IN THE SUPREME COURT OF BELIZE, A.D. 2017

(PROBATE SIDE)

CLAIM NO. 515 OF 2011

BETWEEN:

ZAKIR HUSMAN	**Claimant**
AND	
MUMTAZ HUSMAN **Executrix in the Estate of** **Sadhadeth Allie Husman**	**Defendant**

BEFORE: Hon. Chief Justice Benjamin.

Appearances: Mr. Kareem Musa for the Claimant.
Mrs. Andrea McSweaney-McKoy for the Defendant.

JUDGMENT

[1] The Claimant, Zakir Husman, and the Defendant, Mumtaz Husman, are brother and sister. They are two of the four living children of Sadhadeth Allie Husman who died on November 19, 2007. The present Claim was filed on August 10, 2011 and seeks the revocation of the grant of Probate of a will dated October 25, 2007 for the estate of the deceased. The said grant was issued on December 21, 2010 in the name of the Defendant as executrix. The basis for the Claim is that the said Will was not duly executed by the deceased.

[2] The Amended Statement of Claim seeks the following orders:

> "1. An Order to have the probate of a pretended will of Sadhadeth Allie Husman dated the 25th day of October, 2007 granted on the 21st day of December, 2010 revoked and the said Will pronounced against, the said will not having been executed by the deceased, Sadhadeth Allie Husman.
>
> 2. An Order that the Defendant do furnish proper particular accounts and records of any transactions conducted in her capacity as Executrix in the Estate of Sadhadeth Allie Husman, namely the accounts of the deceased's real and personal property.
>
> 3. An Order that a Grant of Probate be issued for the will dated the 22nd of June, 2000 in the Estate of Sadhadeth Allie Husman.
>
> 4. In the alternative that an Order that a Grant of Letters of Administration be issued in the Estate of Sadhadeth Allie Husman.
>
> 5. Cost (sic)
>
> 6. Such further or together (sic) relief as may be just."

The Claimant averred that he received information on or around July 21, 2011 that the grant of Probate of the will dated October 25, 2007 purportedly signed by the deceased had been applied for and received by the Defendant. It was alleged that as a lawful child of the deceased, the Claimant is entitled, along with his other two siblings, to share in their father's estate. The Claimant also pleaded that a purported will of June 22, 2000 is the only testamentary document left by the deceased.

[3] In the Defence, it was stated that the alleged Will was discovered in the deceased's office after his death. It was further averred that the alleged Will was duly executed by the deceased. The Defence also set out the facts surrounding the Defendant's knowledge of the purported Will of June 22, 2000.

[4] The issues to be determined by the Court are:

1. Was the alleged Will lawfully executed?

2. If not, should an order be made for a grant of Probate to be issued for the Will of June 22, 2000?

3. Or in the alternative, should an order be made for the grant of Letters of Administration of the deceased's estate?

THE LAW

[5] The present claim has been brought as a probate action pursuant to Part 67 of the Supreme Court (Civil Procedure) Rules, 2005. Rule 67.1(2) provides:

> ' "Probate action" means an action for the grant of probate of the will, or letters of administration of the estate of a dead person or for the revocation of such a grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non contentious or common form probate business.'

Rule 67.2 requires that probate proceedings must be commenced by a fixed date claim form in which must be stated the nature of the interest of the claimant and the defendant in the deceased's estate to which the action relates. As was the case in the present claim, a statement of claim must be filed together with the fixed date claim form.

[6] As earlier iterated, the crux of the Claim is that the alleged will was not duly executed by the deceased. In her written submissions, the Defendant raised as a preliminary matter that the Claim provided no particulars as to the invalidity of the signature of the attesting witnesses. It was contended that the Claimant having not particularized the invalidity in the execution of the alleged Will, he was not entitled to adduce evidence outside of the scope of his pleadings. The Claimant's Attorney did not address this matter. However, it must be immediately noted that this matter was being raised after the close of the evidence. This meant that the Defendant acquiesced in the alleged omission. Having said that, no rule of procedure or of practice was referred to, in support of the contention. It cannot be gainsaid that the providing of particulars assists in refining the factual issues and sets out the case which the Defendant is

expected to answer. The Claimant did seek the Court's permission to call a handwriting expert and the Notice of Application plainly set out the reason for calling upon such an expert. In the premises, the preliminary objection is without merit and cannot be entertained by the Court.

[7] The Claimant challenged the authenticity of the signatures of the testator and of the two attesting witnesses, Mordecai Charlie and Lloyd Holmes. The law governing the execution of a will is set out in section 7 of the Wills Act, Chapter 203 of the Revised Laws of Belize 2011 which enacts:

> "7.(1) No will shall be valid unless it is in writing, and executed in manner hereinafter mentioned, that is to say –
>
> (a) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and
>
> (b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
>
> (c) such witnesses shall attest and subscribe the will in the presence of the testator.
>
> (2) No form of attestation shall be necessary."

The requirements are cumulative (**Barrett v Bem [2012] 2 All ER 920** at p. 927) and must be strictly applied (see: **Brown v Skirrow [1902]** P. 3).

[8] A presumption as to due execution of a will is founded on the *maxim omnia praesumuntur rite esse acta*. The learning of Halsbury's Laws of England, 5th ed. Vol. 102 (2010) at para. 68 states:

> "There is a presumption of due execution where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will, but this presumption may be rebutted by evidence of the attesting witnesses or otherwise ... Where there is no attestation clause, the presumption of due execution may be applied,

usually where no evidence can be produced as to the circumstances of the signing and attestation.

The burden of proving due execution, whether by presumption or by positive evidence, rests on the person setting up the will."

The presumption may be rebutted by the evidence of a handwriting expert that the testator's signature was forged (**Parslow v Parslow (1959) Times**, 3rd December).

[9] Learned Counsel for the Claimant urged that the presumption of due execution can be rebutted and referred to the following passage in Halsbury's Laws of England, 5th ed, Vol. , para.

> "Probate of a will may be opposed on the ground that the statutory requirements for due execution have not been complied with. The evidence of one of the attesting witnesses, if he deposes to the due execution, is sufficient. It have been held that, if he fails to prove the due execution, the other attesting witness must be called, even though he may be an adverse witness. The party calling an attesting witness is entitled to cross-examine him, because the witness is a witness of the court and not the witness of one of the parties. It follows that the court is entitled if it thinks fit to see documents which would otherwise under the general law be clearly entitled to privilege. The court will not exclude further relevant evidence, other than that of the attesting witnesses, for the purpose of the statutory requirements is to the prevention of fraud. If neither of the attesting witnesses can be found, or both are dead, any person who in fact saw the execution may be called, and the court is entitled to read the affidavit of one of the attesting witnesses previously made upon the application of the grant in common form. Where the witnesses are dead, evidence may be admitted of persons who were told by one of the witnesses that she had witnessed the will. The burden of providing due execution, whether by presumption or by positive evidence, rests on the person setting up the will (**Clery v Barry (1887) 21 LR Ir. 152** at p. 155n)."

[10] In urging the Court to apply the presumption of due execution of the alleged will in the absence of an attestation clause, Learned Counsel for the Defendant relies on two cases. The first was **In the Goods of Frances Peverett [1902]** P. 205 which involved an informal holograph document without an attestation clause. The witnesses to the will were dead and there was no evidence to prove the handwriting of either of them. Jeune, P applied the *omnia praesumuntur* rule and had this to say:

> "There is no authority covering this case. Two things may be laid down as general principles. The first is, that the Court is always extremely anxious to give effect to the wishes of persons if satisfied that they really are their testamentary wishes; and, secondly, the Court will not allow a matter of form to stand in the way if the essential elements of execution have been fulfilled. Those are principles which I can act upon, although I am conscious that in this case, where there is no attestation clause at all, I am going to the furthest limit ... In the present case I am willing to take the further step of allowing the presumption to prevail, although there is a total absence of attestation clause."

It is to be noted that the President found that the document was signed by the testator. It was held that the document was duly executed as a will in accordance with the statute.

[11] The second case cited was **Re: Denning (deceased), Harrett v Elliott et al [1958] 2 All ER 1**. This matter involved a holograph will on a single sheet of paper signed by the Testator. The witnesses' names were written in different handwriting upside down on the reverse side of the sheet of paper with no attestation clause. There was no evidence as to the identity of the witnesses. Sachs, J applied the presumption and granted probate of the will, referring to **In the Goods of Peverett** (supra). His Lordship had this to say:

> "If I grant probate in the present case it seems to me that I am going a step further than that which was regarded in 1902 as the furthest limit, in that here is no indication why the names were on the back of the document upside down. Having taken into account all the facts I think it

proper to go that step further because it seems to me that there is no other practical reason why those names should be on the back of the document unless it was for the purpose of attesting the will. In those circumstances I think this is a proper case for the grant of probate."

In the course of argument, learned Counsel for the Claimant sought to distinguish both cases on the basis that in neither case was there any suggestion that the signatures of the witnesses were not authentic.

[12] As stated by the learned authors of Halsbury's (see: paras. 8 and 9 above), the burden of proving due execution rests on the person setting up the will who would be the Defendant in this case. The standard of proof is the civil standard of a balance of probabilities (see: **In the Matter of the Estate of Cynthia Sholto-Small, Edwards v Maitland [2002] WL 31414007**.

[13] **ISSUE: WAS THE ALLEGED WILL LAWFULLY EXECUTED?**

The alleged Will reads as follows:

> "This document shall serve as the last will and testament of me, Sadhadeth Allie Husman, Registered Date of Birth: May 3, 1942, of 109 Freetown Road, Belize City, Belize.
>
> I hereby bequeath all real, personal, household and all other properties held in my name, Sadhadeth Allie Husman, to my only daughter, Mumtaz Jihan Allie Husman.
>
> Total assets and holdings of Aligraphics Limited shall be equally shared between Zakir Hussein Allie Husman and Mumtaz Jihan Allie Husman.
>
> Label Solutions Limited shall be left in the hands of Fizaud Husman and Farouk Husman respectively.
>
> 1 Gold/Sapphire Ring shall be left in the hands of Zakir Hussein Allie Husman.
>
> 1 Diamond Ring and 1 Gold Indian Necklace shall be given to Yvonne Pamela Sobha.
>
> 1 Set of ...... and 1 Marble Chess Set shall be given to Jonathan Moore.
>
> Executor: Mumtaz Jihan Allie Husman"

At the bottom of the page there appear three signatures, the one above appearing to be 'S. Al. Husman" and two below, one of which reads 'M. Charley' and the other is indecipherable.

[14] The Claimant, in his witness statement, stated that he is familiar with his father's signature having lived and worked with him for his entire life and he was of the firm belief that the signature on the alleged will was not that of his father. Significantly, this evidence was not challenged in cross-examination by learned Counsel for the Defendant. Instead, most of the questioning was directed towards the will of June 22, 2000.

[15] The Claimant's case was supported by the testimony of Michael Holmes, the son of Lloyd Ignatius Holmes, who was purported to be one of the witnesses to the alleged will. Lloyd Holmes died in 2009 and was thus deceased at the time of trial. Michael Holmes asserted in his witness statement that he was absolutely certain that none of the signatures on the alleged will was that of his father. He went on to refer to documents bearing his father's name and authentic signatures which were compared to the signature on the alleged Will. Here again, the substance of this witness evidence was never suggested to be not true or correct.

[16] The Claimant's case rested substantially on the evidence of the expert witness, Genoveva Marin, a forensic document analyst appointed by the Court. Her preliminary report was unhelpful as it merely served to point out the limitations on the use of a photocopy, to wit, the photocopy of the alleged Will provided to her for examination. The original documents to be questioned and for comparison were requested for physical analysis before a conclusion could be proferred.

[17] The expert report of February 20, 2012 contained certain stated conclusions. The original of the alleged Will was examined as to the signature of the deceased along with his passport, driver's licence, Belize Identification Card and fifty-six (56) Scotiabank cheques purported to have been signed by the deceased. She also examined photocopies of documents provided as specimen signatures of Lloyd Holmes, namely

business registration forms, certificate of registration of BIMPLEX and a Statement of Change of name of 'Lloyd's Royalty'. In respect of Mordecai Charley, a photocopy of the affidavit of attesting witness and his Belize passport were available for examination. The examination was stated to involve the use of a Leica Stereoscope SC with 15X magnification and a Kodak digital camera.

[18] Among other variations of signature characteristics, Ms. Marin found that pen lift was only seen on the questioned will but not on any of the known specimen signature. Although she stated that she found several similarities, there were more differences found. She stated her opinion thus:

> 'Based on the results of examination, I am of the opinion that the purported signature of Sadhadeth Allie Husman on the questioned Will was found to be different from the specimen signature submitted to me as that of Sadhadeth Allie Husman.'

The Defendant put a number of questions to the expert and in response a Further Report of April 23, 2012 was issued. The questions numbered 11. Learned Counsel complained that the questions were not all responded to and invited the Court to treat this as affecting the weight of the expert's evidence.

[19] Learned Counsel for the Defendant urged the Court to reject the reports of the expert for non-compliance with Rule 32.13 (2) of the Supreme Court (Civil Procedure) Rules, 2005. The said Rule states:

(2) At the end of an expert's report, there must be a statement that:

a) The expert understands his duty to the court as set out in Rules 32.3 and 32.4

b) He has complied with that duty;

c) The report includes all matters within the expert's knowledge and area of expertise relevant to the issue on which the expert evidence is given, "and

d) The expert has given details in the report of any maters which to his knowledge might affect the validity of the report"

Attention was drawn to the letters from both lawyers giving instructions to the expert. It was contended that the requirements were mandatory and that in the circumstances; the court ought to place little or no weight on the expert's evidence.

[20] As to the mandatory nature of the relevant rule, Learned Counsel cited the case of **Phillips et al v Symes** [2005] 4 All E.R. 519 which was decided on the basis of CPR Pt. 35 and CFP PD 35 applicable to the UK. Accordingly, this court adopts the safe course of applying the relevant Rules in Part 32 of the Rules applicable to Belize.

[21] The expert was provided with a copy of the relevant Rules from Part 32 by the lawyers for both parties coupled with a synopsis of the duties of an expert. The Attorney-at-Law for the Defendant also included the following instruction:-

> "Your report must contain a statement certifying that you understand your duty to the court; that you have complied with that duty, that the report includes all matters within your knowledge and area of expertise..."

And further instructed:

> "You must state whether your report is the truth, the whole truth and nothing but the truth."

[22] Notwithstanding the foregoing instructions, Ms. Marin's reports each included the following statement above her signature:

> "This statement, consisting of _____ pages each signed by me is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall liable to prosecution if I have willfully stated in it anything which I know to be false or do not believe to be true."

This statement does not follow the instructions set out in the letters from the Attorney-at-Law which were attached to the report. Indeed, the statement is obviously fashioned for a report to be produced in criminal proceedings. Nevertheless the expert expresses that she is aware that it is imperative to be truthful and she attests that her report is true

within her knowledge and belief on pain of prosecution for perjury for willful false statements. To my mind, this is a recognition of her duty to the same standard as that required by the Rules. Let me at once say that it is highly desirable that the statement attested to by the expert follow the requirements of Rules 32.3, 32.4 and 32.13 as far as possible. However, in this case, I am satisfied from the statement contained in the reports of the expert that there was substantial compliance with the requirement that there be a statement of truth. In addition, as will become apparent, the Court did not rely exclusively upon the expert's reports. Accordingly, the omission to fully comply with the relevant Rules in Part 32 does not, in my view, operate to render the evidence of the expert to be without weight.

[23] It is ultimately a question of fact for the Court to decide whether in the round the evidence as to the questioned signature leads to one conclusion or another. In doing so, the evidence of the lay witness may be accepted in preference to that of an expert. In the case of the deceased's signature, the Court heard the testimony of the Claimant who is the son of the deceased, the Expert's reports and the documents used by the expert for comparison. The testimony pointed to the signature not being that of the deceased and the report of the expert speaks of the signature on the alleged Will being different. A visual comparison of the documents did not assist the court one way or the other. It is of significance that the Claimant was not challenged as to his statement that his father's signature was not genuine and further that it was not inquired of the expert as to whether it was likely that the signature on the alleged Will was that of the deceased. Based on the foregoing, I have concluded that the impugned signature on the alleged will is less likely than not to be that of the deceased.

[24] The expert report of April 23, 2012 stated that: 'The purported signature of Mordecai Charley on questioned document was found to be different from the two signatures submitted as known signature of M. Charley.' Using the naked eye there are plain differences between the signature on the document as against those on the passport and the affidavit of attesting witness. Further, when cross-examined about the circumstances under which Mordecai Charley signed the affidavit, the Defendant could not give first-hand evidence and could only say she dealt with one Fitzroy Yearwood

who was not presented as a witness. In the premises, I unhesitatingly concluded that the signature on the alleged Will is not that of Mordecai Charley.

[25] The son of Lloyd Holmes, Michael Holmes, was adamant that the signature he saw on the alleged Will was not that of his father and this was not put to him as being incorrect or untrue or that he was or may be mistaken. The expert found the signature to be 'different' from the known signatures. The combined effect of the evidence leaves me in no doubt that the purported signature on the alleged Will is not that of Lloyd Holmes.

[26] The burden of proving the due execution of the alleged Will has to be discharged by the Defendant as she has sought to set up the alleged Will for probate in solemn form. She explained in her witness statement that her father had entrusted her with certain keys one year prior to his death. Upon his death, she used one key to open a metal security box in which she found among other items, a number of books. Three years later, she found the alleged Will in one of the books. She went on to detail her relationship with the purported witnesses to the Will.

[27] This evidence did not impress the Court. It passed strange that the Defendant did not find the alleged Will until June 2010. Further, having discovered it, she never brought it to the attention of any of her siblings. This was against the background that she had seen a photocopy of the purported Will of June 22, 2000 on the Claimant's desk since December 2007 and had made a photocopy. Her explanation that she was not on good terms with the Claimant does not extend to her other two siblings. Even more significant, she proceeded to clandestinely obtain probate of the alleged Will which named her an 'Executor' and substantially bequeathed all the deceased's personal and real property to her. The entire sequence of events was shrouded in surreptitious acts and raised questions as to her credibility. Her evidence did not begin to counter the rebuttal of the presumption satisfactorily established by the Claimant's case. Accordingly, I hold that the alleged Will was not duly executed in accordance with the Wills Act.

SHOULD A GRANT OF PROBATE BE ISSUED FOR THE WILL OF JUNE 22, 2000?

[28] Notwithstanding the prayer in the Amended Statement of Claim, neither party presented any evidence or advanced any submission for or against the making of an order for the grant of probate of the Will of June 22, 2000. Accordingly, there being no evidence save for the lodging of a copy of the said Will, the Court declines to make an order in respect of the probate of such Will.

SHOULD AN ORDER BE MADE FOR THE GRANT OF LETTERS OF ADMINISTRATION OF THE ESTATE OF THE DECEASED?

[29] In light of the conclusions made thus far, the estate of the deceased falls to be dealt with on intestacy. Since, neither the Claimant nor the Defendant have stated a willingness to apply for Letters of Administration, I would leave this to be issued in the normal way by application by any of the deceased's children.

[30] Further, the Defendant has stated her willingness to render an account of her dealings with the assets of the deceased's estate.

ORDERS

[31] In summary, it is ordered that probate of the purported will of Sadhadeth Allie Husman dated October 25, 2007 granted on December 21, 2010 be revoked. It is further ordered that the Defendant do furnish within 60 days, accounts and records of any transactions or other dealings in her capacity as executrix of the estate of Sadhadeth Allie Husman. The Claimant is entitled to his costs in the sum of $10,000.00 which shall be paid from the estate of the deceased and it is so ordered.

DATED this 29th day of September, 2017.

KENNETH A. BENJAMIN
Chief Justice