

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2014/CLE/gen/00602

IN THE MATTER OF THE ESTATE OF NOEL STAFFORD ROACH, late
of Pinewood Gardens, in the Southern District of New Providence, one of
the Islands of the Commonwealth of The Bahamas

BETWEEN

INGRID MCKINNEY

Plaintiff

AND

NOEL WILLIAM ROACH

(a minor by his Guardian Ad Litem and mother Nikenya C. Rolle)

First Defendant

AND

NIKENYA C. ROLLE

(Administratrix of the estate of Noel Stafford Roach and Trustee)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Larell Hanchell h/p for Mrs. Donna Dorsett-Major for the Plaintiff
Ms. Glenda M. Roker of Davis & Co. for the Defendants

Hearing Dates: 21 February 2019, 4 July 2019, 3 October 2019

Estate – Insurance – Life Insurance policy – Assignment of policy as collateral for mortgage – Claim for equitable interest in estate property – Whether the beneficiary of life insurance policy acquired an equitable interest in the deceased’s property upon the satisfaction of mortgage with proceeds of the policy - Costs – Reasonable costs

The Plaintiff is the mother of the Deceased (Noel Stafford Roach) and the sole named beneficiary of his insurance policy. She instituted these proceedings against the Defendants seeking, *inter alia*, a declaration that she has an equitable interest in the triplex building constructed on the Deceased's land.

She asserts that in addition to giving the Deceased \$10,000 toward the acquisition of the property, there was an agreement between them that she would assign her beneficial interest in the policy to the bank as security for the mortgage for the construction of the triplex in return for an equitable interest in the property. She further asserts that as a result of the agreement she also contributed building material to assist with the construction of the triplex.

The Plaintiff is also seeking to be reimbursed in the amount of \$26,000 from the estate of the Deceased which she claims to have paid out as funeral expenses for the Deceased.

The Second Defendant is the Administratrix of the estate of the Deceased and the mother of the First Defendant (Noel William Roach) who is the minor son of the Deceased. The Defendants deny the claims and put the Plaintiff to strict proof. Additionally, the Defendants counterclaimed seeking (i) cost of the application to remove the caveat lodged by the Plaintiff and (ii) damages for intermeddling in the estate and the loss of use of items belonging to the estate. At the trial, the Defendants did not pursue their claim for damages for intermeddling in the estate of the Deceased.

HELD: Dismissing the Plaintiff's claim with costs to the Defendants in the sum of \$25,000. The Defendants are also entitled to costs of \$1,500 for the removal of the Caveat on the Deceased' estate which was lodged by the Plaintiff on 9 March 2012.

1. The Deceased was the owner of the life insurance policy and the Plaintiff, a revocable beneficiary. His assignment of the policy to the Bank was valid and not subject to consent or approval of the Plaintiff.
2. The claim that the Plaintiff obtain an equitable interest in the triplex building as a result of the assignment of the policy to the Bank which proceeds satisfied the mortgage following the Deceased's death are misconceived and unsustainable.
3. There is no satisfactory evidence by which the Court could find that the Plaintiff and the Deceased had an agreement that the Plaintiff would have an equitable interest in the triplex building. The totality of the evidence suggests that any and all contributions of the Plaintiff towards the acquisition of the land and the construction of triplex building were gifts to the Deceased.

JUDGMENT

Charles J:

Introduction

[1] The principal dispute in this action centers around the issue of whether the Plaintiff ("Mrs. Mckinney") acquired an equitable/beneficial interest in the triplex building of her deceased son, Noel Stafford Roach ("the Deceased") as a result of the

assignment of his life insurance policy 003016177 (“the Policy”) to the Finance Corporation of The Bahamas (“the Bank”) to secure a mortgage for the construction of the triplex building. Mrs. McKinney was named the sole beneficiary under the Policy and, following the death of the Deceased, the insurance proceeds were paid to the Bank to satisfy the mortgage and the balance paid to her.

Background facts

- [2] On 16 July 2010, the Deceased was murdered in front of her mother’s home located Cascarilla Street, Pinewood Gardens Subdivision. At the date of his untimely demise, he left behind one minor child, Noel William Roach (“Noel”) who is the First Defendant in these proceedings. The Second Defendant (“Ms. Rolle”) is the mother of Noel and the Administratrix of the estate of the Deceased. Together, the First Defendant and the Second Defendant are conveniently referred to as “the Defendants”.
- [3] On 26 September 2000, the Deceased took out the Policy with Global Life Assurance Bahamas Ltd (now Colina Insurance Limited) (“Colina”) in the amount of \$150,000. His first born child (Kryston Roach) was named the sole beneficiary under the Policy. Kryston accidentally died on 21 July 2004 and, by Memorandum of Policy Certificate dated 11 June 2007, Mrs. McKinney was subsequently named the sole beneficiary under the Policy.
- [4] On 26 June 2001, the Deceased acquired Lot No. 1639 located Walnut Street, Pinewood Gardens Subdivision (“the land”) and sometime in June 2007 he secured a mortgage with the Bank to construct a triplex building on the land (“the triplex”). As collateral for the mortgage, \$135,000 of the Policy was assigned to the Bank on 18 June 2007. The assignment and the mortgage predated the birth of Noel.
- [5] Following the death of the Deceased and in accordance with the assignment, Colina paid monies from the insurance proceeds to the Bank to satisfy the mortgage and the balance was paid to Mrs. McKinney.

The pleadings

[6] On 2 May 2014, Mrs. McKinney filed an Originating Summons along with her Affidavit in support.

[7] On 6 March 2015, the Court ordered that the action proceed as if it had begun by Writ of Summons.

[8] On 20 May 2015, Mrs. McKinney filed her Statement of Claim seeking the following reliefs:

"21. ...

AND THE PLAINTIFFS CLAIM:

- I. A declaration that the Plaintiff has a beneficial interest in the said property of the deceased by virtue and to the extent of the said assignment and the said mortgage payment in the amount paid to the bank to satisfy the mortgage;**
- II. An order restraining the Second Defendant from conveying, mortgaging or agreeing to convey or mortgage or any material particular encumbering the Plaintiff's interest in the said property;**
- III. An order for an accounting of all monies collecting by the Second Defendant from the tenants of the said property (triplex) in her capacity as trustee/administratrix of the said estate;**
- IV. An order that until the Plaintiff's equitable interest is paid, she is entitled to such share of the rent proceeds as her interest reflects, calculated as from the date of the deceased's death until satisfaction or to such other sums as the Court thinks fit;**
- V. An order that said property situate, (sic) Pinewood Gardens, New Providence be sold and the sums owned to the Plaintiff be paid forthwith;**
- VI. Interest pursuant to the Civil Procedure Award of Interest Act 1992;**
- VII. Costs.**
- VIII. Any other relief as the Honourable Court deems just."**

[9] On 12 June 2015, the Defendants filed a Defence and Counterclaim which essentially denied Mrs. McKinney's claims and put her to strict proof.

[10] The Defendants' Counterclaim is set out as follows:

COUNTERCLAIM

1. On the 9th March, 2012, the Plaintiff entered a caveat in the estate of the Deceased.
2. On the 21st March, 2013, the Second Defendant made application to have the Caveat set aside before Assistant Registrar Camille Darville-Gomez.
3. The application was granted and costs was awarded to the Second Defendant.
4. To date, the costs of this application remains unpaid by the Plaintiff.
5. The Deceased was the owner of several items at the time of his demise namely:-

<u>Item</u>	Estimated Value
1993 2 Door Accord	\$5,500.00
24 K gold Rope chain w/Pendant	\$1,600.00
High School Ring	\$400.00
14 K Gold Masonic Ring	\$800.00
14 K Gold Ring	\$600.00
2 Sterling Silver Rings	\$300.00
Miscellaneous Jewelry	\$1,000.00
<u>TOTAL</u>	<u>\$12,300.00</u>

6. The Plaintiff is in possession of the said items and as a result has intermeddled with the property of the Estate and has ignored the request of the Second Defendant to turn the property over to the Estate.
7. The Plaintiff has enjoyed the use of the 1993 2 Door Honda Accord for nearly five (5) years without any recourse to the estate despite written demands for compensation for the use of the same.

AND THE FIRST AND SECOND DEFENDANTS COUNTERCLAIM AGAINST THE PLAINTIFF:

1. **The Defendants' cost of the application to remove the caveat;**
2. **Damages for intermeddling in the said estate and the loss of use of items belonging to the said estate to be assessed;**
3. **Interest pursuant to the Civil Procedure (award of interest) Act,**
4. **Cost; and**
5. **Any other relief that the court deems just."**

[11] At the trial of the action, Ms. Roker appearing as Counsel for the Defendants, indicated that they will not pursue their counterclaim for intermeddling in the estate.

The evidence

[12] Mrs. McKinney testified on her own behalf and Ms. Rolle testified on behalf of the Defendants. Mortician Mr. Vaughn O. Jones ("Mr. Jones") of Vaughn O. Jones Memorial Center and building subcontractor Mr. Greg Treg Rolle ("Greg Rolle") were subpoenaed by Mrs. McKinney to testify at the trial.

Mr. Jones

[13] Mr. Jones gave oral testimony on 29 February 2019. In a nutshell, he testified that Mrs. McKinney is a client of his and that he "*funeralized*" most of her family. He further testified that Mrs. McKinney came in to make funeral arrangements for her son who had just been murdered (the Deceased) and they made the necessary funeral arrangements. He charged her \$16,000. The sum of \$16,000 was satisfied in part payments; \$8,500 came from the insurance company, \$1,500 from the National Insurance Board ("NIB") and \$7,000 was paid by Ms. Rolle in two payments of \$4,000 and \$3,000 respectively. He said that some of the funds were reimbursed to Ms. Rolle.

[14] Mr. Jones further testified that he issued a receipt in the amount of \$26,000 at the request of Mrs. McKinney. It represented the amount of payments she made for the funeral of the Deceased and for the funeral service of her mother-in-law (Ms.

Viola McKinney). He stated that Mrs. McKinney requested the receipt in that amount because she wanted to get a bank loan.

- [15] Under cross-examination by Ms. Roker, Mr. Jones admitted that Mrs. McKinney did not satisfy the full amount for the funeral of the Deceased but only a portion of it; in the overall amount of \$5,000 or \$6,000. He further confirmed that some funds were reimbursed to Ms. Rolle but he could not remember the exact amount.

Greg Treg Rolle

- [16] Greg Rolle testified that he is a sub-contractor and lives across the street from the Deceased. He blocked up the Deceased's triplex building from the foundation to the belt course. He was paid by the Deceased.

- [17] Greg Rolle also stated that the blocks which he used during the construction were delivered to the building site and the other building materials like cement, nails, plywood were collected by him and the Deceased from Mrs. McKinney's house. He further stated that he did not know who the materials belonged to or who would have purchased them. He also said that he recognized Ms. Rolle as she came to the building site off and on while the construction was in progress.

Mrs. McKinney

- [18] Mrs. McKinney filed a witness statement on 10 November 2017 which stood as her evidence in chief. She testified that she is the mother of the Deceased who was born on 17 January 1975. The Deceased was murdered outside her home on 19 July 2010.

- [19] She stated that, on 26 September 2000, the Deceased took out a \$150,000 life insurance policy with Global Life Assurance Bahamas Ltd (now Colina). The Deceased named his first born son Kryston as the sole beneficiary and she was the trustee for the minor child, Noel. She next stated that Kryston died on 21 July 2004 by accidental electrocution while at Brooks Auto located on Gladstone Road and she was subsequently named the sole beneficiary under the Policy.

- [20] She testified that, on 18 June 2007, she assigned \$135,000 of the Policy to the Bank as security for a mortgage for the Deceased for the construction of the triplex. She further testified that the Deceased died intestate and, at the time of his death, there was an outstanding balance on the mortgage in the amount of \$137,503.00.
- [21] According to her, on 6 December 2010, she made a payment on the mortgage arrears in the amount of \$1,113.00 and, on 26 August 2010, the Bank exercised its security. She attended at the offices of Colina and signed a document authorizing them to pay to the Bank the sum of \$136,390.30 and for her to receive the remainder of the Policy.
- [22] Mrs. McKinney testified that the Deceased was survived by his only son, Noel, a minor and Ms. Rolle is the mother of Noel. Ms. Rolle obtained Letters of Administration in the estate of the Deceased.
- [23] Mrs. McKinney asserted that prior to the Deceased's death, he resided at the triplex which she financially assisted him to construct and that sometime in 2001 she gave the Deceased the sum of \$10,000 from an A-sue for the down payment for the purchase of the land. According to her, she purchased thousands of dollars' worth of auto mechanic tools along with a 1993 Honda Accord for the Deceased. She further testified that during the time that the triplex was being constructed, she assisted the Deceased with the purchase of building materials such as lumber, plywood, bathroom fixtures, cement, lime and all the electrical wiring that the contractor (Greg Rolle) collected from her home. She said that, at the time, she was also constructing her home and had purchased the building materials in bulk.
- [24] Mrs. McKinney further testified that she is also seeking from the Defendants reimbursement for the Deceased' funeral expenses which totaled \$26,000. She further stated that she and her son were very close and, as a direct result of her financial involvement in the construction of the triplex, he named her as the sole beneficiary of the Policy.

- [25] She averred that, after the Deceased' demise, she visited Colina to receive the insurance benefits under the Policy and was told that she needed to pay \$136,390.30 to the Bank (which was the outstanding amount owed on the mortgage of the Deceased). She opined that she holds an equitable interest in the property as a result of the monies which was paid from the Policy in which she was the named beneficiary and also, because she assisted the Deceased to purchase the land and to construct the triplex.
- [26] Mrs. McKinney testified that several days after the death of the Deceased she discovered that Ms. Rolle had removed everything out of the apartment including the Deceased's personal belongings. Ms. Rolle left it abandoned. Her husband (Arthur McKinney Sr.) and her son (Arthur McKinney Jr.) secured the triplex to avoid vandalism. She caused the utilities to be disconnected. While securing the triplex, Ms. Rolle arrived with two police officers. One of the officers told them to leave and not come back otherwise they would be arrested.
- [27] Mrs. McKinney stated that the Deceased was buried on Saturday 20 July 2010. Three days later, a police officer came to her house and served her with a letter from Ms. Rolle's attorney informing her that she must cease and desist from claiming to be the Deceased's beneficiary.
- [28] Mrs. McKinney opined that Ms. Rolle is very manipulative. She treated her like a daughter but Ms. Rolle took advantage of her vulnerability. Ms. Rolle ensured that she paid the \$136,390.30 to satisfy the mortgage and it was after she showed Ms. Rolle the receipt confirming payment of the mortgage that Ms. Rolle took full possession of the Deceased's property and excluded her.
- [29] Mrs. McKinney asserted that, notwithstanding the receipts produced, Ms. Rolle did not pay any monies towards the Deceased's funeral but instead referred her to a funeral home where Ivan C. Thompson ("Mr. Thompson") worked. Approximately six months after the death of the Deceased, Ms. Rolle became pregnant with Mr. Thompson's child.

- [30] Mrs. McKinney concluded her testimony by stating that she does not believe that Ms. Rolle should be left alone to act as trustee for her deceased son's interest due to the fact that Noel (her grandson) would not fully inherit what is rightfully his as there is now another child. She also stated the Ms. Rolle and the Deceased were not in a relationship around the time that he was murdered and the Deceased had asked Ms. Rolle to leave the home on several occasions but she (Mrs. McKinney) intervened and asked her son to allow her to remain there.
- [31] Under cross-examination by Ms. Roker, Mrs. McKinney asserted that she and her son paid the payments under the Policy. He eventually took over the payments. She was the beneficiary under the Policy. When confronted with the Policy and the Memorandum of Policy Certificate dated 11 June 2007, Mrs. McKinney acknowledged that it expressly provides that the Deceased was the owner of the Policy and he could change the beneficiary at any time without informing her. She also confirmed that she does not have any documentary evidence for the \$10,000 which she gave to the Deceased towards the purchase of the land.
- [32] Further, when Mrs. McKinney was asked whether the \$10,000, the thousands of dollars' worth of auto mechanic tools and the car she purchased for the Deceased were gifts, Mrs. McKinney responded as follows: "that's my son. Just like the property. Noel was a young man coming up. I needed to help my son as much as I could for him to grow up and do what he has to do. Noel wasn't in the working world long. I wanted to see him aspire and do well, so ain't nothing he couldn't ask me for, I wouldn't have sacrificed and give it to him."
- [33] Under further cross-examination, Mrs. McKinney asserted that after she completed the construction of her home, there were building materials remaining. The Deceased came and told her what materials he needed and she gave him all that he needed.

[34] When pressed by Ms. Roker about the \$26,000 receipt for funeral services, Mrs. McKinney caved in and then admitted that the cost of the funeral was only \$16,000 and that the insurance company paid \$8,500 to Vaughn O. Jones Memorial.

[35] Under re-examination, Mrs. McKinney asserted that the Deceased promised to return the \$10,000 but she never got it back ever though she asked him for it. She also admitted that the Deceased was not supposed to pay her back for the building materials and she was glad to help him to get his own place.

Ms. Rolle

[36] Ms. Rolle filed a witness statement on 14 December 2017 which stood as her evidence in chief. She stated that she is the mother of Noel who is the only child of the Deceased and she is the Administratrix of the Deceased's estate by virtue of Letters of Administration which were granted to her on 21 June 2013.

[37] She next testified that she had an intimate relationship with the Deceased and they had lived together for 5 ½ years up to the time of his death. According to her, the Deceased always told her that the down payment for the property came from the proceeds of his winnings at several car shows. She also stated that during their cohabitation the Deceased never expressed to her that his mother assisted with the down payment nor was it ever expressed that he was indebted to his mother in any amount. She further stated that the Deceased never told her that his mother had an equitable interest in the property. Ms. Rolle testified that she also assisted the Deceased during the construction and that the bulk of the building materials were purchased from JBR and TOPS.

[38] Ms. Rolle stated that, in August 2010, she accompanied Mrs. McKinney to Colina to enquire about the benefits relating to the Policy and she is of the view that Mrs. McKinney received, on 18 January 2011, payments in the amount of \$6,012.72 as the beneficiary as well as payment for accidental death benefits in the amount of \$150,000. She also opined that she understood that, by an assignment dated 18 June 2007, the Deceased assigned the Policy to the Bank as security for a

mortgage over the property and that the mortgage was paid off on 16 September 2010 with proceeds from the Policy.

- [39] Ms. Rolle next testified that shortly after the passing of the Deceased, she received a letter from Mrs. McKinney evicting her from the property. She also testified that from the night of the death of the Deceased, she and Noel slept at her mother's residence and she did not remove any of the Deceased's personal effects prior to receiving the grant of Letters of Administration. She noted that she has seen family members wearing the Deceased's jewelry and driving his car.
- [40] Ms. Rolle stated that after things became acrimonious with Mrs. McKinney she moved out of the triplex. She secured it by locking the doors and windows and activating the alarm. She stated that Mrs. McKinney and other family members changed the locks on the door and, as a result, she made a report to the police. She made another report to the police after Arthur McKinney Sr. and Arthur McKinney Jr. entered into the premises. The police asked them to leave.
- [41] In continuing to give oral testimony, Ms. Rolle said that she and the Deceased had a very good relationship for several years. They cohabited despite the fact that she maintained her own apartment and her earnings were more than that of the Deceased. She further stated that the Deceased would often say in her presence and in the presence of Mrs. McKinney that the property was for their child and that Mrs. McKinney had nothing to come around for. Ms. Rolle stated that she and the Deceased often had discussions about what would happen to his finances and his estate in the event of his demise. The Deceased indicated that his Lodge would assist. Ms. Rolle unhesitatingly said that she always understood Mrs. McKinney to be the beneficiary of the Policy.
- [42] According to Ms. Rolle, Mrs. McKinney is incorrect in her claim for funeral expenses in the amount of \$26,000. She did not pay that amount for the Deceased's funeral. Ms. Rolle testified that when the family began to plan for the funeral the original quote was \$16,000. It was subsequently reduced to \$13,000.

Colina paid \$8,500 and she (Ms. Rolle) paid \$7,200 to the funeral home. She also paid \$450 to the videographer.

[43] Ms. Rolle opined that she did not befriend Mrs. McKinney but rather treated her like a mother during her time of bereavement. She stated that she paid her own money towards the funeral and made no independent decisions about the funeral. She only supported Mrs. McKinney and her family's decisions.

[44] Under cross-examination by Counsel, Mr. Hanchell who represented Mrs. McKinney in these proceedings, Ms. Rolle confirmed that after the Deceased died, she had control of the triplex and her son (and not her) is the beneficiary of the property. She further confirmed that the triplex was rented in 2012 for eight months at \$700 per month and again in 2012 for \$600 per month. The triplex was not rented from 2014 to 2018.

Discussion and findings

[45] I had the advantage of seeing, hearing and observing the demeanour of the witnesses as they testified. In analysing their oral testimony conjunctively with the documentary evidence, I prefer the evidence adduced by the Defendants to that of Mrs. McKinney. I also found Mr. Jones and Greg Rolle to be truthful witnesses and I accepted their respective testimony.

Claim for equitable interest in property

[46] Learned Counsel Mr. Hanchell submitted that, on 18 June 2007, Mrs. McKinney assigned her interest as a sole beneficial owner of the Deceased's Policy to the Bank to secure the mortgage. Therefore, she became the equitable owner of the property. He further submitted that the assignment by Mrs. McKinney created a trust of the property held by the estate in her favour. This is an unattractive argument and I am not persuaded by it. In fact, I find this submission to be misconceived in light of the documentation relative to the Policy.

[47] In her evidence, Mrs. McKinney admitted that she was not the beneficial owner of the Policy as stated in her witness statement but she was merely a beneficiary

under the Policy. She also indicated that she understood that the Deceased could change the beneficiary at any time without telling her.

[48] The Deceased owned the Policy. It was a revocable Policy. During his lifetime, the Deceased knowingly and voluntarily assigned the sum of \$135,000 from the Policy to the Bank without the consent of Mrs. McKinney as the Policy was designated “revocable”. This, he was empowered to do.

[49] A review of Colina’s Memorandum of Policy Certificate dated 11 June 2007 along with the Universal Life – Policy Provisions (“the Policy Provisions”) clearly shows that the Deceased was the owner of the Policy and Mrs. McKinney was a revocable beneficiary. Therefore, the Deceased alone had the right of assignment along the right to change the beneficiary without the consent or approval of Mrs. McKinney.

[50] Clause 20 of the Policy Provisions is important and provides:

“20. Assignment

Notice to the Company of any assignment or written instructions affecting the policy must be given in writing and received at the Company’s Head Office. The Company does not undertake to assume responsibility for the validity or sufficiency of any assignment or written instrument affecting the policy or of any notice thereof.”

[51] Clause 24 of the Policy Provisions is equally important. It allows the owner to change a beneficiary without the consent of any beneficiary or trustee. It provides:

“24. Beneficiary Designation

Whenever a beneficiary is designated either in this policy or by a declaration in writing by the Owner, such beneficiary will be deemed to be beneficially entitled to the proceeds of the policy, if and when the policy becomes payable upon the life insured’s death, and a trust will be thereby created in favour of such beneficiary or beneficiaries as the Owner may appoint from time to time by a like declaration.

...

Change of beneficiary for any death proceeds and appointment and change of trustee – During the life insured’s lifetime, the Owner, without the consent of any beneficiary or trustee, can from time to time by declaration in writing:

(1) Change any prior beneficiary designation or appointment, provided that the Owner cannot change the beneficiary to the Owner or the Owner's estate.

(2) Appoint a trustee to receive the proceeds for any beneficiary, and change or revoke any prior trustee designation or appointment.

The Company assumes no responsibility for the validity of any designation or declaration.” [Emphasis added]

[52] The provisions of the Insurance Act 2005, Chapter 347 (“the Act”) are also instructive. Section 159 provides:

“159. (1) A Subject to subsections (3), (4) and (5) a policyholder may, by declaration in writing filed with the company at the time the policy is taken out or at any time thereafter, designate irrevocably a named person to be the beneficiary under the policy and, in such a case –

(a) the policyholder subject to section 171 may not during the lifetime of the named beneficiary, alter or revoke the designation without the consent of the beneficiary; and

(b) the moneys payable under the policy are not subject to the control of the policyholder or the creditor of the policyholder and do not form part of the estate.

(2) Notwithstanding paragraph (a) of subsection (1), the consent of the beneficiary is not required where the beneficiary under a policy of insurance is, as the case may be –

(a) a former spouse and the marriage ended in divorce; or

(b) a child who has reached the legal age of majority.

(3) Where the insured purports to designate a beneficiary irrevocably in a declaration that has not been filed with the company as required by subsection (1) or in a will, the designation has the same effect as if the insured had not purport to make the designation irrevocable.

(4) An irrevocable designation may be made by a policyholder only in favour of a spouse or a child.

(5) A designation by a policyholder shall not be regarded as irrevocable unless the words creating the irrevocable designation are clear and unequivocal and are prominently displayed on the proposal form and signed by the policyholder and there is sufficient evidence that it was explained to the policyholder that the designation was irrevocable.”

[53] Section 166 of the Act allows for the assignment of a policy when a beneficiary is not designated irrevocably. It provides:

“166. (1) Where a beneficiary is not designated irrevocably, the policyholder may assign, exercise rights under or in respect of, surrender or otherwise deal with the policy as provided in the policy or in this Part or as may be agreed upon with the company. [Emphasis added]

(2) Where a beneficiary is designated irrevocably, the policyholder may not assign the policy, use the policy as security, surrender it or other deal with it without the consent in writing of the designated beneficiary.

[54] Then, section 168 of the Act deals with the effect of assignment on beneficiaries. It provides:

“168. (1) An assignee of a policy who gives notice in writing of the assignment to the head office of the company or to its agent has priority of interest as against –

(a) Any assignee other than one who gave notice earlier in like manner; and

(b) a beneficiary other than one designated irrevocably under section 159 prior to the time the assignee gave notice to the company of the assignment in the manner prescribed in this section.

(2) Where a policy is assigned as security, the rights of a beneficiary under the policy are affected only to the extent necessary to give effect to the rights and interests of the assignee. [Emphasis added]

(3) Where a policy is assigned absolutely, the assignee has all the rights and interest given to the policy holder by the policy and by this Part and shall be deemed to be the policyholder.

(4) A provision in a policy to the effect that the rights or interest in the policyholder or in the case of group insurance, the group life insured, are not assignable, is valid”.

[55] There is no evidence presented to the Court to suggest that Mrs. McKinney was an irrevocable beneficiary under the Policy. The Deceased duly assigned the Policy to the Bank and this is evidence by the assignment executed between the Bank and the Deceased on 18 June 2007. Upon the demise of the Deceased, the Bank was able to call upon the outstanding amount of \$135,000 due under the mortgage. Mrs. McKinney received the remainder of the proceeds of the Policy in accordance with section 168 of the Act. The assignment of \$135,000 effectually revoked any expectation of benefit or perceived entitlement by her on the death of the Deceased to this particular amount during the life of the mortgage/policy and transferred the benefit to the assignee.

[56] Therefore, the claim by Mrs. McKinney to an equitable interest in the triplex on the basis of the assignment of the Policy is rejected. Additionally, there is no satisfactory evidence by which the Court could find that Mrs. McKinney and the Deceased had an agreement that she (Mrs. McKinney) would have an equitable interest in the triplex. On the contrary, the evidence suggests that all or any contributions by Mrs. McKinney towards the acquisition of the land and the construction of the triplex were gifts to the Deceased (her son).

Claim for re-imbursement of funeral expenses

[57] Both Mrs. McKinney and Mr. Jones admitted that the cost of the funeral was not \$26,000. The receipt tendered in evidence was, to say the least, inflated (and prepared by Mr. Jones to allow Mrs. McKinney to secure a loan). The evidence clearly suggests that the cost associated with the Deceased' funeral was somewhere between \$13,000 and \$16,000 which was paid by funds from the insurance proceeds, NIB and Ms. Rolle. Consequently, this claim fails.

Claim for \$10,000 down-payment contribution

[58] This claim also fails. Mrs. McKinney admitted in her evidence that the \$10,000 which she gave to the Deceased toward the down-payment of the land in 2001 was a gift. She also admitted that the building materials (taken from her property) used in the construction of the triplex was also a gift.

Conclusion

[59] In all the circumstances, I would dismiss the claim brought by Mrs. McKinney.

Costs

[60] The Defendants, being the successful parties to this action, are entitled to their costs. Ms. Roker submitted a Bill of Costs in the amount \$42,883.68. I find this amount to be unreasonable and award costs of \$25,000 to the Defendants. I do so by applying the law and guiding principles relative to costs. I also relied on a judgment of this Court in the case of **Soldier Crab Limited t/a Sandy Toes v Aqua Tours Limited** 2013/CLE/gen/01310 (unreported). At paras [71] to [75], I detailed the applicable principles relating to costs as follows:

[71] A convenient starting point is Order 59, rule 3(2) of the Rules of the Supreme Court (“RSC”) which states:

“If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

[72] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:

“Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid.”

[73] Order 59, rule 2(2) of the RSC similarly reads:

“The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall

have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order.”

[74] The discretionary power to award costs must always be exercised judicially and not whimsically or capriciously. The Judge is required to exercise his discretion in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties’ conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in Scherer v Counting Instruments Ltd.[1986] 2 All ER 529 at pages 536-537.

[75] In deciding what would be reasonable the court must take into account all the circumstances, including but not limited to:

- a) any order that has already been made;
- b) the care, speed and economy with which the case was prepared;
- c) the conduct of the parties before as well as during the proceedings;
- d) the degree of responsibility accepted by the legal practitioner;
- e) the importance of the matter to the parties;
- f) the novelty, weight and complexity of the case; and
- g) the time reasonably spent on the case.

[61] In addition to costs which I have taxed at \$25,000, the Defendants are entitled to the sum of \$1,500 being the costs of the application for the removal of the Caveat which was lodged by Mrs. McKinney on 9 March 2012.

[62] The Defendants are also entitled to interest at the statutory rate of 6.25% per annum from the date of the Judgment to the date of payment.

Dated this 22nd day of January, A.D., 2021

**Indra H. Charles
Justice**