BARBADOS
[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
FAMILY DIVISION

No. 415 of 2010

IN THE MARRIAGE OF:

MAY ETTA KING **APPLICANT**

AND

JOHN WINSTON KING **RESPONDENT**

Before the Honourable Mr. Justice William J. Chandler, Judge of the High Court

2013: April 11
May 8, 15

Beverley Lady Walrond Q.C. for the Applicant/Wife
Mr. John Winston King, in person

DECISION

BACKGROUND

[1] The parties to this action were married on 14 July 1990. The Applicant/Wife filed an application for dissolution of marriage on 13 July 2010. On 3 December 2010 the Honourable Mr. Justice Randall Worrell granted orders under ***sections 27*** and ***42*** of the ***Family Law Act, Cap. 214 of the Laws of Barbados ("the Family Law Act")***. The *decree nisi* became absolute on 4 July 2011. Worrell J. also ordered the Applicant/Wife to pay the Respondent/Husband maintenance of $400.00 per month in respect of the infant child of the marriage, Corey King, commencing the 1st day of January 2011.

THE APPLICATIONS

The Applicant/Wife's Application

[2] On 30 April 2012 the Applicant/Wife filed an application for the following orders:

(a) That she be at liberty to pursue her application in respect of the settlement by the Court of her right to remove the Respondent as the named beneficiary of her two insurance policies Nos. 9694040 and 3287887 taken out by her with American Life Insurance Company Limited notwithstanding that the period of one year from the *decree nisi* has elapsed;

(b) That the Court do alter the right of the Respondent to the said policies owned by the Applicant by ordering the removal of his name therefrom as the beneficiary of the said policies; and

(c) That the Respondent be ordered to pay the Wife's costs occasioned by this Application on an indemnity basis in the sum of $4,500.00 plus the out of pocket expenses and the VAT chargeable thereon;

(d) Such further or other order as to the Court may seem necessary and/or just.

The Respondent/Husband's Application

[3] In his affidavit in response the Respondent/Husband applied to the Court for the following orders:

(a) That the applicant Ms. May Etta King be commanded, prohibited and/or estop[ped] from removing the Respondent['s] name of John Winston King as an irrevocable beneficiary from insurance policies numbered 3287887 and 9694040 issued by the American Life Insurance Company;

(b) That there should be no alteration to the respondent['s] beneficial rights and interests arising under the said policies;

(c) That the monies payable under the two policies are not subjected (sic) to the control of the policy holder Ms May Etta King;

(d) That the applicant May Etta King do pay to the respondent John King all arrears on maintenance due of the month of December 2011, January and February 2012 in the sum of $1,200 in full;

(e) And that the applicant do pay the Respondent cost[s] occasioned by this application in the sum of $1,500; and

(f) Any such order as this honourable court deems fit.

THE EVIDENCE

The Applicant/Wife's affidavit

[4] An affidavit in support of the application was filed on 21 June 2012 in which the Applicant/Wife deposed that she was the owner of two life insurance policies Nos. 3287887 and No. 9694040 ("the policies"), both with American Life Insurance Company ("Alico"). She named the Respondent, her then husband, as the beneficiary of those policies since they were married at the time that the policies were taken out. She deposed that, subsequent to the divorce, "I requested him to sign a Change of Beneficiary Form so that I may remove him as my named beneficiary and he did so, but the signature was not witnessed."

[5] She further deposed that the Respondent/Husband was asked to contact her insurance agent to verify his signature, but failed to do so. She then instructed her Attorney-at-Law to write to the Respondent/Husband on 8 March 2012, giving him until 24 March 2012 to visit her offices to verify his signature on the said documents. The Respondent/Husband made no response to the letter of 8 March 2012.

[6] She deposed at paragraph 5 of her affidavit "I would suffer a hardship if in fact I am forced to leave the proceeds of my policies for the said Respondent from whom I am divorced whilst I also have a child and other relatives whom I may wish to benefit."

The Respondent/Husband's affidavit

[7] The Respondent/Husband filed his affidavit in response to the application on 19 June 2012. He deposed that, with respect to the policies "…Numbered **9694040** and **3287887** the beneficial interest in the same is vested in me as an irrevocable beneficiary." The said

policies were taken out by the Applicant/Wife (as owner) with Alico some time before 1997 and the monies payable under the policy are "not subject to the control of the applicant policy holder or the creditors of the applicant policy holder and the same do not form part of her estate."

[8] He deposed that he was of the view that the Applicant/Wife was not at liberty to effect necessary changes to remove him as beneficiary since his designation as named beneficiary was irrevocable and because the policies were taken out before 1997, the date of passage of the ***Insurance Act, Cap. 310*** of the ***Laws of Barbados*** **("the Insurance Act")**. Therefore, he deposed, his consent was necessary and he was not prepared to give the Applicant/Wife consent. He conceded that if the policies had been taken out after 1997, his consent would not be required because the ***Insurance Act*** would have been in the Applicant/Wife's favour. The Court interpreted that statement to mean that the Insurance Act would have enabled her to do so. He reiterated that the Applicant/Wife possessed no "beneficial, contingent or vested interests in the two policies in issue".

[9] He further deposed that the Applicant/Wife brought two blank forms from Alico for him to sign. He told the Applicant/Wife that he did not remember that she had taken out the policies and asked about the status of the same. No satisfactory answer was given. He also deposed that the Applicant/Wife induced him to sign the two forms and that he signed the same "under mistake". Alico refused to accept the forms "by virtue of the way in which the same were presented to them by the applicant." The Applicant/Wife subsequently asked him to accompany her to Alico. He refused and told her to look at the ***Insurance Act***.

[10] Mr. King contended that the Applicant/Wife could not, during the lifetime of a *cestuis que* trust (himself as beneficiary), alter or revoke the designation and/or beneficial interests arising under the policy. He claimed that the policies had the special effect of creating a trust in favour of the object therein named and that, so long as any object of the trust remained unperformed, the policy monies did not form part of the estate of the insured. He deposed that he was strongly convinced that this was the position whether or not there was a pronouncement of a *decree nisi*, a decree absolute, or even if the Applicant/Wife had died.

[11] He claimed that he was a beneficiary *sui juris* and possessed the right to call in the estate arising out of the fund so long as the equitable and beneficial interest on the said contingency had arisen. Therefore, he deposed that at the time of the happening of the event upon occurrence of a contingency, the said funds became payable in favour of the objects named and the same should be payable to the *cestuis qui* trust in accordance with the terms of the settlement.

[12] The Respondent/Husband further deposed that he wrote to Alico on 31 January 2012 and requested information with respect to the policies, he also visited the company on 14 June 2012, but the company refused to provide such information since they could not "give away any information on the policy because the applicant is the owner and the payer." He, however, was of the opinion that a beneficiary had a proprietary right to inspect trust documents and should be allowed to see the status of the said policies in issue.

[13] At paragraph 8 of his affidavit he deposed that the Court should not sanction the variation of any beneficial interests arising under the policies because the Applicant/Wife was in breach of the 3 December 2010 order of Worrell J., in that she failed to pay the maintenance ordered by the Court in the sum of $400 per month for the period December

2011 to February 2012. He contended that this action forced him to seek financial assistance from the Barbados Public Workers' Co-operative Credit Union Ltd. in the sum of $800 to "set off the arrears for the due period". He made an application for an order for the payment of the alleged arrears in paragraph 15 of the same affidavit.

THE APPLICANT/WIFE'S SUBMISSIONS

[14] Lady Walrond submitted that the Court ought to exercise its discretion in the Applicant/Wife's favour and allow the application. The *decree nisi* was granted on 3 December 2010 and the Applicant/Wife filed her application on 30 April 2012. The one year limitation period during which the application should have been filed expired in December 2011. Counsel therefore submitted that the Applicant/Wife was only about five (sic) months outside the time for filing.

[15] Counsel submitted that the application was in two parts, firstly the application for leave to file out of time and secondly the question of whether or not there was power vested in the Court to vary the designation of the named beneficiary under the policies. Lady Walrond conceded that the issue as to whether or not the Respondent/Husband's name could be removed was a live one, but agreed that a decision on that matter would have to await the outcome of this present application since the Applicant/Wife could not, of her own volition, alter the named beneficiary under the policies.

[16] Counsel submitted that the first policy was executed in about 1990 prior to the parties' marriage. The second policy was executed in 1997. Counsel relied upon the affidavit of the Applicant/Wife in which she deposed that hardship would be occasioned to her if the substantive application was not allowed to proceed since the Applicant/Wife would be paying the premium on the insurance policies thus benefitting the Respondent/Husband from whom she was divorced and she would be unable to direct by will or otherwise the persons who should benefit from these policies.

THE RESPONDENT/HUSBAND'S SUBMISSIONS

[17] The Respondent/Husband submitted that, as a named beneficiary, he could not be removed from the policy without his consent and reiterated what he deposed to in his affidavit of 19 June 2012. He relied upon ***section 115(1)(b)*** of the ***Insurance Act*** which provides:

> "the moneys payable under the policy are not subject to the control of the policy-holder or the creditors of the policy-holder and do not form part of his [her] estate."

[18] He also said that he had in fact signed the Change of Beneficiary Form intending to benefit Corey King, the infant child of the marriage, as the primary beneficiary and not the other relatives and friends of the Applicant/Wife. The agreement between himself and the Applicant/Wife was to benefit their infant child.

[19] Mr. King referred to ***section 114*** of the ***Insurance Act*** and claimed that the application to have his name removed from the policies was statute barred as the policy was executed in 1997.

[20] Mr. King also repeated his submission in relation to the payment of the $1,200.00 arrears of maintenance referred to in his affidavit.

THE ISSUES

[21] The Court is of the opinion that the issues for its immediate determination arising out of the Applicant/Wife's application are as follows:

1. Whether the Applicant/Wife should be granted leave to file her application out of time, that is, in excess of one year after the granting of the *decree nisi*; and
2. Whether the Court has jurisdiction to order the removal of the Respondent/Husband's name from the Applicant/Wife's policies as named beneficiary of those policies.

Under the Respondent/Husband's application only one issue arises for present determination, namely:

3. Whether the Applicant/Wife's application is barred by virtue of ***section 114*** of the ***Insurance Act***.

[22] The Court is principally concerned with the resolution of the first and third issues. The second issue will have to be determined on a full ventilation of the arguments in the event that the Applicant/Wife succeeds in her application for leave to file out of time. For reasons which will hereinafter appear, no other issues arise for immediate determination with respect to the Respondent/Husband's application.

THE LAW

[23] ***Sections 23(3)*** *and* ***(4)*** of the ***Family Law Act, Cap. 214 of the Laws of Barbados*** provide as follows:

> ***Section 23(3):*** Where a decree *nisi* of dissolution of marriage or a decree of nullity of marriage has been made, proceedings within paragraph (d)(i) or paragraph (e) of the definition of "matrimonial cause" (not being proceedings, seeking to discharge, suspension, revival or variation of an order previously made in proceedings in respect of the maintenance of a party) shall not be instituted after the expiration of 12 months after the date of the making of the decree, except by leave of the court in which the proceedings are to be instituted.
>
> ***Section 23(4)***: The Court shall not grant leave under subsection (3) unless it is satisfied that hardship shall be caused to a party to a marriage or to a child of the marriage if leave were not granted.

DISCUSSION

[24] As previously noted, the Applicant/Wife's application filed is twofold: (1) for leave to file out of time and (2) for the alteration of the policies by ordering the removal of the Respondent/Husband's as named beneficiary.

[25] The main issue before me is whether I should grant leave to apply. If leave is granted the further issue as to whether or not the beneficiary can be removed may then be heard by the Court.

[26] To argue that leave ought not to be granted because the named beneficiary clause is irrevocable is to ask the Court to anticipate its decision on the substantive issue.

[27] ***Section 2(1)(k)*** of the ***Family Law Act*** defines property as follows:

> "Property in relation to the parties to a marriage or to a union other than a marriage or either of them means property to which those parties are, or that party is, as the case maybe, entitled in possession or reversion"

[28] Property for the purposes of the ***Family Law Act*** includes rights over real property as well as over personal property. ***In the Marriage of Duff*** **(1977) 29 FLR 46**, the Family Court of Australia held that the term "property" is to be given a broad meaning. It approved the statement of Langdale M.R in ***Jones v Skinner*** **(1835) 5 LJ Ch 90 at page 87** where he said:

> "The word property is the most comprehensive of all the terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have".

[29] The author **Anthony Dickey** in **Family Law, 5th Ed. 2007** notes at **page 482** under the heading "Judicial Definition of 'Property'" that:

> "...there is now no doubt at all, for example, that "property" can be either real or personal, and if personal can be either a chose in possession or a chose in action, including both an equitable and a legal chose in action. Shares in a limited liability company, an interest in a partnership, a licence to conduct a trade or business, rights arising under a contract, rights in respect of property held in trust, a bankrupt's right to the surplus of his or her estate, and the interest of a beneficiary in a deceased's estate have accordingly all being held to constitute property under the *Family Law Act*."

[30] At **page 485** of the said text the author notes:

> "It would appear that the kernel of the notion of "property" for the purposes of the *Family Law Act* is that it involves an interest which a person owns at the present time, even though full enjoyment of this right - in other words, enjoyment in possession - might not occur until some time in the future or (if contingent interests are to be included) until some future event takes place, even though this might never happen. It is anyway of the essence of property that it involves an interest which is owned at the present time. It is strictly irrelevant that this interest might be terminable at some time in the future, for it is nonetheless owned now and will continue to be owned until ownership is terminated."

[31] Inherent in the Respondent/Husband's submissions is a concession that the policies are owned (in law) by the Applicant/Wife and that he, as named beneficiary, has an equitable interest which he considers to be irrevocable. It is clear that the policies are property within the meaning of ***section 2*** of the ***Family Law Act***. The legal and/or equitable interests in the said policies represent the property interests of the parties therein.

[32] Given that the policies represent the property of the parties, the next question is in relation to the issue of hardship if the property application was not allowed to be heard, which is the salient consideration for the Court. In resolving this issue, there are two matters to be considered:

1. Whether the Applicant/Wife has a reasonable claim to an alteration of a property interest (see ***In the Marriage of Whitford*** **[1979] FLC 90-612**) **(Whitford)**; and
2. Whether the circumstances of the Applicant/Wife, the Respondent/Husband or the child of the marriage are such that any one of them would suffer hardship if leave to pursue the application was refused.

[33] In this context "hardship" has been held to mean a substantial detriment. What constitutes a substantial detriment depends upon the circumstances of each case. In many cases, as Dickey opines:

> "...the substantial detriment is the inability of a spouse to pursue a claim for maintenance or an alteration of property interests where the resulting loss is significant in light of his or her financial circumstances. The detriment need not, however, be exclusively financial. It may, for example, involve a need to sever equitably an economic relationship that exists between the parties, especially where "matrimonial cause" (ca), with s.8(1)(a), would prevent recourse to alternative relief under State or Territorial law."

[34] Dickey further opines that it is quite clear, that the mere loss of the right to litigate is not sufficient to constitute hardship. Paragraph (a) (the equivalent to ***section 23(4)*** of the ***Family Law Act*** as reproduced at paragraph [16] above) he said, "concerns the *effect* of the loss of the right to litigate and not loss itself."

[35] ***Whitford*** is instructive on this point. In that case the court said at page 78, 145:

> "Hardship may be caused to an applicant if leave were not granted to institute proceedings, although the applicant is not in necessitous circumstances. Whatever the financial situation of an applicant may be, his or her loss of a prospective entitlement to property including money, or his or her inability to have the financial and property relations of the parties adjusted or resolved, may constitute hardship. In some cases, where a resolution of the property or financial relationships of the parties is desired, it might be, that the applicant would receive no more or even less, than he or she already owns at law or in equity. Nevertheless, hardship might be caused to the applicant if leave were not granted so as to facilitate such resolution. Examples where this kind of situation may arise are, where the matrimonial home has been left in joint ownership to enable the wife to continue to live there with the children for the time being or where a joint business venture has been continued to provide for the family. Where then circumstances arise which make it just, that the financial or property inter-dependence of the parties be terminated, hardship may be caused to an applicant if leave to institute proceedings were not granted."

[36] In this regard ***section 57*** of the ***Family Law Act*** is instructive. It provides as follows:

> **Section 57(1)**: In proceedings in respect of the property of parties to a marriage or union, or of either of them, the

> court may make such order as it thinks fit altering the interests of the parties in the property, including:
>
> (a) An order for a settlement of property in substitution for any interest in the property; and
> (b) An order requiring either or both of the parties to make, for the benefit of either or both of the parties or a child of the marriage or union, such settlement or transfer of property as the court determines.

[37] It is clear to me that the relief sought by the Applicant/Wife in paragraph 1(b) of her application is an alteration of property interests within the scope of ***section 57*** of the ***Family Law Act***.

[38] This Court is of the opinion that, having regard to the fact that the policy is owned by the Applicant/Wife, who pays the premiums on a monthly basis, considerable hardship would be caused to her if she were not allowed to litigate the application before the Court. The effect of the loss would be that, she would continue to be tied to the Respondent/Husband through the policies thus fettering her ability to deal with her interests in the property as she may deem fit. In addition, the continued payment of the premium, in such uncertainty, is also a loss to her. In all the circumstances, I consider it just and equitable for these parties to have their property inter-dependence determined.

[39] The Court notes that the Respondent/Husband's submissions do not speak to whether hardship would be caused if leave is not granted. The Court is of the opinion that there has been no counter to the Applicant/Wife's allegation that she would suffer hardship if she could not proceed to file her application out of time. Having regard to the fact that the Respondent/Husband admitted that he signed the Change of Beneficiary Form to benefit his son only, and not any other person as the Applicant/Wife alluded to in her affidavit, I am of the opinion that no hardship would be occasioned to the Respondent/Husband if the Applicant/Wife were allowed to proceed with her application to have the interests in the proceeds of the policies determined by the Court. It appears to me also, that the child of the marriage may also suffer hardship if the application for leave was not granted. The interest of the child is the only common ground between the Applicant/Wife and the Respondent/Husband.

[40] In making this finding, I make no ruling as to whether or not the Respondent/Husband's name can be removed as a named beneficiary under the policies. That finding will await the final determination of the Applicant/Wife's application with respect to the second issue identified at paragraph [21] above.

The Limitation Period

[41] The Respondent/Husband submitted that the application for removal of his name from the policies was statute barred since the policies were executed in 1997 by virtue of ***section 114*** of the ***Insurance Act***. This section provides as follows:

> **Section 114(1)**: The provisions of this section and sections 115 to 126, subject to anything to the contrary contained in

> those sections, apply in respect of policies taken out after 17th February, 1997.
>
> **(2)**: A policy-holder may at the time the policy is taken out or at any time thereafter by declaration in writing, designate his personal representative or a named person to be the beneficiary under his policy and may subject to section 116 alter or revoke the designation by declaration in writing.

[42] ***Section 114(1)*** of the ***Insurance Act*** section applies in relation to policies taken out after 17 February 1997, that is, the date of passage of the ***Insurance Act***. It is the basis upon which the Respondent/Husband submitted that his designation as named beneficiary is irrevocable. It does not speak to the barring of property settlement claims. The limitation period in relation to applications for property settlement of parties to a marriage is contained in ***section 23*** of the ***Family Law Act*** and applies to all property however and whenever acquired. I therefore find that there is no merit in the Respondent/Husband's submission that the application is barred by virtue of ***section 114*** of the ***Insurance Act***.

Delay, Prejudice, Maintenance and Costs

Delay

[43] The application for leave was necessitated by the Applicant/Wife's default in filing for property settlement during the 12 month period following the grant of the *decree nisi*. No explanation has been provided for her default. However, the Court does not consider that the default period of five months is inordinate or unreasonable so as to warrant the refusal of leave.

Prejudice

[44] In considering the grant of leave the Court must also consider any prejudice which might be occasioned to the Respondent/Husband. He has not alleged that he has been prejudiced or will be prejudiced if leave is granted. The Applicant/Wife did not address the issue of prejudice in her submissions. In the circumstances of this case there can be no prejudice to the Respondent/Husband in having the Court determine whether or not he can be substituted as the named beneficiary. Any likely prejudice would be to the infant son whom the Applicant/Wife said she wished to benefit. If the issue is not determined the Respondent/Husband, as named beneficiary, will continue to hold the equitable interests in the policies for himself without any direct benefit to the child. Any benefit to the child will depend upon the Respondent/Husband leaving the proceeds of the policies to the child by will or by gift inter vivos when the child attains its majority. The hearing of the application will remove such speculation.

Maintenance

[45] The Applicant/Wife has not addressed the issue of arrears for maintenance since the focus of her application was the grant of leave. The Court is of the opinion that the fairest way to treat this matter is to allow the Applicant/Wife, by affidavit or otherwise, to respond to the Respondent/Husband's application for an order for payment of the alleged arrears. The Court will then make a determination on that point after hearing submissions from both parties. Although his application for arrears is not drafted as prescribed in ***Form 6*** of the ***Family Law Rules, 1982***, it is clear that he is applying for arrears of

maintenance and therefore ought to be heard on that issue. I am mindful of the fact that the Respondent/Husband does not have the benefit of Counsel, even though the Court has been informed that he is a law student.

Costs

[46] The Applicant/Wife applied at paragraph 1(c) of her application for the costs of "this application". The application is in relation to leave, alteration of property interests and costs cumulatively. It has not been alleged, by affidavit or otherwise, that the Applicant/Wife's financial circumstances do not permit her to pay her legal costs. The Court is of the opinion that the resistance of the application by the Respondent/Husband, though it did not succeed, was not frivolous or vexatious as such as to merit an order of costs as against him. In addition, his application is twofold: (1) a resistance to the present application for grant of leave and (2) an application for payment of arrears of maintenance in the sum of $1,200 under the Order of Worrell J. The Court has divided up the nature of the applications so that the relevant issues are not confused. There are other issues still to be litigated.

DISPOSAL

[47] The Court, therefore, orders that:

1. The Applicant/Wife is hereby granted leave to file her application to remove the Respondent/Husband as the named beneficiary from the policies notwithstanding the fact that the application was not filed within one year after the grant of the *decree nisi*;
2. The application filed on 30 April 2012 by the Applicant/Wife in paragraph 1(b) do stand as though filed with the leave of the Court;
3. The affidavits filed by the Applicant/Wife and the Respondent/Husband do stand in support of the application to remove the Respondent/Husband as named beneficiary;
4. The Applicant/Wife to file and serve a further affidavit in support of her application to remove the Respondent/Husband as a named beneficiary within 14 days of today's date;
5. The Respondent/Husband to file and serve an affidavit in response within 14 days of service of the Applicant/Wife's affidavit on him;
6. The relief sought at paragraph 15(a) to (d) inclusive of Respondent/Husband's cross-application is adjourned until the next date of hearing;
7. That the Applicant/Wife do file and serve within 14 days of the date hereof, an affidavit in response to paragraph 15(d) of the Respondent/Husband's cross-application together with an updated Statement of Financial Circumstances;
8. The Respondent/Husband to file a Statement of Financial Circumstances within 14 days of today's date; and
9. Each party to bear their own costs in respect of the Applicant/Wife's application for the grant of leave.

William J. Chandler
Judge of the High Court