

IN THE SUPREME COURT OF BELIZE A.D. 2017

CLAIM NO. 45 of 2017

**CONRADO CUELLAR JR.
DORIS CUELLAR
JESUS CUELLAR
MARCUS CUELLAR
LETICIA CAWICH
AND
IRMA ESCALANTE
ERIC REYES
ALVA CUELLAR**

CLAIMANTS

DEFENDANTS

BEFORE the Honourable Madam Justice Sonya Young

Hearing
25.5.2017

Written Submissions
Delivered 1.6.2017- Defendants
Filed 2.6.2017 - Claimants

Decision
5.7.2017

Mr. Mark Williams the Claimants.
Mr. Darrell Bradley for the Defendants.

**Keywords: Wills – Validity – The Execution – Witness Attestation – Wills Act
Cap 203**

JUDGMENT

1. Conrado Cuellar Sr. died leaving his offspring to mourn. The Claimants, five of his children, say that the Will (The Will) naming, one of his daughters, Irma Escalante as executor, is false and not a true representation of Conrado's intentions. Further, it had not been properly executed and the signature on it is not Conrado's usual

signature. They seek to have The Will declared null and void and ask that Letters of Administration be granted to them instead.

2. During these proceedings it was revealed that Conrado's estate had somehow been probated notwithstanding that a caveat had previously been lodged by Conrado Cuellar Jr. The Claimants sought to have the grant revoked by an ordinary form 6 application. They also joined an application for an interim injunction. The Defendants gave an undertaking not to deal with the estate in any way until determination of this matter. That undertaking has yet to be filed notwithstanding repeated reminders given by the court and they will be condemned in cost for this. The court also called in the grant pursuant to Rule 67.4. The application for revocation was never heard as the court was of the mistaken belief that the Registrar being made aware of what could only have been an administrative error, had revoked the grant.
3. In any event, the use of an ordinary application was procedurally incorrect. A grant may only be revoked by the court through contentious proceedings on the filing of a fixed date claim form as mandated by Rule 67.2(1). Properly, the claim herein ought to have been amended to include a claim for the revocation of the grant. Nothing significant turns on this as the court is empowered to order any relief as are just in the circumstances. It cannot be contested that if the Will is found to be false or invalid, the grant of probate thereof would consequently have to be revoked.

The Issues:

4. The issues to be determined are few but fraught:

1. Is the Will Valid:
 - a. Was The Will signed by Conrado Cuellar
 - b. Was The Will signed by Conrado, or did he acknowledge his signature, in the presence of two witnesses at the same time.
2. Is The Will a true representation of Conrado's intention.

Was the Will properly executed:

The Law:

5. Section 7 of the Wills Act (The Act) reads:

“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 testatrix 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.”*

6. **Williams, Mortimer and Sunnucks 16th Executors, Administrators and Probate 16th Ed at pg 135** explains:

“There is no absolute necessity for positive evidence of due execution in order to enable the court to enable the court to pronounce for a will. The court will take into account the circumstances and judge from them collectively whether or not there was due execution ...

The presumption that everything was properly done (omnia rite solemniter esse acta), arises whenever a will, regular on the face of it and apparently duly executed, is before the court, and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute with reference to execution have been duly complied with. The presumption applies with more or less force according to the circumstances of each case.”

7. However, where the presumption of the due execution of a Will is to be rebutted there must be strong and cogent evidence. The English Court of Appeal case **Re Channon [2005] EWCA Civ 1808** (presented by the Defendants) explains at paragraph 41:

“The court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the court to affirm that the will was duly executed.”

8. Strong evidence is required because of the fallibility of the human memory and the overarching need to give effect to the true wishes of the now deceased testator. It stands to reason therefore that the more probable it is that the will was duly attested the stronger the evidence ought to be to rebut the presumption.

a. Was the Will signed by Conrado.

The Evidence:

9. The Claimants state that the signature at the foot of The Will is not Conrado’s usual signature. They seek to support this contention by the evidence of his son Conrado Jr., who worked with Conrado for many years and swore full familiarity with his signature. Conrado Jr. explained how he had often seen his father sign documents and attempted to introduce a number of documents, purportedly signed by his father, into evidence. No foundation whatsoever had been laid for any of these documents and what was of great concern to the court was that he shared the same name as his father. Even when given the opportunity to amplify his witness statement he offered nothing by way of laying a proper foundation. Those documents were objected to by the defence and excluded by order of the court.
10. The Claimants also sought to rely on a preliminary report from a handwriting expert. However, they had never sought or received the court’s

leave to have an expert appointed pursuant to Rule 32.6. That evidence was also excluded.

11. All that was left of the Claimant's proof was Conrado Jr's assertion as to the testator's usual signature coupled with his testimony and that of his sister Doris Cuellar that Conrado had uttered that he did not intend to do any papers (the court accepting such to be a reference to a Will).
12. It is accepted that one's mind could change in that regard, as in any regard. Further, the person who prepared The Will, Mr. Eric Reyes, (who is also a named executor herein) testified that he inserted the name as it appeared on Conrado's passport. The name below the signature line of the testator reads: "Leonardo Conrado Selvestre Cuellar." That the testators full name was in fact Leonardo Conrado Selvestre Cuellar was never refuted, nor was it refuted that his name so appeared on his passport. In fact, Conrado Jr. and Doris both accepted under cross-examination that they did not know whether their father's name included Leonardo.
13. Now, it is not beyond imagination to understand why Conrado may have signed as he did. He may have deemed it necessary to adhere to the format displayed on the document. Nor, again does it defy imagination that he may have misspelt Leonardo ("Leonrado") as he was not (as Conrado Jr. testified) accustomed to using that name. Without more, the court finds the signature to be sufficient to stand as the mark of the testator signifying his intention to give effect to The Will. A final determination on validity will follow after consideration of the next issue.

b: Was the Will signed by Conrado in the presence of two witnesses at the same time:

14. At the foot of the Will there appears an attestation clause which reads:

‘SIGNED by the above-named LEONARDO CONRADO SELVESTRE CUELLAR (the testator) as and for his Last Will and Testament in the presence of us both being present at the same time who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.’

15. The names and signatures of two persons, Raul Torres and Bernadette Conejo follow this clause. Both persons have affixed their Justice of the Peace stamp. The presence of a complete attestation clause such as this creates a strong presumption of due execution. This presumption is grounded on the question - why would anyone sign such a statement knowing it to be untrue. But such a presumption is rebuttable and such a rebuttal will prove fatal to the Will.

16. The Claimants allege that the Will was not signed by Conrado in the presence of two witnesses at the same time nor did Conrado acknowledge his signature to both witnesses at the same time. Neither party saw it fit to present any of the witnesses to the Will and so the court does not have the benefit of that evidence tested in the usual way by cross-examination. Having not seen or heard the attesting witnesses, the court is in no position to make any findings as to their reliability.

17. Neither party offered any reason (credible or otherwise) for the witnesses absence or silence. The Claimants belatedly sought leave to have a witness summons issued for one of the witnesses - Bernadette Cornejo. However, the date had longed passed for the filing of witness statements and none of the relevant applications to facilitate a late filing had been made. This application was denied and the reasons therefor are the subject of another ruling of this court.

18. Effort was also made by the Claimants to introduce what was described as a transcript of a video recorded conversation which one witness in this matter allegedly had with the very same attesting witness. The video recording was not in evidence. There was no testimony as to its whereabouts and why it had not been disclosed nor was there any foundation laid as to who had prepared the transcript and how. That too was excluded following objection by the defence. There remained one statement, purportedly from the attesting witness, in the testimony of Iliana Cawich which had not been objected to by the Defendants although it was clearly hearsay and inadmissible.
19. Once the Claimants formed the view that The Will may not have been properly executed it was always open to them to place before the court any evidence tending to negative execution. It became even more imperative particularly because The Will had already been probated. A probated Will carries with it certain implications as to at least one attesting witness statement under oath that he did witness and he did do what he is stated in the attestation clause to have witnessed and to have done.
20. The Claimants ask that the court draws an adverse inference against the defence for their failure to call the attesting witnesses. Indeed, in certain circumstances a court is entitled to do so where a witness who may have pertinent material is absent. However, an attesting witness to a Will is the witness of the court and he can even be cross-examined by the very party calling him. The underlying principle here is that he is *“the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, an agreement which may be waived for the purposes of dispensing with proof at trial, but cannot be broken.”* **Phipson on Evidence 13th Ed paragraph 35-11.**

21. The sum total of what has been presented to the court is a mere suspicion by the Claimants that The Will was not properly executed and this is insufficient for the court to make a finding against the validity of The Will. The court ventures as far as to say that it's own suspicion had not indeed even been aroused. Such arousal would then have required the propounding party to prove that the will was indeed duly executed.
22. Having found that The Will is valid it really isn't necessary to consider whether it is in fact the true wishes of the testator. However, for the sake of completion I shall do so briefly.

Is The Will a true representation of Conrado's intention:

23. The Claimants case is that Conrado always said that he did not intend to do any papers and even when an Attorney came to the house to assist in the preparation of will, he declined to participate. Their testimony was that Doris Cuellar was the child who looked after Conrado and lived with him from her birth until he died. Conrado Jr. and Doris both offered evidence that Conrado was always being harassed by their siblings Irma and Alva and that he wanted nothing to do with them. He had refused to eat any food they brought him and did not appreciate their visit at the hospital because he believed they only wanted his things.
24. I found both Conrado Jr. and Doris to be contrary and unreliable. Doris explained that Irma and Alva brought food to Conrado at home and at the hospital but she was adamant that neither Irma or Alva ever came around. Neither Conrado Jr. nor Doris seemed willing to offer a straight answer as to their own relationship with each other or their father. What became obvious was that Doris lived with Conrado who payed all the bills and took care of

the home. And Conrado Jr. had his business in Conrado's yard but he never spoke of paying rent. Rather, he discussed signing for gas on Conrado's account. Another son had been given property by Conrado during his life time and had sold it all before Conrado died. In all of this there was no evidence that the contents of The Will was not Conrado's intention.

25. When the court considered Mr. Reyes testimony that he prepared The Will in accordance with Conrado's instructions, it was Conrado who gave him the names of his intended two witnesses and that he was to keep the matter of The Will confidential, no suspicion is aroused. The court was well minded to believe Mr. Reyes. He was calm and forthright. He admitted that he may not have done all he ought to have done when he omitted to find out about the due attestation on Conrado's return with the signed Will. Had he intended to mislead the court it would have been easy for him to say he had indeed inquired and been assured. He was not a solicitor and he even explained how little experience he had had preparing Wills at that time. However, he was adamant that he had explained the attestation clause to Conrado and the court could find no reason to doubt any of his testimony. The court therefore finds that The Will is the true last Will of Conrado Cuellar Sr. probate of which need not be disturbed.

It is therefore ordered:

1. The claim herein is dismissed.
2. Each party shall bear its own costs.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**