COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivAPP. No. 101 of 2020

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

B E T W E E N

AUDREY SHEILA FLOWERS (formerly AUDREY SHEILA SCAVELLA)
(Personal Representative of the Estate of the late WILLIAM GRAHAM SCAVELLA)
Intended First Appellant

AND

AUDREY SHEILA FLOWERS (formerly AUDREY SHEILA SCAVELLA)
Intended Second Appellant

AND

BRIA SCAVELLA
Intended First Respondent

AND

ERIN SCAVELLA
Intended Second Respondent

AND

GINA SCAVELLA
Intended Third Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. Clinton Clarke, Jr., Counsel for the Intended Appellants**

Mrs. Krystal Rolle, QC with Ms. Kendrea Demeritte, Counsel for the Intended Respondents

DATES: **28 June 2021; 18 August 2021**

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Civil Appeal – Application for an extension of time within which to appeal - Prospects of success - Inordinate delay – Delay due to counsel of the intended appellants – Section 65 of the Probate & Administration of Estates Act

The judgment of the court below in the proposed appeal was delivered in December 2019. Notwithstanding counsel for the intended appellants being instructed to appeal immediately, the appeal was not filed until September 2021, well outside of the six week statutory time limit imposed on civil appeals. Counsel for the intended appellants accepts responsibility for the delay and seeks an application for an extension of time within which to appeal. The application is opposed on the basis that the delay is inordinately long, without reasonable excuse and the prospects of success are poor.

Held: application to extend time granted. Time for appealing extended to 31 August 2021, conditional upon the intended appellants paying to the intended respondents $3,000.00 by 31 August 2021 as the costs of the application to extend the time.

The length of the delay is inordinate and the reason for it is lamentable. However, the appeal raises an important issue of law and it has a good and not a fanciful prospect of success. Further, the issue of the proper interpretation of section 65 of the Probate and Administration of Estates Act raised by this appeal is of sufficient public importance that it should be considered by this Court. There does not appear to be any prejudice to the intended respondents.

Antonio v Insurance Company of The Bahamas [2012] 2 BHS J No 53 mentioned
Gatti v Shoosmith [1939] Ch 841 considered
Navette Broadcasting & Entertainment Company Ltd. v The Utilities Regulation and Competition Authority SCCivApp. No. 117 of 2019 considered
Vidale v Mayor, Aldermen and Citizens of Port-of-Spain [1968] 13 WIR considered

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J U D G M E N T

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an application for leave to appeal and for an extension of time within which to appeal.

2. The judgment against which this appeal is sought is a judgment of Thompson, J. dated 9 December 2019.

3. In that judgment Thompson, J. ordered that the intended appellants do pay to the intended respondents the sum of $48,190.55 plus accrued pre-judgment interest in the amount of $13,189.65.

4. In this action the intended appellant Mrs. Flowers is the widow of the deceased, William Scavella, who died intestate on 19 November 2012. The intended first and second respondents are the children of the deceased by an earlier marriage.

5. As the widow of the deceased, letters of administration were granted to Mrs. Flowers on 12 March 2013.

6. In this action, the children of the deceased seek an accounting from Mrs. Flowers of the monies received and payments made by her as the personal representative and beneficiary of his estate.

7. Although the action seeks an accounting, the main gravamen of the appeal is the decision by Thompson, J. that Mrs. Flowers pay to the children half of the monies paid by Mrs. Flowers from proceeds of an insurance policy. Mrs. Flowers used the proceeds of the insurance policy to pay off a debt owed by the deceased and her to RBC Finco which debt was secured by property jointly owned by Mrs. Flowers and the deceased.

8. The dispute concerns the proper interpretation of section 65 of the Probate and Administration of Estates Act. That section reads as follows:

> **"65. Charges on property of deceased to be out of property charged.**
>
> **(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 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 a contrary or other intention shall not be deemed to be signified –

(a) by a general direction for the payment of debts or all of the debts of the testator out of his personal estate, or his residuary, real and personal estate, or his residuary estate: or

(b) by a charge of debts upon any such estate, unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

(3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction therefor either out of the other assets of the deceased or otherwise."

9. In his judgment the judge held that:

"[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 (sic);

> **'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."**

10. Following that finding, the judge directed the intended appellants to pay to the children one-half of the monies used to pay off the mortgage debt.

11. Although the judgment was delivered in December 2019, and counsel for the intended appellants accepts that he received instructions to appeal immediately, the appeal was not in fact filed until 21 September 2021 well outside the six weeks' time limit imposed by the Court of Appeal Rules. Counsel for the intended appellants candidly admits that the delay was his responsibility and not that of the intended appellants.

12. The intended respondents oppose the application for an extension of time. They say the delay is inordinately long, that there is no reasonable excuse for it and the prospects of success are poor.

13. The delay is inordinately long, and the excuse given is lamentable. We have considered refusing the application to extend the time and leave the intended appellants to their civil claim against their attorneys. However, it is settled law that the failure on the part of an appellant's lawyer may be relied upon as a basis for an extension of time. In **Gatti v Shoosmith** [1939] Ch 841 Sir Wilfred Greene MR at page 845 said:

> **"On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the Court in exercising its discretion…"**

14. In **Vidale v Mayor, Aldermen and Citizens of Port-of-Spain** (1968) 13 WIR 299 Fraser JA said at page 304:

> **"…a mistake of a solicitor may be a good reason for making an application for leave to a appeal out of time and the court in considering the facts will have to determine whether in a particular case the delay was due substantially to the mistake and if so, whether, having regard to all the circumstances of the case, the court in the exercise of its discretion ought to make it an exception to the rule…"**

15. Both cases were referred to with approval by this Court in **Antonio v Insurance Company of The Bahamas** [2012] 2 BHS J No 53.

16. Relatively recently, in the case of **Navette Broadcasting & Entertainment Company Ltd. v The Utilities Regulation and Competition Authority** SCCivApp. No. 117 of 2019 this Court had to consider an application for an extension of time within which to appeal. The delay in that case was 9 months and the reason provided was the negligence of counsel. While the delay in the present case is much longer than the delay in **Navette**, we are of the view that every case must turn on its own facts. What is fair in each case will be a matter of discretion.

17. We are satisfied that the issue of the proper interpretation of section 65 of the Probate and Administration of Estates Act raised by this appeal is of sufficient public importance that it should be considered by this Court.

18. We have great difficulty with the interpretation given to this section by the trial judge and his findings as recited above.

19. The mortgage debt was owed by the deceased to bank at the time of his death and it is difficult to see how his death extinguished the obligation. The fact that the intended second appellant was now the sole owner of the mortgaged property, appears to have nothing to do with the debt itself. It is difficult to see how the deceased estate does not remain liable for the debt.

20. However, we do not decide the issue on this application for an extension of time.

21. As we are satisfied that because the appeal raises an important point of law and that it has a good and not a fanciful prospect of success we grant the application for an extension of time. It does not appear to us that the intended respondents have suffered much prejudice by the delay as the judgment debt continues to bear interest. There is no suggestion that the intended appellants will not be able to pay it if their appeal is not successful. We will grant the intended appellants an extension of time to appeal. The extension, however, is conditional on the

intended appellants paying to the intended respondents the sum of $3,000.00 as costs on this application to extend the time. The sum is to be paid by 31 August 2021.

22. The time for appealing is extended to 31 August 2021, conditional upon the sum of $3,000.00 being paid by that time.

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Isaacs, JA

The Honourable Mr. Justice Evans, JA