

BARBADOS

No. 415 of 2010

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(FAMILY DIVISION)

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

2014: July 15

Beverley Lady Walrond Q.C. for the Applicant/Wife

Mr. John Winston King in person

DECISION

INTRODUCTION

[1] The parties were married on 14 July 1990. The Applicant filed an application for dissolution on 13 July 2010. On 3 December 2010 **Worrell J.** 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.

THE APPLICATIONS

The Applicant/Wife’s Application

[2] On 30 April 2012 the Applicant 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;
- (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; and
- (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 applied to the Court for the following orders:

- “(a) That the applicant Miss 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 [L]ife Insurance [C]ompany [L]imited;

- (b) And 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 Miss May Etta King;
- (d) That the applicant May Etta [K]ing do pay to the respondent John King all arrears on maintenance due for the month of December 2011, January and February 2012 in the sum of \$1200.00 in full;
- (e) And that the applicant do pay the Respondent[’s] cost[s] occasioned by this application in the sum of \$1500.00; and
- (f) Any such order as this honourable court deems fit.”

[4] On 15 May 2013 I granted leave to the Applicant/Wife to file her application to remove the Respondent as the named beneficiary from two insurance policies, notwithstanding the fact that her application to do so was not filed within one year after the grant of the *decree nisi*.

[5] On that date I further ordered that:

- “1. 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;
2. 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;
3. 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;
4. The Respondent/Husband to file and serve an affidavit in response within 14 days of service of the Applicant/Wife’s affidavit on him;

5. The relief sought at paragraph 15(a) to (d) inclusive of Respondent/Husband's cross-application is adjourned until the next date of hearing;
6. 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;
7. The Respondent/Husband to file a Statement of Financial Circumstances within 14 days of today's date; and
8. Each party to bear their own costs in respect of the Applicant/Wife's application for the grant of leave."

[6] As a consequence, the only outstanding application pertains to the alteration of the parties' interests in the two insurance policies.

THE EVIDENCE

The Applicant/Wife's affidavits

- [7] An affidavit in support of the Applicant's application was filed on 21 June 2012. In that affidavit the Applicant deposed that she was the owner of two life insurance policies Nos. 3287887 and 9694040 ("the policies"), both with American Life Insurance Company ("Alico").
- [8] In her second affidavit filed on 17 June 2013 she explained that she had taken out the first policy on 1 May 1990, before the parties were married, and had initially named her estate as beneficiary, only changing the beneficiary to the Respondent after the parties' marriage. The second

policy, however, was acquired after the marriage and at all times the Respondent was named as beneficiary.

[9] She deposed in para 3 of her first affidavit that subsequent to the divorce, however, she had “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.”

[10] According to the Applicant, as the Respondent’s signature had not been witnessed, the Respondent was asked to contact her insurance agent to verify his signature, but failed to do so. On her instructions, her attorney-at-law therefore wrote to the Respondent by letter dated 8 March 2012, requesting that he visit her offices to verify his signature and giving him until 24 March 2012 to do so. The Respondent neither responded to that letter nor did he visit Mrs. Walrond’s office.

[11] The Applicant therefore urged the Court in para 5 of her affidavit to remove the Respondent’s name and entitlement to the policies, averring that:

“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.”

[12] She stated in para 5 of her second affidavit that the Respondent’s refusal to sign over his beneficial interest in the policies meant that she was forced to

either allow the policies to lapse or continue to pay them for his benefit.

Both options, she stated, “would be unfair”.

- [13] In response to the Respondent’s affidavit, she further deposed at para 12 that:

“I do not believe that the issue of whether I would wish to leave my son as my beneficiary under my will or under the policies or to share the proceeds with any other relative is a matter to be determined by the Respondent and I ask the Court not to allow him to try to exert control over my life in these circumstances.”

The Respondent/Husband’s affidavit

- [14] The Respondent filed an affidavit on 19 June 2012 in response to Mrs. King’s application. In that affidavit, he agreed that with respect to the policies “...Numbered **9694040** and **3287887** the beneficial interest in the same is vested in me as an irrevocable beneficiary.” He also agreed that the policies had been taken out by the Applicant (as owner) some time before 1997 but alleged at para 6 that 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.”

- [15] According to the Respondent, the Applicant was not at liberty to effect the necessary changes to remove him as beneficiary since his designation as named beneficiary was irrevocable. This was because the policies were taken out before 1997, the year in which the **Insurance Act, Cap. 310 of the**

Laws of Barbados (“the Insurance Act”) had been passed and, as a result, his consent was necessary to his removal as the beneficiary named on the policies. The Respondent indicated that he was not prepared to give that consent. He conceded, however, 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’s favour. The Court interpreted that statement to mean that the **Insurance Act** would have enabled her to remove him as beneficiary without his consent. He reiterated that the Applicant possessed no “beneficial, contingent or vested interests in the two policies in issue”.

- [16] The Respondent explained in his affidavit that when the Applicant had brought him two blank forms from Alico for him to sign, he informed her that he did not recall that she had taken out the policies and enquired about the status of the same. He said she gave no satisfactory answer. The Respondent did not deny signing the forms. He deposed, however, that the Applicant induced him to sign and that he signed them “under mistake”. Alico refused to accept the signed forms “by virtue of the way in which the same were presented to them by the applicant” and the Applicant subsequently asked him to accompany her to Alico. He refused to do so, telling her to look at the **Insurance Act**.

[17] Mr. King contended that the Applicant 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 had died.

[18] 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.

[19] The Respondent further deposed that he wrote to Alico on 31 January 2012 and requested information on the status of the policies but the company “refused to accommodate [him]. He stated that he also personally visited the company on 14 June 2012 and spoke to a supervisor who informed him “that

company policy does now allow her to 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.

[20] At para 8 of his first affidavit Mr. King had deposed that the Court should not sanction the variation of any beneficial interests arising under the policies because the Applicant was in breach of the order of Worrell J. dated 3 December 2010 in that she had failed to pay the maintenance of \$400.00 per month ordered by the Court for the period December 2011 to February 2012. He contended that her failure to comply with the order 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” and made an application for an order for the payment of the alleged arrears in para 15 of the same affidavit.

[21] However, in his second affidavit filed on 18 June 2013 and amended on 24 September 2013, the Respondent deposed that he “no longer wish[ed] to proceed with paragraph 15(d)...with respect to the arrears of maintenance”, conceding that the parties had settled that question. By para 28, however, he sought the costs of the application because he had been “put to unnecessary

cost and expense by the Applicant” and also prejudiced by the failure of her Counsel to serve the documents ordered by the Court in time.

[22] In his second affidavit, the Respondent addressed the **section 57** application. He urged the Court not to exercise its discretion under **section 57** to remove his name from the policies in issue and questioned whether the Court had the jurisdiction to do so. He contended at para 15 thereof that removal of his name was prohibited by **section 115** of the **Insurance Act**.

[23] The Respondent insisted that the removal of his name from the policies would cause him hardship. He deposed at para 21 that:

“...it section 57(1) is applied to remove the Respondent’s name as primary beneficiary the respondent would suffer loss of his right to name his son of the marriage as primary beneficiary on the said policies and the right to pass over all of his equitable interest’s possession which he presently owns to his son absolutely.”

[24] He also stated at para 19:

“I aver that equality being equity in any event if the policies are adjusted under section 57(1) of the Family Law Act the whole of my equitable interest and rights in the property should not be given to the applicant absolutely to be divided amongst her relatives. I say so because if said property is construed as property of the marriage then the same has to be determined on equal footing.”

THE APPLICANT/WIFE’S SUBMISSIONS

[25] Lady Walrond Q.C. pointed out that the Applicant’s evidence was that she took out the policy of insurance on her life No 3287887 on 1 May 1990 prior

to her marriage to the Respondent. The second policy No. 9694040 was taken out during the subsistence of the marriage on the 1 February 1997 – the policies bear the dates of issue of 25 May 1991 and 27 February 1997 respectively.

[26] Counsel agreed with the Respondent's submission that, because the policies were taken out prior to the enactment of the **Insurance Act**, the provisions of that Act did not apply and she could not withdraw his designation as beneficiary without his consent. The Court agrees. Counsel submitted, however, that under **section 56** of the **Family Law Act, Cap. 214** the Court was empowered to make a declaration as to the interests of the parties in the policies and also had the power to alter their respective interests under **section 57** of the said **Act** if it considers it just and equitable to do so. She argued, applying **In the marriage of Duff (1977) FLC 90-217**, that the policies of insurance are property within the definition of the term in **section 2(1)** of the **Family Law Act**.

[27] Counsel further submitted, that, whilst the Applicant could not alter the Respondent's rights under the two life insurance policies the Court was not so stymied and could do so under **section 57**.

[28] The Applicant, she contended, paid the premiums herself without assistance from the Respondent. The Respondent, she further noted, had made no

contribution to the acquisition, conservation or improvement of the property (the policies) and did not attempt to claim that he had paid any of the premiums. Counsel further submitted that the house in which the parties resided had been provided by the Applicant's aunt and the Applicant had also contributed as a homemaker and parent.

[29] It was inequitable, she proffered, to allow the Applicant to benefit from the policies after the couple was divorced.

THE RESPONDENT/HUSBAND'S SUBMISSIONS

[30] The submissions of the Respondent in relation to the irrevocability of the trust need not be repeated since they have been fully articulated in his affidavit evidence and in my decision rendered on 15 May 2013. Suffice it to say that he argues that the named beneficiary clause cannot be altered without his consent.

[31] In his written submissions filed on 10 October 2013 the Respondent submitted that by executing the two blank forms transferring his interest as beneficiary to Corey King, the minor child of the marriage, he parted with his beneficial interest in the policies to his son. The present application was therefore, he submitted, unnecessary as it sought to vary what had already been varied by his voluntary act of signing the transfer forms and the

agreement made between the parties in that regard. In making this submission he relied on the English case of **Pennington and Another v Waine and Another** [2002] EWCA CIV 227.

[32] Mr. King conceded that the policies were property for the purposes of the **Family Law Act** but argued that he had exercised his “conscience in equity” to ensure that any arrangement proposed would not affect his son adversely. The Applicant, he submitted, was seeking to use the **Family Law Act** “as a tool of her own device” [to benefit her family] by applying for the relief sought since he never intended to benefit her family by executing the transfers. He argued that she had agreed that his interest should be transferred to their son and that it would be unjust and inequitable for the Court to permit her “to go back on her promise”.

[33] In relation to **section 57** of the **Family Law Act**, he submitted that he had contributed significantly to the marriage. He had maintained his son from the onset and also submitted that he had expended significant sums of money during the course of the marriage in order to take care of the Applicant and her aunt.

[34] He further contended that the payment of premiums by the Applicant did not give any interest or charge to her, as payer, save for certain exceptions which he did not name.

ISSUES

[35] The issues for determination by the Court are as follows:

- (1) whether the naming of the Respondent as the beneficiary under the policies of insurance created an irrevocable trust of the benefit of the policies of insurance in favour of the Respondent;
- (2) whether the designation of the named beneficiary under the policies may be altered under the provision of **section 57** of the **Family Law Act** and if so, ought that designation to be altered; and
- (3) what, if any, is the effect in Law of the execution of the change of beneficiary forms by the Respondent.

LAW AND DISCUSSION

[36] Both parties have conceded that the naming of the Respondent as the beneficiary of the policies created an irrevocable trust in his favour. There is no need to further elaborate on the first issue. I will deal with the second issue next in light of the Respondent's submission that his execution of the change of beneficiary forms effectively transferred his interest in the policies to the then minor child of the marriage.

[37] The change of beneficiary forms executed in relation to both policies of insurance by the Respondent were attached to the Applicant's affidavit filed on 21 June 2012 as exhibits "A" and "B" respectively. The forms were

signed by both the Applicant and the Respondent but are undated and unattested. Of particular interest to the Court is the fact that no new named beneficiary has been inserted in the area provided for this purpose in either form.

[38] There was no cross-examination of the affidavit evidence of either deponent. Without the affidavit evidence being tested, I am left in the difficult position of attempting to ascertain the truth of the Respondent's allegation of his intention to benefit the then minor child of the marriage.

[39] I have not had the benefit of directly hearing the Applicant since she was represented by Counsel. I have, however, had the benefit of hearing the Respondent who represented himself and most ably presented his submissions. He is a currently a law student and was assured and articulate in his presentation. He did not appear to me to be a person who would fail to insert the name of his son as beneficiary, if that had actually been his intention, especially in light of the strained relations between the parties when the transfer forms were executed.

[40] I therefore do not accept his affidavit evidence and submission that he intended to name his son as the new beneficiary and so find. In any event the fact that there is no named new beneficiary means that the forms were

ineffectual to achieve the changing of the named beneficiary from the Respondent to the parties' son. Intent alone does not suffice.

[41] With respect to the second issue, in my first decision I held that the policies were property within the meaning of the **Family Law Act**. In doing so, I applied the reasoning of the Full Court of Australia **In the marriage of Duff (1977) FLC 90-217 ("Duff")**. The Court, in interpreting "property" stated at pp 76,132-76,134 of its decision in **Duff** that:

"It seems unnecessary to attempt to set out a catalogue of what "property" may include in the content of sec. 79. It is sufficient for the purposes of this case to say that "property" means property both real and personal and includes choses in action.

The word "property" has been the subject of a very large volume of judicial interpretation. A compendious description of it is to be found in *Halsbury*, 3rd ed, Vol 3, para 541 with multiple references to cases. It is sufficient for our purposes to refer to that definition which states:-

‘Property is that which belongs to a person exclusive of others and can be the subject of bargain and sale. It includes goodwill, trademarks, licenses to use a patent, book debts, options to purchase, **life policies and the rights under a contract.**’ (emphasis added)

...The word has also been comprehensively defined in statutes both State and Imperial relating to married women's property. We do not propose to instance those definitions here, but in *Jones v Skinner* (1835) 5 LJ Ch 90 *Langdale* MR said:-

‘Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have.’

This is a definition which commends itself to us as being descriptive of the nature of the concept of "property" to which it is intended that the *Family Law Act* 1975 should relate and over which the Family

Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage.

We are of the view that the intention of sec. 79 is to enable the court to take into account and assess all the property of the parties upon being asked by either of them to make an order altering the interests of the parties in property. We are further of the view that when sec. 4 defines property as being 'property to which the parties are entitled whether in possession or reversion' the words 'whether in possession or reversion' are not intended to indicate that the kind of property with which this Act can deal must be property to which a party is entitled in possession or reversion but rather the phrase 'whether in possession or reversion' is, as a matter of grammar, an adverbial phrase which qualifies the word 'entitled'. The phrase means that the entitlement to the property may be either in possession or reversion; i.e. the phrase is descriptive of the entitlement and not of the property and it removes any fetter upon the court in dealing with property under this Act by limiting the nature of the entitlement thereto to entitlement in possession.

To this extent we would, with respect, decline to follow the reasoning of Hogan J in *Komaromi v Komaromi* (1976) FLC ¶90-142. We agree with the view expressed by Goldstein J in *Nelson v Nelson* (1977) FLC ¶90-204 where the learned Judge says:

'I cannot attribute to our legislature such short sightedness as to limit the word 'property' as to mean corporeal property only and I am more persuaded to give this statute such construction as will make the statute work and as makes sense, than otherwise. I am also of the view that the words in s 4 ' . . . whether in possession or reversion' extend the meaning of 'property' rather than limit it. Section 86 of the previous Act had to be read in a particular way because of the presence in s 86 of the word 'settlement' but even in this context *Walsh* J expressed himself in *Smee v Smee* (1965) 7 FLR 321 at 335 as being of the view that this embraced assets *either* [my italics] owned or in which the party had some 'lesser proprietary

right'. The current English, by 'English' I mean 'English Australian', usage of the word 'property' includes in its meanings, and has been held in relation to other statutes to include things other than corporeal property, for example in the Stamp Duties legislation of New South Wales such things as shares and choses in **action and I do not exclude from 'property' as defined the interest parties have in a contract.**”(emphasis mine)

[42] The contractual nature of the life policy of insurance is borne out in a number of scholarly works. For example, in **MacGillivray on Insurance Law 11th Edn 2008** the learned authors, adopting the definition of a contract of insurance given by **Channell J. in Prudential Insurance Co. v. Inland Revenue Commissioners [1904] 2 KB 658**, stated that “...a contract for insurance is one whereby one party (the insurer) promises in return for a money consideration (the premium) to pay to the other party (the assured) a sum of money or to provide him with a corresponding benefit upon the occurrence of one or more specified events.”

[43] In **Colinvaux’s Law of Insurance (7th Edition) at pp. 218-9, paras 10-04 - 10-05** the author opines that:

“Life policies are to be considered something more than a contract. They are treated as securities for money payable at an uncertain but future date which is bound to occur. Apart from the operation of excepted peril, the insurers will be bound to pay the sum insured at some date, and the original contract is therefore to be considered as the purchase of a reversionary sum in consideration of the payment of an annuity... If the insurance is upon the assured’s own life, the right to the policy moneys will

devolve on his personal representatives on his death, who will be bound to treat it as money owing to him and forming part of his estate just as much as money due to him under a promissory note.

Life policies are things in action and are freely assignable whether they are expressed to be payable to the assigns of the assured or not, provided that the assignment complies with s.136 of the Law of Property Act 1925 or the Policies of Assurance 1867. The assignment may take the form of sale, mortgage, settlement or gift. He may leave it by will, or make it, without anything in writing, the subject of a *donatio mortis causa*. On the other hand an assured's creditors may be entitled to take his life policy, like other property, in execution.

An assignment passes a right to the insurance moneys whether or not the assignor or the assignee has an insurable interest in the life assured, provided that the assurance was valid in the first place.”

[44] I am of the view that a policy of life insurance represents a contractual right to property – namely the sum assured, payable upon the contingency of the death of the life assured. This contingency is inevitable. There is no doubt that it falls within the definition of matrimonial property in **section 2(1)** of the **Family Law Act** and, indeed, both parties so accept. Both parties also accept, and the Court finds, that as the **Family Law Act** came into force on 1 February 1982, prior to the execution of the life insurance policies in this case, the Court has jurisdiction to declare and alter their respective interests in these policies.

[45] It is trite law that the life policies are owned by the insured whereas the named beneficiary has an equitable interest. Accordingly, pursuant to **section 56**, I declare that the legal interest in the life insurance policies in

this case is vested in the Applicant whilst the equitable or beneficial interest is vested in the Respondent.

[46] I now turn to consider whether the designation of the named beneficiary under the policies may be altered under the discretion given to the Court by **section 57** of the **Family Law Act** and, if so, whether that designation ought to be altered.

[47] **Section 57** of the **Family Law Act** provides as follows:

“57. (1) In proceedings in respect of the property of the 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.

(2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

(3) In considering what order should be made under this section, the court shall take into account the following:

- (a) the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;
- (b) the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent;

- (c) the effect of any proposed order upon the earning capacity of either party;
- (d) the matters referred to in section 53(2) in so far as they are relevant; and
- (e) any other order that has been made under this Act in respect of a party.”

[48] According to the Court of Appeal in **Proverbs v Proverbs (unreported) Court of Appeal of Barbados, Civil Appeal No. 7 of 2001, Decision dated 28 May 2002**, a Court before whom is an application under **section 57** of the **Family Law Act** is required to first determine the full extent and value of the matrimonial property, then the respective contributions of the parties to the acquisition, conservation or improvement of the property under **section 57(3) subsections (a) and (b)** and then finally determine whether it is just and equitable to vary the interests in the property that the parties have acquired on the basis of their respective contributions after a consideration of the relevant **section 53(2)** factors.

[49] The factors referred to in **section 53(2)** of the Act, to which the Court must have regard, are:

- “(a) the age and state of health of each of the parties;
- (b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;
- (c) whether either party has the care or control of a child of the marriage or union other than a marriage, who has not attained the age of 18 years;

- (d) the financial needs and obligations of each of the parties;
- (e) the responsibilities of either party to support any other person;
- (f) the eligibility of either party for a pension, allowance, or benefit under any Act or rule, or under any superannuation fund or scheme, or the rate of any such pension, allowance, or benefit being paid to either party;
- (g) where the parties have separated or the marriage has been dissolved, a standard of living that in all the circumstances is reasonable;
- (h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;
- (i) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party;
- (j) the duration of the marriage or union other than a marriage, and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration;
- (k) the need to protect the position of a woman who wishes only to continue her role as a wife and mother;
- (l) if the party whose maintenance is under consideration is cohabiting with another person, the financial circumstances relating to the cohabitation;
- (m) the terms of any order made or proposed to be made under section 57 in relation to the property of the parties; and
- (n) any fact or circumstance that, in the opinion of the court, the justice of the case requires to be taken into account.”

[50] The matrimonial property forming the subject of this application is two life insurance policies with Alico, numbered 3287887 and 9694040. Both policies carry a face value of \$20,000.00 and name the Respondent as the

sole beneficiary. I have already declared that the legal interest in these policies is vested in the Applicant, whilst the equitable or beneficial interest is vested in the Respondent.

[51] I now turn to consider the respective direct and indirect financial and non-financial contribution of both parties to the acquisition and preservation of the insurance policies in issue.

[52] There was no matrimonial home acquired by the parties; it is common ground that the Applicant's aunt provided a home for them. She no doubt did so because of her relationship with the Applicant. The Applicant deposed that she acted as homemaker and parent; she took care of the child of the marriage; the home was provided by her aunt and she (the Applicant) contributed to its upkeep.

[53] During the course of his submissions, the Respondent stated that he too contributed to the maintenance and upkeep of the home and the child and that he helped with the maintenance of the Applicant's aunt. He provided no evidence to this effect.

[54] I must stress that the legal submissions of a party must be based on evidence that is either given by affidavit or *viva voce*. The Respondent's submissions do not constitute evidence. He provided no evidence at all as to his

contributions to the home nor did he depose to any circumstances by which the Court could come to a reasonable conclusion that he, by his contributions to the home or family, freed the Applicant's hands to allow her to pay the premiums on her life policies. It is for him to establish or prove, on a balance of probabilities, that he contributed either directly or indirectly to the acquisition, conservation or improvement of the matrimonial property, namely the insurance policies. The question is, has he done so?

[55] Reference has already been made to the Applicant's affidavit evidence. She deposed that she had acted as homemaker and parent, but did not elaborate on her roles. She, however, also deposed that she had paid the premiums on the life policies. That evidence has not been challenged by the Respondent. He also conceded that one policy was executed prior to the marriage and the other some time after its celebration. The Respondent also accepted that the Applicant paid the premiums on the property without any assistance from him and it is common ground that she continues to do so.

[56] On the evidence before it the Court accordingly finds that the Applicant alone contributed directly to the acquisition of the insurance policies and that she alone contributed to their preservation by paying the premiums and keeping the policies on foot.

[57] I now return to the question posed earlier. Has the Respondent proved that he has made an indirect contribution to the acquisition or preservation of the property? He has alleged an indirect contribution to the preservation of the policies and is required to prove his case on a balance of probabilities.

[58] He alleged, as did the Applicant, that he maintained their son. The parties' maintenance of their son is part and parcel of their parental responsibilities. There is no evidence in relation to the payment of utility bills, groceries or performance of household duties by either party. Such evidence would have provided the indicia of indirect contribution.

[59] In the premises, I am left with two parties who were married for 19 years prior to dissolution; no evidence of direct or indirect contributions to the acquisition, improvement or conservation of the policies by the Husband and evidence of the normal contribution of married parties to the upkeep of their household and child of the marriage.

[60] The Husband in his written submissions asserted that he had also taken out two policies of insurance on his life, one of which was cancelled due to his inability to pay his premiums while he surrendered the other to obtain money when he fell on hard times. Though not evidence, his submissions contrast strongly with the undisputed affidavit evidence of the Applicant that she was able to maintain her policies during marriage and still fulfil her

responsibilities to the household and also continue to maintain the policies after the parties' separation.

[61] It is for the Respondent who alleges that he contributed to the preservation of the policies to prove his contribution on a balance of probabilities. He has not done so. I therefore find that he had failed to provide any direct or indirect contribution to the acquisition or conservation of the policies during the subsistence of the marriage. On the basis of the parties' respective contributions to the acquisition and conservation of the insurance policies, I find that the Applicant alone is entitled to the legal and equitable interests in the same.

[62] I now turn to consider the **section 53(2)** factors. In relation to these considerations, which have been set out above, there has been, sadly, a paucity of evidence. The Applicant is 58 years old and the Respondent is 49. They were married for approximately 19 years. The marriage produced one child, a son. He is now 20 years of age. There is no evidence that either party has assumed responsibility of supporting any other person.

[63] There is also no evidence that the parties do not currently enjoy good health. Both parties are gainfully employed, the Applicant as a Secretary in the private sector and the Respondent as an acting clerical officer in the civil

service. It is likely that both of them may be entitled to a pension, but there is no evidence before the Court on the pensions they may expect to receive.

[64] As to their income and financial expenses, the Applicant disclosed an annual income of \$72,291.00, while the Respondent disclosed an annual income of half that figure - \$35,883.86. Her estimated expenses were placed at \$55,188.92 and his at \$32,603.56. It is clear that the Applicant currently earns more than the Respondent and appears to be in a more financially stable position. This factor of itself, however, is not sufficient to justify an alteration of the interests in the matrimonial property in his favour.

[65] Having considered all applicable **section 53(2)** factors, I do not think it just and equitable to alter, on the basis of those factors, the interests acquired by the parties in the property as a result of their respective contributions.

DISPOSAL

[66] In the premises, I consider it just and equitable to order an alteration of the interests of the parties in the policies on the basis of their respective contributions. It will be inequitable to allow the Applicant to continue to pay premiums to benefit the Respondent from whom she is now divorced. She could easily have surrendered the policies or caused them to lapse by non-payment but did not do so.

[67] Accordingly, I order as follows:

- (1) The Respondent/Husband be removed from the policies of insurance numbered 3287887 and 9694040 issued by Alico on the 25th day of May 1990 and on the 27th day of February 1997 respectively with immediate effect;
- (2) The Applicant/Wife be at liberty to designate the named beneficiary (ies) in respect of the said policies; and
- (3) The Respondent/Husband's application for the arrears of maintenance is hereby dismissed.

COSTS

[68] I consider that the Respondent's opposition to the application was not unreasonable and I see no need to order him to pay the costs of the application. I also find that the Respondent has not established that this is an appropriate case in which to order costs against the Applicant.

[69] In these circumstances, it is therefore further ordered that each party bear their own costs.

WILLIAM J. CHANDLER

Judge of the High Court

