

**IN THE SUPREME COURT OF BELIZE, A.D. 2018**

**CLAIM NO. 210 OF 2018**

**BETWEEN:**

**MARVA PUERTO as executor of the Estate  
Of Elizabeth Denton**

**Applicant**

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF THE PRESUMED  
DEATH OF DONALD EDISON FITZGIBBON**

**BEFORE:** Hon. Chief Justice Kenneth Benjamin  
May 7 & 8, 2018

**Appearances:** Mrs. Yogini Lochan-Cave for the Applicant

**JUDGMENT**

(1) By a Fixed Date Claim Form filed on April 5, 2018, the Claimant, Marva Puerto sought the following:

- “ 1. Directions as to the manner in which the application is to proceed
2. An Order that Donald Edison Fitzgibbon is presumed to be dead since in or around 1994.
3. In the alternative, an order for leave to swear death of Donald Edison Fitzgibbon.
4. Any other orders or reliefs the Honourable Court deems just.”

The Claim was supported by an affidavit sworn to by the Claimant and affidavits sworn to by Herman Puerto, Beryl Puerto and Doris Tzul.

## **BACKGROUND**

- (2) The subject of the claim is Donald Edison Fitzgibbon. He is the cousin of the Claimant by virtue of his mother being her grandaunt. He was born to Elizabeth Denton on October 26, 1952 in Belize City, Belize as evidenced by his Birth Certificate.
- (3) Elizabeth Denton died on March 20, 2006, in Los Angeles, California, USA leaving a will executed on July 6, 1999. The Claimant is named as the Executor and she has obtained a Grant of Probate to the deceased's estate. She is now desirous of claiming funds held in an account at the Holy Redeemer Credit Union in respect of which Donald Edison Fitzgibbon is named as beneficiary. In order to do so, she seeks a declaration of the Court that Donald Edison Fitzgibbon be presumed to be dead since in or around 1994.

## **THE LAW**

- (4) In Belize, there is no statute that governs the presumption of continuance of life. Hence, there exists no presumption of law by which a conclusion can be drawn that a person is dead or alive on a given date. The issue is one of fact to be determined upon evidence as to the circumstances (See: **MacDarmaid v A-G ([1950] 1 All ER at p 499)**, and **Chard v. Chard (otherwise Northcott [1953] 3 All E.R. 721.**
- (5) In the local case of **Rodolfo Juan v. Trinidad Santiago Juan et al** – Action No. 229 of 2005, Awich J (as he then was) stated as follows (at para. 28):-

*“A presumption of death arises where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years and more, and it can be proved that there are persons who would be likely to have heard from or of him, and that all due inquiries have*

*been made appropriate to the circumstances and yielded no evidence of the person being alive.”.*

His Lordship cited as authority for this dictum the cases of **Prudential Assurance Co. v. Edmonds** [1877] 2 App. Case 487 HL and **Watkins v. Watkins** [1953] 2 All E.R. 1113. The proposition is also set out in paragraph 759 of Halsbury’s Laws of England, (5<sup>th</sup> edition) Volume 12 A (2015).

- (6) The presumption was set out in the speech of Lord Blackburn in **Prudential Assurance Co. v. Edmonds** (1877) 2 App. Case 487 at p. 509 in this way:

*“...in order to raise a presumption that a man is dead from his not having been heard of for seven years, you must inquire amongst those who, if he was alive, would be likely to hear of him, and see whether or not there has been such an absence of hearing of him as would raise the presumption that he was dead.”*

Accepting this passage to be a correct analysis of the authorities, Sachs, J. in the **Chard** case summarized the position as follows ( *Ibid.*, p. 728):-

*“My view is thus that in matters where no statute lays down an applicable rule, the issue whether a person is, or is not, to be presumed dead is, generally speaking, one of fact and not subject to a presumption of law. To that there is an exception which be assumed ... By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years’ absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows. Where as regards “AB” there is no acceptable affirmative evidence that he is alive at some time during a continuous period of seven years or more, then if it*

*can be proved first, that there are persons who would be likely to have heard of him over that period, secondly, that those persons have not heard of him, and thirdly, that all due inquiries have been made appropriate to the circumstances, "AB" will be presumed to have died at some time within that period. (Such a presumption would, of course, be one of law and could not be one of fact...)."*

The foregoing therefore falls to be applied to the facts found upon the evidence of the present case.

- (7) In Watkins, the plaintiff married "E" in 1913 and they had two children. "E" deserted her in 1921 but returned to resume cohabitation in 1922 but she rejected him. The plaintiff maintained contact with "E's" father until he died in 1927 and with his sister until she died in 1937, and no mention was made of "E". The plaintiff assumed E to be dead and remarried in 1948. Her second husband died and the issue arose as to whether she was a widow for inheritance purposes. Harman, J. sitting in the Chancery Division, held that the plaintiff, her children and E's father and sister being persons who were most likely to hear of him and there being no word since 1922, the plaintiff was entitled to assume E was dead in 1948.

### **EVIDENCE**

- (8) The Claimant swore that Donald Fitzgibbon suffered from mental illness and he was known to wander in the streets of Belize City. He grew up with his mother who took care of him. The Claimant was close to them and would see Donald with his mother or alone on the streets in Belize or in the United States. Donald's cousin, Herman Puerto, deposed to substantially the same facts. He grew up with Donald. He lived with Donald and his mother on his first visit to the United States and he was aware that Donald and his mother travelled between Belize

and the United States together on a regular basis. In 1994, Donald went missing and he was not heard from or seen since then.

- (9) Beryl Puerto swore that Elizabeth Denton was her aunt by marriage and she spoke of her children and Donald growing up together and attending the same primary school. She confirmed that Donald and his mother travelled back and forth between Belize and the United States. She too attested to Donald being mentally challenged and wandering in the streets of Belize. She explained that he never ventured far from the family home or for an extended period. However, he had not been seen since the 1990s on the streets of Belize City. From her inquiries, no one had seen or heard from him in over two decades. Also, since he was dependent on his mother, he would not have had the means to go beyond Belize or the United States without her.
- (10) All three deponents held the belief that having not heard from or seen Donald that he is dead. Indeed, the most compelling evidence is that contained in the 1999 will of his mother, Elizabeth Denton, wherein she described Donald as being her "deceased son".
- (11) Advertisements were placed in the New York Post and in the local Amandala newspaper on March 29, 2018 and March 20, 2018 respectively seeking information as to the whereabouts of Donald Edison Fitzgibbon or Donald Webster or Donald Denton as he was known by. No one has been forthcoming with any information.

### **CONCLUSION**


- (12) The witnesses are all of the honest belief that Donald Edison Fitzgibbon is dead having not been heard of since the 1990s and more specifically since 1994. He suffered from mental illness and was known to wander in the streets of Belize City; however, he had not been seen since then in the United States or in Belize.

There is no evidence as to whether he was last seen in Belize or the United States, but, he has not been seen in either place since the 1990s his close relatives. In 1999, his own mother assumed that he was dead.

- (13) Donald Fitzgibbon would have been likely to make contact with persons with whom he was very well acquainted, to wit, his own mother with whom he travelled and upon whom he was dependent and also his close relatives, Marva Puerto, Herman Puerto and Beryl Puerto. They have not heard of or from him since the 1990s. Inquiries have been made to no avail including advertisements to the general public in Belize and in New York. Accordingly, on the probabilities of the case, it can be inferred that Donald Edison Fitzgibbon has died.

**ORDER**

- (14) It is ordered that Donald Edison Fitzgibbon be presumed to be dead since in or about 1994. The costs of the Claim shall be paid out of the estate of Elizabeth Denton.

  
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**KENNETH A. BENJAMIN**  
Chief Justice