COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/01201

IN THE MATTER OF the Estate of the late WILLIE GRAHAM SCAVELLA, Deceased

BETWEEN:

GINA SCAVELLA

(Mother and Next Friend of BRIA SCAVELLA, An Infant)

First Plaintiff

And

GINA SCAVELLA

(Mother and Next Friend of ERIN SCAVELLA, An Infant)

Second Plaintiff

And

GINA SCAVELLA

Third Plaintiff

And

AUDREY SHEILA FLOWERS (Formerly AUDREY SHIELA SCAVELLA),

Personal Representative of the Estate of the late WILLIAM GRAHAM SCAVELLA, Deceased

First Defendant

And

AUDREY SHEILA FLOWERS

(Formerly AUDREY SHEILA SCAVELLA)

Second Defendant

Before: The Honourable Mr. Justice Keith H. Thompson

Appearances: Ms. Crystal Rolle along with Ms. Cyd Ferguson
Counsel for the Plaintiff

Mr. Clinton Clarke Jr., Counsel for the Defendant

Hearing Dates: 10th October, 2018
28th January, 2019

[1] This action was commenced by Writ of Summons filed on October 04th, 2017. The Writ was amended without leave pursuant to Order 20 Rule (1) of the Rules of the Supreme Court and the amended Writ was filed November 14th, 2017.

[2] The Writ was specially endorsed with a statement of claim. The amended Writ sought to correct the name of the Personal Representative of the estate of the late Willie Graham Scavella who, since the demise of the deceased remarried.

[3] The particulars of Loss and Damage are set out in the Statement of Claim as follows;

"PARTICULARS OF LOSS AND DAMAGES

i. The First and Second Plaintiffs have lost their respective shares of the Deceased's estate including but not limited to the sum of $85,390.01 representing one half (1/2) of the total sum of $170,780.01 representing the aforesaid proceeds of the Colina Insurance Policy and the aforesaid funds standing to the credit of the Deceased in the said bank account.

ii. The First and Second Plaintiffs also claim as loss their respective shares of any other assets of the Deceased found to be due on the Accounting Claim herein.

iii. Further, the First and Second Plaintiffs and each of them claim interest on the said sum of $85,390.01 as well as on any other sums found by the Court to be due to them pursuant to Section 3 of the

Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court deems fit.

The Claim of the Third Plaintiff:

iv. The Third Plaintiff seeks to be appointed the Sole Administrator and Trustee of the First and Second Plaintiffs' respective shares of the Deceased's Estate pursuant to Section 37 of the Act and/or under the Court's Inherent Jurisdiction with all powers provided for by the Trustees Act, 1998 , Chapter 176, Statute Law of the Bahamas.

v. The Third Plaintiff seeks an Order that any and all moneys and damages found to be due to the First Plaintiff from the Defendants be paid by the Defendants to the Third Plaintiff as such sole Administrator and/or as Trustee **UPON TRUST** for the First and Second Plaintiffs.

AND THE PLAINTIFFS AND EACH OF THEM CLAIM AGAINST THE FIRST AND SECOND DEFENDANTS:

1. An Accounting of the property comprising the Deceased's Estate, and/or possessed, and/or received by the First Defendant as the Administrator of the Deceased's Estate.

2. The Appointment of the Third Plaintiff as the Sole Administrator and Trustee in respect of the First and Second Plaintiffs' respective shares of the Deceased's Estate.

3. The aforesaid sum of $85,390.01.

4. Damages for conversion of the First and Second Plaintiffs' respective portions of the Deceased's Estate.

5. Distribution of the First and Second Plaintiffs' respective shares of the Deceased's Estate and payment of any and all moneys and damages due

to the First and Second Plaintiffs to the Third Plaintiff **UPON TRUST** for the benefit of the First and Second Plaintiffs.

6. General Damages.

7. Interest on the said sum of $85,390.01 and on all sums found to be due to the First and Second Plaintiffs pursuant to Section 3 of the Civil Procedure (Award of Interest) Act 1992 at such rate and for such period as the Court deems fit.

8. Such further or other relief as the Court deems fit.

9. Costs.

[4] The first and Second Plaintiffs are the children of the deceased, the late William Graham Scavella. In support of their claim of being the children of the deceased they have provided their birth certificates.

[5] The Third Plaintiff is the mother of the First and Second Plaintiffs and the first wife of the deceased. The Second Defendant is the Widow of the Deceased.

THE DECEASED'S ESTATE:

[6] The estate of the deceased was comprised of;

A. An Insurance Policy with proceeds in the amount of $165,000.00.
B. Cash in bank in the amount of $5,780.00.

[7] This in total amounted to $170,780.00. It is alleged by the First and Second Plaintiffs that the entire estate was valued at approximately $205,780.00.

The Death of the Deceased and the Administration of his Estate.

6. The Deceased died intestate on the 19th day of November, A.D., 2012.

7. By Oath of Administrator dated the 12th day of March, A.D., 2013 filed in 2013/PRO/npr/00103 the First Defendant stated on oath that the Second Defendant and the First and Second Plaintiffs were the Next of Kin of the Deceased. The First and Second Plaintiffs, and each of them, will rely on the said Oath of Administrator at the Trial of this action for its full terms and effect.

8. By Return of Value of the Personal Estate and Effects of the Deceased dated the 12th day of March, A.D., 2013 filed in 2013/PRO/npr/00103, the First Defendant listed the assets of the Deceased as consisting of a Colina Insurance Policy in the amount of $194,220.00 and a Bank Account valued at $5,780.01. The First and Second Plaintiffs, and each of them, will rely on the said Return at the Trial of this action for its full terms and effect.

9. The Certificate of the Grant of Letters of Administration was issued by the Supreme Court as aforesaid on the 8th day of May, A.D., 2013 appointing the First Defendant as the Administrator of the Estate of the Deceased. The First and Second Plaintiffs, and each of them, will rely on the said Grant at the Trial of this action for its full terms and effect.

10. The First Defendant undertook to faithfully administer the real and personal estate and effects of the Deceased, to pay his just debts and legacies, and to distribute the residue of the Deceased's Estate according to law.

11. By the Rules of Intestacy of the Commonwealth of the Bahamas, the First and Second Plaintiffs are and were at all material times entitled to one-half (1/2) of the said residue of the Deceased's Estate.

12. On or about the 7th day of August, A.D., 2013, the First Defendant received a cheque dated the 30th day of July, 2013 issued by Colina Insurance Company, being Cheque No. 20077234, in the amount of One Hundred and Sixty-Five Thousand Dollars ($165,000.00) for the Estate of the Deceased. The First and Second Plaintiffs, and each of them, will rely on inter alia a copy of the said Cheque at the Trial of this action for its full terms and effect.

13. The First Defendant also received all other moneys due and owing to the Deceased's estate including but not limited to the funds standing to the credit of the Deceased at the time of his death on the bank account referred to in paragraph 8 hereof.

14. The First Defendant after having received the funds referred to in paragraphs 12 and 13 hereof, failed to Account to the First and Second Plaintiffs for the said funds and all such other funds and assets collected in respect of the Deceased's Estate. The First Defendant also failed to advise the Plaintiffs of the steps taken or to be taken in the administration of the Deceased's Estate inclusive of the steps taken to effect payment to the First and Second Plaintiffs respective shares of the said residue of the Deceased's Estate.

The First and Second Plaintiffs' Claims against the First and Second Defendants

15. By reason of matters aforesaid, the First Defendant has breached the duties which she owed as the Personal Representative of the

Deceased's Estate to the First and Second Plaintiffs as the beneficiaries of the Deceased's Estate and she breached the statutory duties owed to the First and Second Plaintiffs under the Probate and Administration of Estates Act 2011, No. 1 of 2011, Statute Laws of the Bahamas ("The Act").

AND THE PLAINTIFFS AND EACH OF THEM CLAIM AGAINST THE FIRST AND SECOND DEFENDANTS:

1. An Accounting of the property comprising the Deceased's Estate, and/or possessed, and/or received by the First Defendant as the Administrator of the Deceased's Estate.

[8] The Defendant filed a Defence ("The Defence") on May 28th 2018.

[9] The Plaintiffs in their Skeleton Arguments at paragraph 20 list the issues for the Court's determination as being;

i. Whether the First Defendant breached her duties owed to the First and Second Plaintiffs as the Personal Representative of the Deceased's estate and/or in the administration thereof?

ii. Assuming, (without admitting) that the First Defendant made payments from the proceeds of the Insurance Policy in settlement of the Mortgage and the *"Disbursements"*, whether such payments constituted the just debts of the Deceased's estate for the purpose of the lawful and proper administration thereof?

iii. Whether any payments from the Deceased Estate were due to the First and Second Plaintiffs and if so, whether the First Defendant

breached her duties as Personal Representative of the Deceased's Estate in failing to make such payments?

iv. Whether the Second Defendant is personally liable for the breaches of duty....."

[10] We cannot help but agree that the first critical question to be answered is whether the payments made by the Defendant constituted the just debts of the deceased in the circumstances of the instant matter. The second critical question is whether the payments were due to the First and Second Plaintiffs in part from the cash in the deceased's estate. The third question then, in the event the Court finds in favor of the First and Second Plaintiffs is the Defendant personally liable to the First and Second Plaintiffs.

EVIDENCE OF GINA SCAVELLA:

[11] The evidence of Gina Scavella is basically set out in her witness statement which was filed on December 21st, 2018 and executed on the same date. We take the liberty to set the same out below:-

COMMMMONWEALTH OF THE BAHAMAS

2017/CLE/gen/01201

IN THE SUPREME COURT

Common Law and Equity Division

IN THE MATTER OF the Estate of the late
WILLIE GRAHAM SCAVELLA, Deceased.

BETWEEN

GINA SCAVELLA
(Mother and Next Friend of **BRIA SCAVELLA,** An Infant)

First Plaintiff

And

GINA SCAVELLA
(Mother and Next Friend of **ERIN SCAVELLA,** An Infant)

Second Plaintiff

And

GINA SCAVELLA

Third Plaintiff

AND

AUDREY SHEILA FLOWERS (Formerly AUDREY SHIELA SCAVELLA),
Personal Representative of the Estate of the late **WILLIAM GRAHAM SCAVELLA,** Deceased

First Defendant

And

AUDREY SHEILA FLOWERS (Formerly AUDREY SHEILA SCAVELLA)

Second Defendant

WITNESS STATEMENT OF GINA SCAVELLA

I, **GINA SCAVELLA,** of the Eastern District of the Island of New Providence one of the Islands of the Commonwealth of the Bahamas **WILL SAY** as follows:-

1. I am the Third Plaintiff in this action.

2. I am the Mother and Next Friend of the First and Second Plaintiff's Bria and Erin Scavella, whom at the filing of this action were minors.

3. I make this Witness Statement on my own behalf and on behalf of the First and Second Plaintiffs. I do so based on facts and matters within my own knowledge.

4. I make this Witness Statement as the Plaintiffs' evidence in chief for the purpose of the Trial of this matter.

5. I commenced this action on the Plaintiffs' behalf against the Defendant, Audrey Sheila Flowers (formally Audrey Sheila Scavella) ("The Defendant") by Specially Indorsed Writ of Summons filed on 14th November, 2017.

6. The late Willie Graham Scavella (hereinafter referred to as "Billie") was my former husband. Billie and I were divorced. The Defendant was Billie's second wife.

7. Billie and I had two daughters, (1) Bria Scavella born on 26th August, 2000 ("Bria") and (2) Erin Scavella born on 29th September, A.D., 2001 ("Erin"). At the time of Billie's death Bria and Erin were minors.

8. Billie and the Defendant were still married at the time of his death.

9. Billie died Intestate and the Defendant, became his Personal Representative by virtue of the Grant of Letters of Administration issued by the Supreme Court of the Commonwealth of The Bahamas on 12th March, 2013. A copy of the Grant of Letters of Administration is included in the Plaintiffs' Bundle of Documents filed on 10th December, 2018 at **Tab 22**.

10. The Defendant in support of her application for Letters of Administration filed an Oath of Administrator on 12th March, 2013. A copy of the Oath is at **Tab 1** of the Plaintiff's Supplemental Bundle of Documents. By paragraph 2 of the Oath the Defendant acknowledged that Billie was survived also by Bria and Erin.

11. The Oath made reference to Billie have money in a bank account with Royal Bank of Canada in the amount of $5,780.01.

12. The Defendant also signed on 12th March, 2013 a Return in relation to the application for Letters of Administration. A copy of the Return is at **Tab 2** of the Plaintiff's Supplemental Bundle of Documents. By the Defendant confirmed that Billie had an insurance policy with Colina Insurance Company ("Colina") in the amount of $194,220.00 ("The Colina Insurance Policy").

13. At the time of Billie's death I was not aware of the Colina Insurance Policy. Billie and I at that point had been divorced for some time and so I had no knowledge about his assets and financial affairs.

14. After Billie's death my Attorney Mrs. Krystal D. Rolle provided me with a copy of the Grant of Letters of Administration and the documents submitted by the Defendant in support of the application. Mrs. Rolle sent me copies of these documents in or about March, 2016. At that point Billie had been dead for four (4) years and the Letters of Administration had been issued for three (3) years.

15. During the three (3) year period between the Grant of the Letters of Administration and Mrs. Rolle providing me with copies of the same the Defendant had never contacted me relative to Billie's estate relative to Bria and Erin's interests. She never advised me, on their behalf, what Billie's estate was comprised of and she never advised me, on their behalf, how Billie's estate had been administered.

16. I only became aware of the Colina Insurance Policy after Mrs. Rolle had provided me with copies of these documents.

17. Mrs. Rolle then on my behalf and pursuant to my instructions made numerous inquiries with Colina to obtain information about the Colina Insurance Policy and specifically whether any money had been paid to the Defendant.

18. Mrs. Rolle confirmed that the Defendant in August, 2013 had received a cheque from Colina in the amount of $165,000.00. A copy of the cheque and cover letter from Colina are included in the Plaintiffs' Bundle of Documents at **Tab 23** and **25** respectively. Copies of Colina Insurance Policy and the application form are included in the Plaintiffs' Bundle of Documents at Tabs **3** and **4**.

19. I became aware of the fact that Colina had paid this money to the Defendant as a result of Mrs. Rolle's inquiries.

20. During the three (3) year period between the Defendant's receipt of this cheque from Colina and Mrs. Rolle providing me with a copy of the cheque, the Defendant had never told me, as Bria and Erin's mother, that she had received these funds from Colina.

21. The Defendant also received all other moneys due and owing to Billie's estate including the $5,780.01 standing to his credit on the RBC bank account.

22. The Defendant never paid any part of the proceeds of the Colina Insurance Policy or the money from the bank account to Bria and Erin.

23. In fact, after Billie's death the Defendant made no payment whatsoever to Bria and Erin from Billie's estate.

24. On 5th January, 2017, Mrs. Rolle wrote to the Defendant requesting a formal Accounting of the distribution of Billie's estate. This letter of demand is found at

Tab 30 of the Plaintiffs' Bundle of Documents. The Defendant did not respond to this letter.

25. I started this action on the Plaintiff's behalf because the Defendant did not respond to Mrs. Rolle's letter.

26. The Defendant's Attorney by letter dated 14th February, 2018 provided an Accountant's report which purported to set out how the Defendant spent the proceeds of the Colina Insurance Policy and Billie's estate. A copy of that letter and Accountant's report are included at **Tab 33** of the Plaintiffs' Bundle of Documents.

27. I am an Accountant by training and profession as is the Defendant. After reviewing the Defendant's Accountant's Report I had many questions and so I instructed Mrs. Rolle to request copies of supporting documents relative to many of the entries in the Accountant's Report.

28. Mrs. Rolle made the request for documents and pursuant to that request the Defendant provided numerous documents and receipts. Copies of these documents are included in the Plaintiffs' Bundle of Documents at **Tabs 5 to 20, 21, 24 to 26, 28, 29, 31, 32, 34, 35 and 36.**

29. The Defendant has stated that the majority of the proceeds from the Colina Insurance Policy went towards paying the mortgage on the property which was owned by her and Billie. I don't know whether this in fact occurred. However, I do know that this property is now owned by the Defendant. I am also aware of the fact that the property is an income producing property from which the Defendant derives rental income.

30. I have never received from the Defendant, on behalf of Bria and Erin, any money which purported to be a share of the rental income from the mortgage property.

31. Assuming (without accepting) that the Defendant did in fact pay the proceeds of the Colina Insurance Policy to Finance Corporation of the Bahamas in settlement of the mortgage, I do not accept that this was a proper utilization of the proceeds of Billie's insurance policy in the administration of his estate.

32. The Defendant has also stated that the proceeds of Billie's estate was used to pay off accounts for furniture in her and Billie's name.

33. I, on Bria and Erin's behalf have never received any of this furniture. The Defendant has all of this furniture.

34. Assuming (without accepting) that the Defendant did in fact pay the proceeds of the Colina Insurance Policy towards the settlement of these furniture accounts, I do not accept that this was a proper utilization of the proceeds Billie's insurance policy in the administration of his estate.

35. The Plaintiffs' have made a claim in this action for a proper accounting from the Defendant as to the manner in which Billie's estate was administered.

36. The First and Second Plaintiffs have also made a claim for one-half of Billie's estate **after the payment of his just debts, funeral and testamentary expenses.**

37. The First and Second Plaintiffs have also made a claim against the Defendant in her personal capacity for inter alia conversion in respect of that portion of Billie's estate to which Bria and Erin were entitled which was received by her for her personal use and/or in liquidation of her personal bills and expenses.

38. The First and Second Plaintiffs are also seeking interest on any sums awarded by the Court.

39. I am Bria and Erin's mother legal guardian. Their father is of course now deceased. I am asking the Court to appoint me as Administrator and Trustee of any money to be paid to Bria and Erin arising out of this matter. I am also asking for an Order that any such money or damages awarded to them be paid to me on their behalf in such appointed capacity.

40. The content of this Witness Statement are true and correct.

SWORN at Nassau, New)
Providence this 21st day)
of December, A.D., 2018.)

BEFORE ME

NOTARY PUBLIC

The above witness statement speaks for itself.

[12] Ms. Scavella was cross-examined on her witness statement by counsel for the Defendant. Under cross-examination, Ms. Gina Scavella's answers can be captured as follows. She agreed that she had the obligation of raising the two children of the marriage when she was married to the deceased and she housed them. She was never aware of any insurance policies on the life of the deceased. She was not aware of the Colina Insurance until after the death of the deceased. In this regard, it was quite sometime after the deceased passed that she became aware of the Colina Insurance.

[13] During the time she was married to the deceased they never got together to take out any life insurance policies. Ms. Gina Scavella is an accountant by profession as was the deceased. She was only aware that letters of administration had been granted in 2012 when she was advised by her attorney and had a discussion on the issue with her attorney. She denied waiting until 2016 to make a claim. She was of the view that the new Mrs. Scavella would have done whatever was in the best interest of her children.

[14] The new Mrs. Scavella (Ms. Flowers) did assist her with obtaining Survivors Benefit from The National Insurance Board by bringing the forms to the house to complete and then took them to the Fox Hill Branch of National Insurance.

[15] Her further evidence under cross-examination was that she did not invest an interest in any rental or mortgaged property which the deceased had. She never purchased any furniture or furnishings for them either. Counsel then asked Gina Scavella if it was safe to say that apart from her two children Bria and Erin the deceased had two other children. She said that she was aware of one Rico Davis whom she says the deceased had accepted as being his child. The other child Kyron Jones she was not certain of. She did attend the funeral of the deceased.

EVIDENCE OF AUDREY SHEILA FLOWERS:

[16] Audrey Sheila Flowers formerly Audrey Sheila Scavella is party to this action as the personal representative of the estate of the late Willie Graham Scavella and in her personal capacity. She filed a witness statement on January 18th, 2019 which we take the liberty of setting out below:-

COMMMMONWEALTH OF THE BAHAMAS 2017/CLE/gen/01201

IN THE SUPREME COURT

Common Law and Equity Division

IN THE MATTER OF the Estate of the late **WILLIE GRAHAM SCAVELLA,** Deceased.

BETWEEN

GINA SCAVELLA
(Mother and Next Friend of **BRIA SCAVELLA,** An Infant)
First Plaintiff

And

GINA SCAVELLA
(Mother and Next Friend of **ERIN SCAVELLA,** An Infant)
Second Plaintiff

And

GINA SCAVELLA
Third Plaintiff

AND

AUDREY SHEILA FLOWERS (Formerly AUDREY SHIELA SCAVELLA),
Personal Representative of the Estate of the late **WILLIE GRAHAM SCAVELLA,** Deceased
First Defendant

And

AUDREY SHEILA FLOWERS (Formerly AUDREY SHEILA SCAVELLA)
Second Defendant

WITNESS STATEMENT OF AUDREY SHEILA FLOWERS

I, AUDREY SHEILA FLOWERS, of the South Western District of New Providence, one of the Commonwealth of The Bahamas, make OATH and say as follows:

1

1. That I am the First Defendant named herein in my rightful capacity as personal representative of the Estate of the late Willie Graham Scavella.

2.That in as much as I am named as the Second Defendant in my personal capacity, I take issue with having been named as such for the purposes of being personally liable for any alleged breaches of the First Defendant.

3.That I reserve the right to exercise my right for liberty to apply to have me struck off in my personal capacity as a Second Defendant in this action.

4. More importantly, I make this witness statement in my capacity as personal representative of the estate of Willie Graham Scavella and I do so based on facts and matters within my knowledge.

5. Likewise, I make this witness statement in support of my notice of application to have me removed as a Second Defendant in my personal capacity as I can see no useful purpose for me being named as such.

6. For the purposes of trial, this witness statement will stand as evidence in chief save that I reserve the right to apply to add thereto or to take therefrom in the event of any error or omission.

7. That I am the former wife of the deceased and hence I was once formerly known as Audrey Sheila Scavella by virtue of having been married to the deceased.

8. That there is no controversy as it is accepted and acknowledged by the Plaintiffs that I am the former spouse of the deceased.

9. I have since remarried and I am still lawfully and happily married to my husband and life partner, Andrew Flowers. That my husband and I recently celebrated our 5th wedding anniversary on the 23rd December 2018.

10. It is acknowledged by me that the deceased fathered two children with the Third Plaintiff, namely Bria whom is now 18 years old and Erin Scavella whom will be 18 years old on the 29th September 2019.

11. Further it is acknowledged by me but not pleaded by the Plaintiffs, that the deceased is also the father of two other children, namely Rico Davis and Kyron Jones-Scavella.

12. For the avoidance of doubt, I wish to state that the deceased had a total of four children at the time of his death and as far as I am aware all four of the decease children are alive as at the time of the signing of this statement.

13. I accept that when this action was filed that Bria and Erin were minors. Factually, as at today's date, Bria is no longer a minor and is capable of bringing an action in her own name and on her on behalf.

14. In reply to the Plaintiffs claim I have filed a defence to which I rely upon for its full terms and effect.

15.That in my capacity of personal representative I sought and retained the legal services of Vincent Peet to assist me with making the appropriate applications in the Supreme Court and to advise me generally on my role and duties as a personal representative of the deceased estate. That in my dealings with Mr. Peet, I unreservedly hold him in high regard as a reputable attorney in good standing with the Bahamas Bar Association.

16. That immediately I got into the business of the decease estate by making the appropriate applications and advertising as is customary to do so. I have properly given an account of my duties as personal representative when asked to do so by the Plaintiffs. That it was me through the assistance of my now attorney that suggested that the parties meet to work through the issues to avoid litigation. That I have honestly and faithfully made every effort to settle all of the deceased personal expenses and as at today's date the deceased is still indebted to RBC FINCO to the tune of $395,821.94.

17. The $5,780.01 held by RBC to the credit of the decease, was funds that was held in trust for Ms. Winsom Kerr. I was aware of this as Ms. Kerr is/was a good friend of both myself and the deceased.

18.That there is no dispute or controversy as to whether the decease had a mortgage with RBC FINCO at the time of his death. There is also no dispute or controversy over the fact that the mortgage property prior to the deceased death was held by myself and the deceased as joint tenants.

19. It is also accepted by the Plaintiffs that on the death of the deceased I became the sole owner of the property as a result of the right of survivorship.

20. That since the death of the deceased, I was never approached by the Plaintiffs on an enquiry of the state of affairs of the deceased estate. The first time I became aware that the Plaintiffs were enquiring about the deceased estate was when a stranger showed up to my place of work and served me with a letter from Rolle & Rolle. At no time did the Plaintiffs pick up the phone and call me to make an inquiry about the deceased estate or to enquire as to

whether there were any personal insurance monies to which they could benefit after payment of the decease debts.

21. That had the Plaintiffs made enquiries with me I would have supplied the information without issue.

22. A few weeks after the funeral I personally completed paperwork with the third Plaintiff's assistance and filed the same with NIB for survivors benefit for both Bria and Erin.

23.Further, the returns filed and about to be filed are available at the Probate Registry for inspection.

24. Although I am a certified accountant, I sought the services of another Certified Public Accountant (Mark Moxey) to prepare a financial report of the deceased estate and provided this detail report to the Plaintiffs setting out the financial affairs of the deceased estate.

25. RBC FINCO remains a creditor and I am advised that until RBC FINCO is paid in full the deceased estate will remain encumbered and that distribution of the decease residual estate cannot be distributed.

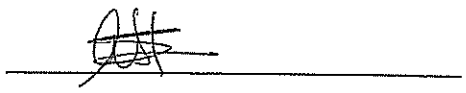
26.I wish to state unequivocally that I am able to properly account for every dollar received and spent on the deceased behalf and that at no time did I misappropriate or convert the deceased monies for my personal use.

27. At all times I conducted my affairs as a personal representative of the deceased estate in a manner consistent with my obligations and I relied on my advice received from my then attorney Vincent Peet.

Dated the 17TH day of January A.D., 2019.

STATEMENT OF TRUTH

I, **AUDREY SHEILA FLOWERS**, have read the statement in this Witness Statement and hereby confirm that the statements in this Witness Statement are correct and true to the best of my knowledge, information and belief and where applicable, are derived from my review of documents in my possession and are correct and true.



AUDREY SHEILA FLOWERS

[17] Quite notably in the "Flowers" witness statement are several paragraphs which ought to be highlighted. Paragraph 1 discloses that the Flowers' statement is only made by Ms. Flowers in her capacity as personal representative. She takes issue in paragraph 2 that she is a party in her personal capacity and reserves the right in paragraph 3 to apply to be struck as a party in her personal capacity.

[18] In paragraph 5 she says she makes the witness statement in support of her notice of application to be removed as a second Defendant in her personal capacity. However, an application by the second Defendant to be removed as a party was never made.

CROSS-EXAMINATION OF AUDREY SHEILA FLOWERS:

[19] Under cross-examination paragraph 2 of the Oath of Administration was read into the record. The Oath is set out below.

> "2. **That the deceased died married leaving Audrey Sheila Scavella his wife, and two children namely, Bria Lauryn Ashley Scavella and Erin Paige Scavella."**

[20] Paragraph 2 states that; "the deceased died married leaving Audrey Sheila Scavella his wife, and TWO CHILDREN NAMELY, BRIA LAURYN ASHLEY SCAVELLA and ERIN PAIGE SCAVELLA. (our emphasis.) I take it that counsel for the Plaintiff focused on this paragraph in light of the fact that no other children were named in the Oath.

"CERTIFICATE AS TO GRANT OF LETTERS OF ADMINISTRATION"

[21] The question was put to her as to whether any time after March 12th, 2013 she swore a supplement to the Oath. She said she did not. We hasten to point out that the grant in paragraph 1 ends with the words;

"She having been first sworn well and faithfully to administer the same according to law and to render a just and true account of all the real and personal estate of the said deceased whenever required by law so to do."

[22] She was then redirected to the following paragraphs of her witness statement.

15. **"That in my capacity of personal representative I sought and retained the legal services of Vincent Peet to assist me with making the appropriate applications in the Supreme Court and to advise me generally on my role and duties as a personal representative of the deceased's estate. That in my dealings with Mr. Peet, I unreservedly hold him in high regard as a reputable attorney in good standing with the Bahamas Bar Association."**

[23] Ms. Flowers agreed that the statement was true and correct.

Paragraph 16 on page 4.

16. **"That immediately I got into the business of the deceased's estate by making the appropriate applications and advertising as is customary to do so. I have properly given an account of my duties as personal representative when asked to do so by the Plaintiffs. That it was through the assistance of my now attorney that suggested that the parties meet to work through the issues to avoid litigation. That I have honestly and faithfully made every effort to settle all of the deceased's personal expenses and as at today's date the deceased is still indebted to RBC FINCO to the tune of $395,821.94."**

[24] Ms. Flowers received the cheque from Colina Insurance in August of 2013. Once she agreed that this was in fact when she received the cheque, she was redirected to paragraph 20.

> 20. **"That since the death of the deceased, I was never approached by the Plaintiffs on an enquiry of the state of affairs of the deceased estate. The first time I became aware that the Plaintiffs were enquiring about the deceased's estate was when a stranger showed up at my place of work and served me with a letter from Rolle & Rolle. At no time did the Plaintiffs pick up the phone and call me to make an enquiry about the deceased estate or to enquire as to whether there were any personal insurance monies to which they could benefit after payment of the deceased's debts."**

[25] Ms. Flowers says that she was never advised that she had to contact the beneficiaries. She was not aware of this. She confirmed that the letter from Rolle & Rolle was in January 2017. She agreed that she should have told the beneficiaries. Ms. Flowers held on to that part of her witness statement which says she gave a proper accounting of her duties to the beneficiaries.

[26] At tab 30 of the Plaintiffs' bundle of documents was a letter dated 5th January, 2017 Which the Plaintiffs' attorney served on the Defendants seeking to obtain the following;

> (i) **A complete accounting of all monies received and/or obtained by you in your capacity as the Personal Representative of Mr. Scavella's Estate.**

(ii) Subject to such Accounting and reserving the right to increase the amount claimed accordingly, payment of the sum of $100,420.99 that being $85,390.01 representing one half (1/2) of the above-mentioned sum of $170,780.01 with interest thereon at the rate of five percent (5%) per annum from 30th June, 2013 to 5th January, 2017, the date hereof and continuing until payment at the per diem rate of $11.70.

(iii) Legal costs in the amount of $10,042.09 representing ten percent (10%) of the claim.

[27] Ms. Flowers never responded to the letter of the 5th January, 2017. She couldn't say whether her attorneys had responded either. All she could say was that she was told that they had spoken to Rolle & Rolle. She confirmed that subsequent to the letter she was served with the Writ of Summons in the instant action. The Writ is a specially indorsed Writ and sets out exactly what is being claimed as against the Defendant.

[28] Ms. Flowers admitted that she only provided information after being served with the Writ of Summons.

[29] As it relates to furniture for which Ms. Flowers produced receipts, she confirmed that she and the deceased agreed to purchase the furniture and she used a portion of the insurance monies to liquidate the outstanding amount owed on the furniture. She explained that she and the deceased purchased the furniture because they had the deceased's two daughters every other weekend.

[30] Ms. Flowers also had a corporate credit card, which she had used and also used some of the insurance money to pay the credit card. She confirmed that she was a Certified Professional Accountant and at the time of giving evidence, was the General Manager of Best Buy Furniture.

[31] Ms. Flowers produced a letter dated February 14th, 2018, which enclosed an accountant's report on the ESTATE OF WILLIE SCAVELLA DECEASED. It purports to be financial statements (unaudited), as at November 30th, 2017. I take particular note of the covering letter from the accountant, one Mr. Mark T. Moxey, Chartered Accountant License No. 707. Of particular note is his first and last paragraphs which say respectively;

> **FIRST PARAGRAPH:**
>
> ***"I have reviewed the statement of net assets of Willie Scavella ("the Deceased") as of November 30, 2017, IN ACCORDANCE WITH GENERAL ACCEPTED ACCOUNTING PRINCIPLES (our emphasis). All information included in these financial statements is the representation of the administrator of the estate."***
>
> **LAST PARAGRAPH:**
>
> ***"Based on my review nothing has come to my attention that caused me to believe that the financial information as set forth in the statement of net assets is not presented fairly in order for them to be in conformity with INTERNATIONAL ACCOUNTING STANDARDS"*** (my emphasis).

[32] In the statement of net assets under "**LIABILITIES**" it shows;

Accounts Payable	-	$40,455.86
$ 6,780.21		(Paid to Winsome Kerr.)
$ 6,278.28	-	(Credit Card)

$ 4, 672.94	-	Accrued Final Expenses).
$16,000.00	-	(Legal Fees)
$13,032.68	-	(Mortgage)

[33] In each category of the report the supporting notes and schedules are explained. This we deem to be critical to the conclusion of this matter and therefore set out the same.

THE ESTATE OF WILLIE SCAVELLA, DECEASED
Supporting Notes and Schedules
November 30, 2017

1. Cash

Cash includes a deposit held at call with Royal Bank of Canada.

2. Insurance Proceeds

Insurance Proceeds relates to a policy held with Colina Insurance Limited. The amount of the benefit of the policy was $165,000. On July 30, 2013 the benefit was paid to Audrey Scavella as Administrator of the Estate of the deceased.

3. Mortgage Payable

Mortgage Payable represent funds borrowed from a RBC Finco for the purpose of financing the purchase a house. The house is owned through joint tenancy with the deceased and his former wife Audrey Scavella, with Right of Survivorship. Monthly payments of $4,969.23 inclusive of escrow payments of $557.84 commenced on May 26, 2011 for a period of 216 months (18 years). The credit facility at the time of death had a balance of $520,786.93. The principal balance of credit facility at November 30, 2017 is $421,650.55. The mortgage is secured by a life insurance policy of which the insured is Audrey Scavella. The policy is equal to the original principal balance of $540,000 and bears an interest rate of 7.00%.

4. Disbursements

Accounts payable represents outstanding balances with businesses.

Master Technician Ltd.	$29,279.87
Best Buy Furniture	$11,175.99
Accounts Payable	$40,455.86

5. Accrued Final Expenses

Accrued final expenses represent amounts hospital costs and costs incurred for burial.

Doctors' Hospital	$2,377.00
Headstone	$1,595.94
Videography of Funeral	$ 700.00
Accounts Payable	$4,672.94

[34] An invoice from Master Technicians dated August 13th, 2011 was produced. The total was $6,323.56. The balance due is "0.00". Tab 11 contains an invoice dated January 28th, 2012 for a total amount of $3,467.36. The balance due is "0.00". The question was put to Ms. Flowers; "How is it that Master Technicians had vat # in 2011 and 2012 when vat was not in force as yet and the invoices were reprinted in 2017."

[35] There were questions on the insurance policy. In form 16, "RETURN OF VALUE OF THE PERSONAL ESTATE AND EFFECTS OF DECEASED" under "Debts still due to the estate considered as good and separate, estimated at (Colina Insurance Limited) it states ($194,220.00).

[36] Ms. Flowers explained that the Human Resource Department of the Bridge Authority had told her that the life insurance was three times the salary of the deceased and even though the salaries had increased, the Bridge Authority never advised the insurance company. Under the rubric "LIVING BENEFIT" she was asked if any application was made relative to this section. Ms. Flowers said she had no knowledge of an application being made. The provision makes an allowance for an insured whose diagnosis is death within the next twelve (12) months to make an application for an amount of $25,000.00 while living.

[37] As it relates to the repatriation of the body, Ms. Flowers did not make a claim and she used her corporate credit card to finance the funeral. However, when she received the cheque, she paid the company back for the use of the corporate credit card. Her employer paid for the plot which she also paid back out of the cheque. The cheque was made payable to "Audrey S. Scavella, Administrator of the Estate of Willie Scavella." In other words, it was paid to her in her representative capacity. She also produced two personal cheques, which she confirmed were hers. Mrs. Flowers also confirmed that she had deposited the insurance cheque into her personal account. When asked if the life insurance funds were co-mingled with her personal money she said yes but admitted that she should have opened a separate account. There was no re-examination of Ms. Flowers.

DISCUSSION:

[38] This is a case wherein there are several issues relative to the duties and obligations of the administrator of the estate of a deceased person under the laws of the Commonwealth of the Bahamas.

[39] Counsel for the Plaintiff re-amended the Writ of Summons to reflect the First Plaintiff as a Plaintiff in her own right due to the fact that before the hearing commenced BRIA SCAVELLA attained the age of majority leaving her sister GINA SCAVELLA to be represented by her Mother and Next Friend and with GINA SCAVELLA being the Third plaintiff.

THE ESTATE OF THE DECEASED:

[40] The estate consisted of the proceeds of an insurance policy ("the policy") in the amount of $165,000.00. There was also cash in the bank in the amount of $5,780.01. The total amount of cash was $170,780.01. According to the statement of account from Vincent Peet & Co. the "PROBATE ASSET" was stated as being $205,780.00 of special note is the sum of $17,000.00 to one Mary Morris.

THE CLAIM:

[41] The Plaintiffs' claims against the First and Second Defendant are;

1. Breach of the First Defendant's duties as the Personal Representative of the estate of the deceased.

[42] The particulars of this alleged breach are;

(a) Failing to render an Accounting of the Administration of the Deceased's Estate.

(b) Failing to deal with the assets of the Deceased's Estate in the due course of the Administration thereof.

(c) Improperly converting the assets of the Deceased's Estate to her own use and;

(d) Failing to distribute assets of the Deceased's Estate which were due to the First and Second Plaintiffs.

(2) The First and Second Plaintiffs claim as against the Second Defendant the tort of conversion.

(3) The First and Second Plaintiffs assert that the Second Defendant is PERSONALLY LIABLE for any and all breaches committed by her in her representative capacity.

THE DEFENCE OF THE FIRST and SECOND DEFENDANT:

[43] The deceased died on 19th November, 2012 WITHOUT A WILL leaving four (4) children and a wife. The First Defendant is claiming that all of the debts, liabilities and expenses are yet to be settled and that distribution has not taken place to permit sharing of the deceased's estate with the Second Defendant and the children of the deceased due mainly to outstanding liabilities and contractual obligations. The Second Defendant says that because of this it became necessary for monies to be applied to the debts, liabilities and expenses of the deceased.

[44] The First Defendant in her defence pleads in paragraph 10;

> *"Further, the First Defendant repeats that she had faithfully administered the estate of the deceased by genuinely carrying out her administrative duties and paying all of the debts of the deceased. Particularly just debts such as a conventional mortgage with RBC FINCO to which the estate of the deceased remains indebted."*

[45] There are some preliminary points I would like to highlight, which are critical to deciding this case. There is the Report of the Accountant which in particular lists a payment of $86,103.70 on a mortgage made between the deceased, the Second Defendant and RBC FINCO.

[46] Additionally, there is a payment for disbursements in the amount of $40,455.86. The disbursements were apparently paid between the day the deceased died and November 17th, 2017. We recall that the deceased died on the 19th, November 2012. The cheque from Colina is dated July 30th, 2013.

ISSUES TO BE DETERMINED BY THE COURT:

1. Did the First Defendant breach the duties owed by her to the First and Second Plaintiffs in her representative capacity of the estate of the deceased.

2. Whether payments made or applied to the mortgage can be classified as just debts of the deceased's estate for the purpose of the lawful and proper administration of the deceased's estate.

3. Were any payments due to the First and Second Plaintiffs, and if so did the First Defendant breach her duties as Personal Representative of the estate of the deceased by her failure to make payments to the First and Second Plaintiffs.

4. Is the Second Defendant personally liable for the alleged breaches in her capacity as personal representative?

5. Did the Second Defendant commit the tort of conversion by improperly converting the assets of the deceased's estate to her own use?

THE LAW:

THE PLAINTIFFS' POSITION:

[47] The Plaintiffs commence their position by focusing on the duties of a personal representative as it relates to the payment of "just debts." They rely on the case of **re TANKARD V. MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY LIMITED [1942] CH 69** at page 72 where **UTHWATT J** states;

> **"it is the duty of executors as a matter of the due administration of the estate, to pay the debts of their testator with due diligence having regard to the assets in their hands WHICH ARE PROPERLY APPLICABLE FOR THE PURPOSE, (my emphasis) and in determining whether due diligence has been shown regard must be had to all the circumstances of the case. It was contended by the Defendants that this was not a duty which was owed to beneficiaries.**
>
> **In my opinion, this contention is not correct. The duty is owed not only to creditors but also to the beneficiaries, for the ultimate object of the administration of an estate is to place the beneficiaries in possession of their interest and that object cannot be fully achieved unless all debts are satisfied."**

[48] The above must necessarily be interpreted to mean that "**IF THE ASSETS IN THE HANDS OF THE ADMINISTRATOR ARE PROPERLY APPLICABLE FOR THE PURPOSE OF PAYING JUST DEBTS.**" It also follows that if assets that are not applicable for the payment of just debts are used for that purpose then there is a breach by the personal representative.

[49] The question to be answered therefore is; "what are just debts and testamentary expenses." The Plaintiffs agreed that reasonable funeral expenses would be payable out of the deceased's estate. What is reasonable however would be a question of fact and would fall to be determined on average and in all the circumstances. It also follows that if an administrator is extravagant in the

spending of funds from the estate for an elaborate funeral then the administrator becomes liable for any amount which is deemed in excess. (See **STANTON V EWART F. YOULDON LTD [1960] 1 W.L.R. 543.**

[50] The Plaintiffs also say that the position is the same for testamentary expenses in that if a personal representative incurs testamentary expenses which are exorbitant or unreasonable having regard to customary charges, then the personal representative will be liable for any excess personally.

[51] The question of whether a personal representative has a duty to account, is addressed in the book of **PARRY & CLARKE, LAW OF SUCCESSION 9TH EDN** Pages 388 & 389;

requested,[17] or consented in writing to the breach of duty by the personal representative,[18] by way of indemnity to the personal representative. The court does not impound the interest of a beneficiary under this section unless the beneficiary knew the facts which rendered what he was instigating, requesting, or consenting to in writing, a breach of duty by the personal representative, though the beneficiary need not know that those facts amounted in law to a breach of duty.[19]

Liability to account. As already explained, a personal representative has a statutory duty to exhibit on oath a full inventory of the estate, and render an account of the administration of the estate, when required to do so by the court.[20] He must also keep clear and accurate accounts and permit the interested parties to inspect them free of charge.[21] By this means they may ascertain how the personal representative has carried out the administration.

But in equity the liability of the personal representative to account does not merely provide the interested parties with information as to how the personal representative has carried out the administration. It also provides a means of remedying many breaches of duty by a personal representative in the conduct of the administration. A personal representative may be ordered by the court to account in an administration action or (alternatively) in an action for specific relief.[22] A personal representative generally has to account for (1) his receipts and (2) his payments.

(1) *Accounting for receipts.* Under the form of order to account which is usually made against a personal representative (called an order for "a common account"), the personal representative must bring in an account showing the assets of the deceased's estate which he or his agent actually received. An executor, who owes a debt to the deceased's estate, is treated as having paid the debt to himself as executor, and he must therefore account for the amount of the debt as an asset of the estate which he received.[23] An administrator, who owes a debt to the deceased's estate, must account in the same way.[24]

[17] *Griffith* v. *Hughes* [1892] 3 Ch. 105 (the instigation or request may be oral).

[18] Trustee Act 1925, s.62 applies to a breach of the duties incident to the office of a personal representative, as well as to a breach of trust, s.68(1)(17). Apart from s.62, equity has jurisdiction to impound the interest of a beneficiary who instigated a breach of trust, to the extent to which he benefited by the breach, *Raby* v. *Ridehalgh* (1855) 7 De G.M. & G. 104.

[19] *Re Somerset* [1894] 1 Ch. 231, 270 and 274.

[20] Administration of Estates Act 1925, s.25, as amended by Administration of Estates Act 1971, s.9: for applications for an inventory and an account see *ante*, p. 216.

[21] *Freeman* v. *Fairlie* (1812) 3 Mer. 29, 43–44; *Ottley* v. *Gilby* (1845) 8 Beav. 602 (legatee entitled to inspect, but not to a copy of the accounts at the expense of the estate); *Re Bosworth* (1889) 58 L.J.Ch. 432.

[22] *Post*, pp. 396 *et seq.*

[23] *Ingle* v. *Richards (No. 2)* (1860) 28 Beav. 366 (debt which executor owed to T was asset in his hands, for which he must account as asset of T's estate); *Re Bourne* [1906] 1 Ch. 697; *Jenkins* v. *Jenkins* [1928] 2 K.B. 501; *Commissioner of Stamp Duties* v. *Bone* [1977] A.C. 511, 518.

[24] Administration of Estates Act 1925, s.21A (added by Limitation Amendment Act 1980, s.10 and amended by Limitation Act 1980, s.40(2) and Sched. 3): s.21A also applies to an executor by representation.

Sometimes a personal representative is ordered by the court to account upon the footing of wilful default, *i.e.* to account, not only for assets which he or his agent actually received, but also for assets which he would have received but for his own wilful default. In this context wilful default means a breach of duty by the personal representative which caused a loss of assets. The breach of duty may constitute a *devastavit*[25] or a breach of trust.[26] Wilful default does not require conscious wrongdoing by the personal representative.[27]

The personal representative may be ordered to account upon the footing of wilful default in respect of the whole estate or (alternatively) in respect of a particular asset or transaction. In *Re Tebbs*[28] the executors of T's will sold T's land to a company pursuant to an option to purchase conferred on the company by will. The sale was made four years after T's death at the probate value of the land, instead of at its (higher) current market value as required by the option. This was a breach of trust by the executors. A residuary beneficiary sought an order against the executors for an account to be taken upon the footing of wilful default in respect of T's whole estate. The court ordered an account upon the footing of wilful default in respect of this land, but ordered a common account in respect of the rest of T's estate. As one act of wilful default (*i.e.* the breach of trust) had been proved, the court had jurisdiction to make an order for an account upon the footing of wilful default in respect of T's whole estate.[29] What test ought the court to apply in exercising its discretion whether to make such an order? Slade J. said that the test to apply was to ask, "is the past conduct of the trustees such as to give rise to a reasonable prima facie inference that other breaches of trust[30] not yet known to the plaintiff or the court have occurred?"[31] The evidence before the court did not give rise to such a prima facie inference, so as to justify a "roving inquiry"[32] by the taking of an account upon the footing of wilful default in respect of T's whole estate.

(2) *Accounting for payments.* The personal representative must discharge himself as regards the assets he received by showing that he dealt with them in due course of administration. For instance, he may show that he applied the assets in paying expenses and debts of the deceased which were properly payable by him, or that he distributed the assets pursuant to an order of the court. He can also discharge him-

[25] *Re Stevens* [1898] 1 Ch. 162.
[26] *Re Tebbs* [1976] 1 W.L.R. 924: see also *Re Wrightson* [1908] 1 Ch. 789, 799–800 (active breach of trust: no "roving inquiry" ordered to ascertain other breaches); *Bartlett v. Barclays Bank Trust Co. Ltd. (No. 2)* [1980] Ch. 515, 546 (wilful default means a "passive" as distinct from an "active" breach of trust): but surely an "active" breach, as much as a "passive" breach, may give rise to a reasonable prima facie inference that other breaches have occurred.
[27] *Bartlett* v. *Barclays Bank Trust Co. Ltd. (No. 2), supra*: see J. E. Stannard [1979] Conv. 345; *cf.* J. A. Andrews (1981) 1 Legal Studies 303, 310–311 and 322.
[28] *Supra.*
[29] *Sleight* v. *Lawson* (1857) 3 K. & J. 292; *Re Youngs* (1885) 30 Ch.D. 421, 431–432.
[30] Or *devastavits*: the test appears equally applicable whether the breaches of duty constitute breaches of trust or *devastavits*.
[31] *Ibid.* at p. 930. *Cf. Re Wrightson, supra,* and *Bartlett* v. *Barclays Bank Trust Co. Ltd., supra.*
[32] *Ibid.* at p. 929.

[52] As to the conversion claim, the Plaintiffs say that it is a long established position that a personal representative will be in breach of his/her duty if he/she converts any assets of a deceased's estate to his/her own use. In reliance they cite the case of MARSDEN V REGAN [1954] 1 W.L.R. 423 the principle of which they say is;

> **"A personal representative breaches his/her duty if he/she converts assets of the estate to his/her own use."**

[53] In further support of this principle the Plaintiffs cite Section 56 of the Probate and Administration of Estates Act 2011 ("The PAE Act"), which states;

> **"Where a person as personal representative of a deceased person (including an executor in his own wrong) wastes or converts to his own use any part of the real or personal estate of the deceased, and dies, his personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste and conversion in the same runner as the defaulter would have been if living."**

[54] I do not hesitate to say that I agree with the above positions. However, before I can conclude such a position I would have to show that the First Defendant converted assets of the estate to her own use which would then be transferred to the Second Defendant.

[55] In the first instance, there is no denying that the First Defendant is the personal representative of the estate of "WILLIE GRAHAM SCAVELLA", ("the Deceased"). The term "personal representative" applies both to an executor of a Will and a Court appointed administrator of the estate of a deceased person, which is the situation in the instant case.

CONVERSION:

[56] The tort of conversion is defined as being;

> **"An intentional tort consisting of "taking, with the intent of exercising over the chattele an ownership INCONSISTENT (our emphasis) with the real owners right of possession."**

[57] It is a tort of strict liability. Special note is taken of the fact that its equivalent in criminal law includes "LARCENY" or "THEFT" and "CRIMINAL CONVERSION". As in any other criminal offence there are elements. The elements of conversion are;

1. **"Intent to convert tangible or intangible property of another to one's own possession and use.**

2. **The property in question is subsequently converted.**

[58] However, the question which should perhaps be answered first and foremost is; "Was the insurance money properly applied to just debts, funeral and testamentary expenses.

[59] At paragraph 25 in the Case of **Re: TANKARD** (supra), it speaks of the duty of executors (personal representatives) to pay the debts of the testator with due diligence, having regard to the assets in their hands **"WHICH ARE PROPERLY APPLICABLE FOR THAT PURPOSE."**

[60] When one looks at Section 56 of the Probate and Administration of Estates Act 2011, ("the PAE Act") it is patently clear that wherever and whenever a personal representative in their capacity as personal representative wastes or converts to his own use any part of the real or personal estate of a deceased and dies, his

personal representative **"SHALL"** to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner **AS THE DEFAULTER WOULD HAVE BEEN IF LIVING** (my emphases).

[61] In other words, dead or alive, a personal representative shall be liable personally for the conversion or waste of any assets of a deceased's person's estate, which may have been converted to the personal representatives own use.

[62] The Defendants seem to be relying on S. 65 of the PAE Act which states;

S. 65

(1) **"Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.**

(2) **Such contrary or other intention shall not be deemed to be signified**

[63] However, we must necessarily look at S. 20 of the Inheritance Act which provide;

"Where a deceased person was immediately before his death beneficially entitled to a JOINT TENANCY of any property, the deceased's share in the property shall upon his death pass automatically to the surviving joint tenant or tenants AND SHALL NOT BE TREATED FOR THE PURPOSE OF THIS PART AS PART OF THE NET ESTATE OF THE DECEASED."

[64] Again, this section is patently clear. In common language it is saying, where a person while alive, is a joint tenant/owner of any property, his share passes AUTOMATICALLY to the surviving joint tenant or tenants. The section goes on to make it clear that the joint property once owned by the deceased SHALL NOT BE TREATED AS A PART OF THE NET ESTATE of the deceased.

[65] Therefore, the claim by the first defendant that she was entitled to pay sums on the mortgage and outstanding bills is seriously without merit. The liability for the mortgage balance on the jointly owned property and JOINTLY OWNED DEBTS were automatically or put another way "BY OPERATION OF LAW" his and hers alone in her capacity as Second Defendant. She was immediately upon the death liable to pay those debts personally. In this regard, I conclude that the First Defendant converted the First and Second Plaintiffs' entitlement in the insurance proceeds to her own use and benefit as Second Defendant. She is therefore legally bound to account for the said funds and to pay over the portions to which the First and Second Plaintiffs are entitled. This would be the position even if the First Defendant was not also a beneficiary.

[66] The deceased left no contrary intention or writing to the effect that the insurance monies were to be used for the payment of the outstanding mortgage or any other debts. The legal position in the instant circumstances would be that the First and Second Plaintiffs would have been entitled to 1/3 each of the total sum of the insurance proceeds. This is pursuant to Section 4 of the Inheritance Act which states;

4. **"The residuary estate of an intestate shall be distributed in the manner mentioned in this section, namely –**

(a) if the intestate leaves a husband or wife and no children, the surviving husband or wife shall take the whole residuary estate,

(b) if the interstate leaves a husband or wife and

(A) one child, the surviving husband or wife shall take one half of the residuary estate and the remainder shall go to the child.

(B) children, the surviving husband or wife shall take one half of the residuary estate and the remainder shall be distributed equally among the children."

[67] Therefore, the Second Defendant was only entitled to a Fifty percent (50%) interest in the insurance monies.

[68] I recall that the First Defendant testified and admitted that she co-mingled the insurance monies with her personal funds. She also agreed that she should have, in hind sight, opened a separate account.

[69] In the case of **LIGHTBOURNE V BETHEL [1989] BHS J. No. 105, George C.J.** stated at paragraph 14;

"As stated in 17 Halsbury 4th Edition paragraph 1557;

It is the duty of personal representatives to keep clear and accurate accounts, and always to be ready to render such accounts when called

upon to do so. It is no excuse that they are inexperienced in keeping accounts for in that case it would be their duty to employ a competent accountant to keep them."

[70] It was the evidence of the First Defendant that she was a Chartered Accountant by profession. In this regard she ought to have been extremely familiar with generally accepted accounting principles, (GAAP). As this was not done, then the First Defendant is liable as personal representative.

QUAMTUM OF LOSS, DAMAGES AND INTEREST:

[71] The First Defendant pegged the value of the Deceased's estate at $205,780.00. The First and Second Plaintiffs say that a reasonable payment in respect of testamentary expenses, based on the value of the estate, $205,780.00 would be 2% of the value which is $4,115.60. I concur that a reasonable amount for testamentary expenses ought to be 2% in the circumstances. This would be an amount of $4,115.60.

[72] We also agree with the First and Second Plaintiffs that the sum of $1,850.00 would be a reasonable funeral expense in light of the fact that it was a double plot shared with the Second Defendant's sister. The calculation of the net value of the estate after reasonable expenses of $13,017.70 from the stated value of $205,780.00 would be $192, 762.20. The First and Second Plaintiffs entitlement would be 50%, which is $96,381.10. Each therefore would be entitled to $48,190.55 and I so order the amount of $48,190.55 to be paid to each of the 1st and 2nd Plaintiffs.

[73] I also award interest at the rate of 5% per annum from July 30th, 2013 to date with interest accruing from the date of judgement until full payment.

[74] The sum of $26,379.30 representing interest on the amount of $96,381.15. Interest is also awarded at the rate of 5% per annum for the relevant period.

[75] **AND THE COURT ORDERS THAT**:-

(1) The First and Second Defendant pay to the First and Second Plaintiffs the total sum of $122,760.45 in damages and interest.

(2) The Court hereby appoints the Third Plaintiff as Trustee for the receipt and management of the funds to be received by and on behalf of the First and Second Plaintiffs and that the First and Second Defendants shall make such payment to the Third Plaintiff in her capacity as Trustee for the receipt and management of the said sums ordered to be paid to the Third Plaintiff by the First and Second Defendants.

(3) Costs are to be paid to the First, Second and Third Plaintiffs by the First and Second Defendants occasioned by this action to be taxed if not agreed.

Dated this 09th day of December A.D., 2019.

Keith H. Thompson
Justice