in Grenada, he lived with petitioner as husband and wife. He paid the rent on the apartment they shared in Grenada.

[54] I also do not accept respondent's evidence that during twenty years of marriage they never made plans to buy land or acquire a home. I find it incredible that a man whose life work and trade was in the construction industry never made plans to build a home for his retirement. Respondent does not allege that he built or acquired a home elsewhere. In fact when ill-health forced him into retirement, it was to Grenada, his home, to which he resorted. I accept petitioner's evidence that they planned to live eventually together in Grenada and that they made plans to acquire a home.

[55] I also accept Petitioner's evidence that she obtained the \$10,000.00 loan for the purchase of the land. Although the loan document does not refer to the land, the timing of the loan – a mere 2 months before the purchase – coupled with her evidence create a strong inference of the connection she alleges. I reject the suggestion by the respondent that the money was used to purchase cosmetics for

sale. In fact I find petitioner's evidence convincing. In light of the respondent's lack of credibility generally, and the lack of any other evidence to buttress his allegations, I find that the petitioner has demonstrated on a balance of probability that the loan was obtained for the purchase of the land as alleged and that it was so used.

[56] The purchase price of the land was \$14,600.00, obtaining the loan therefore played a significant step in the purchase of the land. According to petitioner, repayment of the loan was from the proceeds of the couple's business. I therefore find that both parties contributed to the purchase of the land.

[57] I further find that the land was wrongfully placed in the name of Matilda Hazzard, mother of the respondent, to the exclusion of the petitioner. I also find on the evidence that the intention was to defeat any claim for an interest by the petitioner.

[58] With regard to the construction of the house, I also accept the evidence of the petitioner of her contribution. Although non-financial in nature, it was significant in light of respondent's absence from Grenada during a good portion of the time the house was under construction. Her evidence in respect to her non-financial contribution has been supported in material aspects by the evidence of Cecilia George. Even though on cross-examination she was not sure of the year construction began, I found her evidence to be credible.

[59] I also accept Petitioner's evidence that she received money from the respondent which was applied to the construction of the home.

[60] Respondent's response, other than a blanket denial, is the bald statement that his son Julien financed the construction of the house in phases. I note that there is no allegation that Matilda Hazzard contributed in any way to the construction of the house. Julien is a son with whom respondent has alleged a very close

relationship, but no further details were provided. Unquestionably, the burden of proof is on the petitioner. However, given the respondent's lack of credibility in other areas of his evidence, I find his bare assertions on this issue unconvincing. I find that the petitioner's evidence is to be preferred over respondent's. I find therefore that the property at Woodlands was acquired by the joint effort of the parties during the marriage, and is therefore matrimonial property. The court can therefore properly exercise its jurisdiction under the Matrimonial Causes Act in relation to the application for a property adjustment order.

[61] With regard to the second parcel of land, the only allegation with regard to this parcel is contained in paragraph 18 of the petitioner's affidavit of 27th January 2011. She states: "Then we bought a second piece of land next door to the first. Again, unknown to me he put the deed in his mother's name, a copy of which is exhibited as "C". The Deed indicates that the land was purchased in July 2006 at a cost of \$16,851.25. There are no details as to the source of the funds used for the purchase or the nature of her contribution. The petitioner's unsupported statement provides insufficient evidence on which the court can find that either of them contributed to the purchase of the land. Her application in respect of this parcel therefore fails.

[62] The court must now decide the extent of the interest the petitioner is entitled to.

[63] Other than the loan, which was used in the purchase of the land, the petitioner does not allege any financial contribution. Cash contributions over the nine year period it took to build the house, were contributed by the respondent. The evidence also pointed to labour by various workmen and family members. As noted the evidence is that the respondent throughout the life of the marriage worked in the construction industry. He would come to Grenada at intervals and work on the house. He also shipped 'material' to Grenada which was cleared by

the petitioner. I find that the respondent's contribution was stellar and justifies a departure from the equality principle.

[64] Stamp LJ noted in **Martin v Martin**⁴ "It is of primary concern in these cases that on the breakdown of the marriage the parties should, if possible, each have a roof over his or her head. That is perhaps the most important circumstance to be taken into account in applying section 25 of the Matrimonial Causes Act 1973 when the only available asset is the matrimonial home. It is important that each party should have a roof over his or her head whether or not there are children of the marriage."

[65] I have already found that the parties made plans to acquire a matrimonial home. I find that the house at Woodlands was built with the intention that it be used as a matrimonial home. I find further that the marriage broke down shortly after the petitioner moved into the home. So that it served as the matrimonial home for only a short period of time.

[66] The property is a two-storey structure with four bedrooms upstairs. Downstairs has three separate rental units. Respondent currently occupies the upstairs portion. While the petitioner lives in a rented room. Had the marriage not broken down, petitioner could have reasonably expected to remain in the matrimonial home. Now that the marriage has ended, fairness requires that petitioner at least have a roof over her head.

[67] While the parties started several businesses during their marriage, none seemed to have survived. Petitioner has made allegations that the respondent closed them down when the marriage broke down. I note that the matrimonial property is the only asset remaining. It is an important consideration for the court.

⁴ [1977] 3 All ER 762 at 765

[68] With regard to the respondent's income, basically he says he lives off his sons' small restaurant and that he gets some assistance from his sons. Respondent does not admit to having a monthly salary. But he states that the business makes a profit of \$1,500.00 to \$2,000.00. He admits to owning two vehicles: a used Nissan Laurel, 1996 model. The value was not stated. The second is a Suzuki van for which he pays to the bank \$1,300.00 monthly. The Petitioner, on the other hand, states that since the businesses have been closed she is seldom employed.

[69] Fairness requires that that, under the circumstances herein, the petitioner be granted a 1/3 interest in the property.

Available Relief

[70] The fact remains that the property is not in the name of the respondent. So an order for transfer of the property cannot be made in this application before the court.

[71] The petitioner refers the court to section 37 of the Matrimonial Causes Act. That section provides:

"Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person –

(a)

(b) If it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;"

[72] Petitioner also refers the court to the case of **Romney v Romney**⁵ where a

⁵ Suit No AXAHMT 107 of 1998

transfer of property was set aside on a finding that the transfer was made for the sole purpose of defeating any effort by the wife to enforce her judgment in a matrimonial proceeding. It is submitted that, an application could be made under the principle in **Romney v Romney** to set aside the conveyance and have the property sold.

- [73] In order for the court to consider such an application in this matter, the Personal Representative of Matilda Hazzard, deceased would need to be joined in the proceedings. According to the will, the Woodlands property has been bequeath to respondent's sons. Even though no evidence was put before the court that the Personal Representative has executed a Deed of Assent to the said persons named in the will, these persons would also need to be served. Therefore an application to set aside the conveyance to Matilda Hazzard cannot be considered at this time

The Request for Lump Sum Payment

- [74] Petitioner asks that a lump sum order be made or a valuation of the property and a lump sum payment to the petitioner of a proportion of the value of the property be ordered. Petitioner submits that she is not interested in a physical partition of the property but merely wishes to be paid for her interest therein, she therefore requests that a lump sum order can be made at this stage without the setting aside of the conveyance.
- [75] The only lump sum order that the court could make would be for the payment to the petitioner of the proportion of the value of her interest in the property. A valuation of the property would be needed and the court would need to look at the respondent's standard of living in determining his ability to pay.

[76] The respondent's evidence is that he has retired due to ill health. He has been diagnosed with type two diabetes and an enlarged heart (no medical evidence has been submitted). The restaurant 'Sugar Daddy' which he engages in, according to him, belongs to his sons. A copy of the correspondence from the Ministry of Works regarding the lease for the premises, shows approval of the lease in the name of Julien and Orlando Mitchell. Other than the two vehicles previously mentioned, he claims to have no other property. He does not state a salary, but instead assert that he lives off the restaurant with assistance from his two sons. No evidence to contradict this evidence has been submitted.

[77] The petitioner alleges that the respondent closed the businesses they operated together without consultation with her. She also makes the same allegation in regard to the joint bank accounts the couple once held. Unfortunately, no further information has been given upon which the court can base a decision. No information is disclosed as to the financial condition of the businesses at the time they were closed. Likewise the court has no knowledge of the amount of funds in the joint accounts at the time they were closed. Upon the information in the record, there is nothing upon which the court can base an order for the payment of lump sum to the petitioner. Accordingly that request is denied.

[78] The most that the court can do on this application is to make a declaration as to the interest of the petitioner. The petitioner would need to follow up with the relevant application on notice to the third parties.

[79] Accordingly, judgment is granted in favour of the petitioner as follows:

1. A declaration that Petitioner is the owner of and entitled to a 1/3 share in the property located in Woodlands, excluding the second parcel of land, The Deed to which is exhibited as 'C' to petitioner's affidavit.
2. Liberty to apply.

3. Cost to the petitioner in the sum of \$3,500.00.

Clare Henry
HIGH COURT JUDGE