COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION
2019/CLE/gen/00530

BETWEEN

HAJNA MOSS
(a beneficiary of the Estate of Eldica Theresa Moss)

First Plaintiff

AND

TERRILL LOMAR VAN CARRINGTON
(a beneficiary of the Estate of Eldica Theresa Moss)

Second Plaintiff

AND

MICHAEL MOSS
(as Co-Executor of the Estate of Eldica Theresa Moss)

First Defendant

AND

CEPEDA MOSS
(as Co-Executor of the Estate of Eldica Theresa Moss)

Second Defendant

Before:	**The Hon. Madam Justice G. Diane Stewart**
Appearances:	**Mr. Arthur Seligman and Mr. Ra'monne Gardiner for the Plaintiffs** **Mrs. Krystal Rolle Q.C. and Ms. Kendrea Demeritte for the Defendants**
Hearing Date:	**20th July 2021**
Ruling Date:	**2nd September, 2021**

RULING

1. By Summons filed 15th June 2021, the Plaintiffs seek an order directing the Defendants: (1) In their capacity as the Executors of the Estate of Eldica Moss **(the "Deceased") (the "Estate")**, to pay from the Estate, the outstanding taxes for the home situate in New Rochelle, New York, Westchester, U.S.A **(the "Property")** in the amount of $110,152.21; and (2) to pay from the First Plaintiff's share of the estate, her legal fees of her tax attorneys Messrs. Cole Schotz, 25 Main Street, Hackensack, New Jersey, 07601, U.S.A, **(the "U.S. Tax Attorneys")** in the amount of $34,076.12.

2. The Plaintiffs also seek an order approving the payment of the fees, expenses and costs associated with their Bahamian attorneys, Lennox Paton of Bayside Executive Park, No. 3, West Bay St., Nassau, Bahamas, **(the "Bahamian Attorneys")** in the amount of $231,552.34 (VAT inclusive) or alternatively, pre-emptive costs in favour of the Plaintiff for the same amount.

Brief Background

3. The Plaintiffs are challenging the validity of the Deceased's last will and testament executed on the 1st June 2011 **(the 2011 Will")**. They base their claim on the fact that the Deceased was diagnosed with Alzheimers on 30th October 2009 which would have prevented her from having the necessary testamentary capacity to execute the 2011 Will when she had already executed a will on the 24th June 2009 **(the "2009 Will")**.

4. The Plaintiffs' action is based on the alleged relationship which existed between the Deceased and the First Defendant, who they claim was responsible for paying the Deceased's bills and other liabilities in 2011 and who would take her to her bank appointments and to her business manager who allegedly also had a great influence over her at the time; both knowing that she was inflicted with Alzheimer's disease.

5. The Defendants applied for and were granted probate of the Estate on the 14th February 2018 however, before they could carry out their duties as Executors, this action was launched with the aim of having, *inter alia*, the 2011 Will pronounced invalid and the grant of probate revoked.

6. At the time of the application, the evidence in the trial had been completed but closing submissions had not been made.

The Costs and Liabilities Application

7. The Plaintiffs made the application pursuant to Section 30 of the Supreme Court Act, Order 59 of the Rules of the Supreme Court and the inherent jurisdiction of the Court. They relied on the Second Affidavit of Hajna Moss filed on the 16th July 2021 in support **(the "Second Affidavit")**.

8. By the Second Affidavit, the First Plaintiff, averred that she and the Second Plaintiff, both live in the home at New Rochelle, New York, in the county of Westchester, U.S.A., owned by the Deceased and which was willed to the Plaintiffs and the First Plaintiff's two children by the 2011 Will. She also owns a chain of fitness centers and employs the Second Plaintiff as her business assistant. On the 17th March 2020, due to the execution of an Executive Order by the Governor of New York, all non-essential businesses were closed due to the COVID-19 pandemic as strict COVID-19 protocols were implemented.

9. The First Plaintiff explained that the strict protocols had a significant impact on her business, income and finances which resulted in neither herself or the Second Plaintiff receiving a paycheck from the 16th March 2020 to the 17th May 2020. The checks actually received by them from the 18th May 2020 to the 31st October 2020 were considerably reduced based on the guidelines of the federal government.

10. From the 31st October 2020 to the 2nd April 2021, she nor the Second Plaintiff received any income from the business/job. As a result, she was forced to borrow against her IRA

in order to pay her basic bills. She did not know when the business would resume and become profitable again.

11. The First Plaintiff stated that both she and the Second Plaintiff were unable to pay their US Tax Attorneys and their Bahamian Attorneys. She went on to say that at the time this litigation was commenced, she and the Second Plaintiff did not anticipate the pandemic and the financial impact it would cause.

12. Their Bahamian Attorneys wrote to the Defendants' counsel Rolle & Rolle by letter dated the 22nd May 2020 **(22nd May Letter")**. By the 22nd May Letter, they informed Rolle & Rolle that the taxes on the Property were in arrears in the amount of $67,681.11 as at 15th May 2020.

13. As the house has not been conveyed to the Plaintiffs under the 2011 Will, they maintained that it was a liability of the Estate, which the Defendants' were obligated to pay in their capacities as Executors. There was no response to the 22nd May Letter and by a follow up letter dated the 15th April 2021, her Bahamian Attorneys again wrote to Rolle & Rolle requesting, *inter alia*, the payment of the outstanding taxes on the Property.

14. On the 13th April 2021, her US Tax Attorneys wrote to her Bahamian Attorneys and indicated that based upon their professional experience and information they had received, if the taxes were not paid expeditiously, there was a risk that the Property would be sold in order to pay off the outstanding real property taxes. In order to avoid such measures, it was essential that they be paid.

15. This information was also forwarded to Rolle & Rolle who in response on the 28th April 2021, indicated that the Defendants would only be prepared to pay the outstanding liabilities from the Plaintiffs' portion of the Estate. The letter also additionally stated that the Plaintiffs were impugning the appointment of the Defendants and their resultant capacity and that their acknowledgement of their capacity as Executors was wholly inconsistent with the underlying premise of their challenge and pending relief sought.

16. The Defendants offered to pay the outstanding taxes on the premise that the Plaintiffs agreed that the taxes were a financial obligation for their account and would be deducted from their portion of the Estate. The offer was subject to the Executors receipt of the Central Bank of The Bahamas approval. The Defendants also confirmed that the payment would be an exceptional occurrence given that their challenge remains sub-judice and the estate remains un-administered and it was being done for the preservation and protection of the Estate's asset.

17. The First Plaintiff averred that the letter appeared to be an attempt to punish the Plaintiffs for challenging the 2011 Will. She added that the most recent tax statement showed the taxes owing as at May 2021 to be $113,431.51 which continued to increase monthly. Thereafter, on 26th May 2021, Rolle & Rolle wrote to the Bahamian Attorneys confirming that Central Bank approval for the payment of the taxes for the Property had been received and that the taxes were paid. The First Plaintiff stated that the payment was made without consultation with her Bahamian Attorneys.

18. The First Plaintiff also averred that they owed their Bahamian Attorneys $231,552.34 in legal fees as at 7th April 2021 and their US Tax Attorneys $34,076.12 as 9th March 2021. She further averred that no matter what was determined by the Court overall, the First Plaintiff was entitled to $2,500,000.00 under the 2011 Will and an equal share of the Bahamian bank account under the 2009 Will which held much than more what was being sought.

<u>ISSUES</u>

19. I am tasked with determining the following issues:

    1. Whether the Court has the jurisdiction to order the payment of the taxes for the Property from the Estate be deducted from the beneficiary of that Property's share of the Estate?

    2. Whether the Court has the jurisdiction to order the payment of the legal fees of the Plaintiffs' US Tax Attorneys from the Estate?

    3. Whether the Court has the jurisdiction to order the payment of the legal fees of the Plaintiff's Bahamian Attorneys from the Estate?

ISSUE ONE - Whether the Court has the jurisdiction to order the payment of the taxes for the Property from the beneficiary's gift under the Estate?

SUBMISSIONS

20. The Plaintiffs submit that a personal representative had a duty to ascertain the debts of a testator and to pay such liabilities. They highlight that the Defendants were issued a grant of probate on the 14th February 2018 of the 2011 Will. Since the issuance, the Defendants had an opportunity to ascertain the liabilities of the Deceased's estate.

21. The Plaintiffs sought to distinguish the Defendants' reliance on **In Re Rooke [1933] Ch. 970** in support of their decision to pay the outstanding taxes on the Property out of the Plaintiffs' portion of the estate. They instead submit that the Defendants should be obligated to pay such taxes from the Estate based on the unsettled challenge of the 2011 Will. They contended that it was evident from **In re Collins' Will Trusts [1971] 1 WLR 37**, that **<u>In Re Rooke</u>**, was not intended to be applied as a strait jacket as the surrounding circumstances of the case must be considered. Brightman J opined:

> **"It is clear that the ratio decidendi of the decision of Maugham J. was that if the subject-matter of the legacy or devise in fact produced a profit, the legatee or devisee would have been entitled to that profit. I now have to consider whether there is any different approach to the case before me, and I start by directing my mind solely to such articles of furniture and personal effects as may in due course of time be selected by Mrs. Hewetson or others of the indicated beneficiaries. In the normal case there can be no doubt that the title of a specific legatee stems from the will itself. However, in a case where a particular beneficiary is given a power of selection the title of the beneficiary stems, not directly from the will, but from the act of selection; just as in the case of a fund subject to a discretionary trust or power vested in trustees or to a general power of appointment, the title of the beneficiary stems from the act of selection by the trustee or from the instrument of appointment. In those circumstances it seems to me that logically if the subject-matter of the power of selection had been income-producing, any**

income produced between the date of death and the date of selection would have belonged to residue and not to the beneficiary in whose favour the selection was made; the income in such case accrued prior to the moment of time at which the title of the beneficiary was created.
I therefore reach the conclusion that in a case such as the present, where persons are given a power of selection so that the title of the beneficiary stems from the selection, had there been any profits ante-dating the time of selection, those profits would have belonged to residue. On the basis of that reasoning I think that the case is distinguishable from *In re Rooke* [1933] Ch. 970."

22. They contend that the Defendants failure to pay the outstanding taxes constituted a breach of their duties which resulted in the taxes increasing to almost double the arrears. The Plaintiffs attribute such failure to the Defendants' intentionally punishing them for challenging the 2011 2011 Will as set out in the 28th April I 2021 letter which stated: -

> **"Thirdly, and in any event, but for Hajna's challenge, the Estate of Eldica Moss would have long been administered and it cannot reasonably or legitimately be asserted by Hajna and Terrill in the circumstances that the lack of administration is the result of any default or failure on the part of the Executors. Unquestionably, the delay of administration is the result of the challenge of Hajna and Terrill."**

23. The Plaintiffs accordingly seek an order that the Defendants pay the outstanding taxes and their US Tax Attorneys' legal fees out of the Estate and that if it must be taken out of any of the beneficiaries' portion that it should be from the Defendants' share because of their knowledge of the arrears and their failure to carry out their duties.

24. The Defendants conversely submit that it is settled law that all expenses incurred by an estate for the preservation and protection of its assets should be borne by the beneficiary to whom the assets were devised under the will. They contend that the funds paid by the Defendants for the protection and preservation of the Property should ultimately be paid by the Plaintiffs as they are the beneficiaries of the property; the subject of the real property taxes.

25. They relied on **In Re Rooke [1933] Ch. 970** where it was stated:

> **"The costs of the preservation and upkeep of property specifically devised and bequeathed between the date of the testator's death and the date of the executors' assent are payable by the specific devisees and legatees."**

26. The finding in **Re Rooke** was followed by **In re Wilson Dec'd, Wilson v Mackay and Others [1966] 3 WLR 365** where it was held:

> **"….the estate duty on the real estate and the costs of its preservation, upkeep and sale ought to be borne by the devisee of the real estate."**

DECISION

27. Executors of a deceased's estate are not only responsible for distributing a deceased's assets as stated in his or her last will and testament, but by the Probate and Administration of Estates Act **(the "Act")**, they are obligated to also first ensure that any

debts and liabilities are paid. The payment of debts and liabilities has been entrenched in statute in this jurisdiction under section 62 of the Act. Section 62 states:

> **"62. Real and personal estate of deceased are assets for payment of debts.**
> **(1). The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power disposes of by his will, are assets for payment of his debts (whether by specialty or simply contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.**
> **(2) Subsection (1) takes effect without prejudice to the rights of encumbrancers."**

28. The taxes on the Property need to be paid as they continue to increase and because there is the threat of the Property being taken by the relevant authorities and sold to satisfy the debt. The parties do not disagree that the taxes need to be paid nor do they disagree that it should be paid by the Estate as it is real estate previously owned by the Deceased and devised in both the 2009 Will and the 2011 Will.

29. It follows that whatever determination the Court makes in the action, the debt has to be satisfied however, due to the circumstances mentioned above, it has to be satisfied sooner rather than later i.e. before my findings on the validity of the 1st June Will.

30. In **Coutts & Company v. Bank & Ors. [2002] EWHC 2460 (Ch)** the High Court of Justice, Chancery Division had to consider the incidence of costs in relation to an asset which was the subject of a specific legacy and the duties of the executor in that regard. Mr. Justice Lloyd noted that it was a settled principle of law that a specific legatee was responsible for the costs associated with the subject of a gift. He advanced the following in his ruling:

> **"The principle that a specific legatee bears costs incurred in connection with the subject of the gift has been established in relation to a number of kinds of expenditure. Taking only a selection of the cases, costs of packing, transport and insurance are covered in *Re Fitzpatrick* [1952] Ch 86, costs of upkeep, care and preservation in *Re Pearce* [1909] 1 Ch 819, and *Re Rooke* [1933] Ch 930, and foreign duties payable in *Re Scott* [1915] 1 Ch 592."**

31. The Estate is made up of both real estate and personal estate, cash and assets which are sufficient to pay the outstanding taxes on the Property. The responsibility of paying the costs associated with a gift by a specific beneficiary is a common practice. In the instant case, because the 2011 Will is being challenged, the administration of the Estate is at a standstill however, the outstanding taxes on the Property still need to be paid.

32. Upon determination of the validity of the 2011 Will, the amount paid for the outstanding taxes shall be deducted from the beneficiary of the Property. The distinction sought to be made by the Plaintiffs to **In Re Rooke**, is not applicable to these facts. This application relates to a specific devise which has not been completed due to the Plaintiffs' challenge and no other reason. The Plaintiffs are not required to do anything before they can

benefit from the devise. Accordingly, I order that the amount paid by the Estate for the taxes on the New Rochelle property be deducted from the beneficiaries of that property.

ISSUE TWO – Whether the Court has the jurisdiction to order the payment of the legal fees of the Plaintiff's US Tax Attorneys from the Estate?

33. The US Tax Attorneys were engaged by the Plaintiffs and not the Estate. On a review of the invoices, it is apparent that the work performed related to, *inter alia*, matters other than the question of the real property taxes on the House.

34. The Defendants would be liable to the Estate for making a disbursement In favour of certain beneficiaries and not others. The fees of the US Attorneys are personal to the First Plaintiff. Therefore, I decline to make an order directing that the Defendant pay the legal fees from the Estate.

ISSUE THREE – Whether the Court has the jurisdiction to order the payment of the legal fees of the Plaintiff's Bahamian Attorneys from the Estate?

35. The Plaintiffs seek an order for payment of their legal fees of their Bahamian Counsel from the First Plaintiff's share of the Deceased's estate as an interim payment. They contend that the Court has a wide discretion to order costs pursuant to section 30 of the Supreme Court Act and Order 59 Rule 2 of the Rules of the Supreme Court, although this discretion must be exercised judicially. They relied on **Soldier Crab Limited t/a Sandy Toes v. Aqua Tours Limited [2016] 2 BHS J. No. 190** where Charles J stated:

> **"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."**

36. The Plaintiffs also relied on **Amber Louise Murphy v Hot Pancakes Limited SCCivApp No. 95 of 2020** where the appellate Court permitted a party's' legal costs to be paid from a company's account claimed to be beneficially owned by both parties so that the appellant would have been able to afford legal representation. Barnett P held:

> **"21. In a nutshell, where the assets are such that both parties make a proprietary claim to them, the court must engage in a balancing exercise of relative injustice. That is whether the injustice of permitting the use of the funds held by the defendant is outweighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may, in course, turn out to be a successful defence."**

37. The Plaintiffs point out that while the Defendants were prepared to pay the outstanding taxes on the Property, they, without justification, refused to pay any fees from the same funds in relation to the Plaintiffs' legal costs, without justification. The Plaintiffs' contend that the payment of their legal fees was merely an advance due to their extraordinary circumstances.

38. In the alternative, the Plaintiffs seek an order for pre-emptive costs. They cite **McDonald v. Horn [1995] 1 ALL ER 961** where Lord Justice Hoffman described the practice of extending an award of costs in any event to beneficiaries, with reference to the English equivalent of the Bahamian Order 59 rule 6 (2):

> **"(ii) Extension of special principle to beneficiaries**
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> **"..... The Chancery Courts have, however, been willing in certain circumstances to extend to other parties to trust litigation an entitlement to costs in any event by analogy with that accorded to trustees. The classic statement of the principles upon which the court acts is by Kekewich J, who was acknowledged in his time as a master of Chancery procedure, in *Re Buckton, Buckton v Buckton* [1907] 2 Ch 406 at 413–415. While warning that it was 'well nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases', he said that trust litigation could be divided into three categories. First, proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of administration. In such cases, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund. Secondly, there are cases in which the application is made by someone other than the trustees, but raises the same kind of point as in the first class and would have justified an application by the trustees. This second class is treated in the same way as the first. Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in the same way as ordinary common law litigation and costs usually follow the event. Kekewich J acknowledged that it is often difficult to discriminate between cases of the second and third classes."**

39. They contend that in hostile litigation, the Court has an exceptional jurisdiction to make an order regarding the ultimate incidence of costs. They relied on **In the Matter of JP Morgan 2013 (2) JLR** where Nugee JA stated:

> **"Where I think the question of benefit to the trust is potentially relevant is in deciding what order should be made in respect of the beneficiary's liability for costs. Where a trustee brings a claim (a Buckton category (1) case) it is usually because the trustee is facing some difficulty of construction or administration which needs resolution. The trustee may need to know on what trusts he holds the fund, or what the scope of his powers or duties is, or whether some proposed action is a proper course to take, or require some other guidance from the Court. In all such cases, the reason that the proceedings are regarded as being for the benefit of the trust (and hence "the costs of all parties as necessarily incurred for the benefit of the estate" as Kekwich J says) is that there is a question which needs to be resolved in order for the trust to be properly administered..."**

40. The Plaintiffs maintain that the decision as to the validity of the 2011 Will is essential to the proper administration of the Deceased's estate, and that the costs for so doing by the beneficiaries should be borne by the Estate.

41. The Defendants rejected the Plaintiffs' request for the payment of their legal fees from the un-administered Estate on the basis that they had no beneficial interest in it and that they, as Executors, had no legal basis, right or authority to make such a payment. They contended that section 59 of the Act made provision for the transfer of a deceased's real estate and personal estate to the deceased's personal representative. They further

contended that the beneficiaries of the residuary estate, devisees and beneficiaries of specific gifts only had an interest which had not yet realized, in the assets gifted to them in a will.

42. Until an estate is fully administered, a beneficiary was not entitled to claim possession of any residual estate, property or gift left by the testator as the personal representative holds the legal and equitable ownership of all the deceased's assets until administration is complete as held in **Lord Sudeley v Attorney General [1897] A.C. 11**.

43. The Defendants further contended that section 30 of the Supreme Court Act gave the Court discretion to award the costs of and occasioned by proceedings but it did not give the Court a discretion to order that the Plaintiffs pay the Defendant's legal fees from an un-administered estate.

DECISION

44. The court has full power to decide by whom and to what extent any costs are to be paid. However, it is a general rule that an unsuccessful party will usually be ordered to pay the costs of the successful party in proceedings, subject of course in certain circumstances for the Court to vary that usual rule.

45. The Plaintiffs seek the payment of the legal fees of their Bahamian Attorneys to date, from what would be the First Plaintiff's share under either the 2011 Will or the 2009 Will, as a type of interim payment. Interim payments are governed by Order 29 of the RSC and speak specifically to a defendant making payment to a plaintiff in respect of damages for personal injuries or death which the defendant may be made to pay if he is found to be liable at the end of the proceedings. It is important to note that the payment imputes some type of liability.

46. As noted by Winder J in **Bolingbroke Limited v Summit Insurance [2018] 1 BHS J. No. 21**, under the current regime of the Rules of the Supreme Court **(the "RSC")**, the scope of interim payments has not been expanded unlike the expansion seen in the new Civil Procedure Rules. He held that even under the case management provisions of Order 31A of the RSC, the Court could not order an interim payment for claims other than personal injury. He stated,

> **"7 I am not satisfied that the powers of the Court in case management could be stretched to expand the nature of claims amenable to an interim payment. The rules specifically provide for interim payment as well as the mechanism by which it will operate. Further, that mechanism specifically limits the powers of the Court as to how interim payments may be granted.**
> **8 I agree with the plaintiff's observations that other commonwealth jurisdictions have expanded the purview of interim payments under the Wolf CPR reforms. Respectfully however, I am not satisfied that Order 31A rule 18 supplies me with the jurisdiction to engage in the judicial activism necessary to extend the operation of interim payments.**

47. Section 30 of the Supreme Court Act nor Order 59 of the Rules of the Supreme Court, enable the court to make interim payments.

48. The relief sought by way of an interim payment is clearly unavailable on these facts as the Defendants deny that the 2011 Will is invalid. There is no admission of liability or

concession as to the validity of the 2011 Will. There is no claim for damages for personal injuries or death. More importantly, given the Plaintiffs' contention that the legal fees come from her portion of the Estate, an order to pay the legal fees therefrom could not be considered an interim payment. Interim payments are made by a party liable in the action and not from assets bequeath to the applicants. Logically if an interim payment were the appropriate relief, then the persons liable for the payment would be the Defendants. An interim payment is not available to these Plaintiffs.

49. The Plaintiff's alternative request for a pre-emptive costs order must also be considered. Pre-emptive costs orders are mostly made in litigation relating to inter alia trusts and pention funds. I have not found any decision which granted a pre-emptive costs order in a contentious probate matter questioning the validity of the will.

50. Even if this court has a discretion to award costs on a pre-emptive basis, this action is nearly complete. At the time of this application, all evidence was closed and submissions have now been made. Only the decision remains outstanding. This is not an appropriate time for the making of a pre-emptive order.

51. At the time the action was commenced, there was no indication that the Plaintiffs were impecunious. As the evidence shows in the Second Affidavit, this application was made as a result of the conditions the Plaintiffs find themselves in due to the unfortunate COVID-19 pandemic which has regrettably caused their business to be closed. It is acknowledged that the pandemic has brought about many unforeseen and unfortunate circumstances for us all.

52. Each litigant has a right to initiate an action, in an attempt to right a matter or situation which they deem is wrong. This is what the Plaintiffs did. They felt as though there needed to be a challenge to the 2011 Will and they were entitled to do so.. However, they must have been aware of the incidence of costs associated with litigating the action.

53. Whatever will eventually be found to be devised and bequeathed to the Plaintiffs and other beneficiaries by the Deceased were gifts which the Deceased decided she would give to them. The existence of the 2011 Will and the fact that they are beneficiaries thereunder have enabled the Plaintiffs to challenge the Will but until this action has been determined the Plaintiffs cannot lay claim any of these gifts.

54. In **Raymond Saul & Co. (a firm) v Holden & Anor [2008] EWHC 2731 (Ch)** Snowden Q.C. while discussing the benefit or lack thereof of a residuary legatee under an un-administered estate, also discussed the same with respect to all legatees:

> **"29.The most recent case in the quartet is *Marshall v. Kerr* [1995] 1 AC 148. The case concerned the application of part of the capital gains tax legislation to a settlement upon trust which had been made by the widow of a testator whose estate was, at the time, still in the course of administration. Lord Browne-Wilkinson summarised the law, ([1995] 1 AC 148 at page 165E-F),**
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> > **"In English law the rights of a testamentary legatee in the unadministered estate of a testator are well settled: see *Lord Sudeley* v. *Attorney-General* [1897] AC 11 and *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] AC 694....A legatee's right is to have the estate duly administered by the personal representatives in accordance with law. But during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate."**

55. I therefore decline to make the order directing the Defendants to pay the legal fees of the Plaintiffs' Bahamian Attorneys from what would be the First Plaintiffs' portion of the Estate or at all.

56. In consideration of all of the evidence and submissions of the parties, I make the following findings:

    56.1 The amount paid out of the Estate for the outstanding taxes on the Property shall be deducted from the beneficiary to whom the Property was devised. As the Plaintiffs had only sought the payment of $67,681.11 initially in the letter, which was in fact paid, the Executors were unaware of the balance outstanding until the application was made. However, the Executors, now being aware of the balance owing, should seek expeditiously to pay the balance owing, and I so order;

    56.2 The Defendants, as Executors of the Estate, shall not pay or be liable to pay the legal fees of the Plaintiff's US Tax Attorneys from the Estate;

    56.3 The Defendants, shall not be responsible or liable for the payment of the Plaintiffs' Bahamian Attorneys from the Estate.

    56.4 The Defendants are awarded their costs of the application to be taxed if not agreed.

Dated this 2nd day of September, 2021

The Hon. G. Diane Stewart