

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

CLAIM NO. 396 of 2018

GORGINA MAJARREZ

CLAIMANT

AND

JOSE MAJARREZ

DEFENDANT

BEFORE the Honourable Madam Justice Sonya Young

Hearings

2019
6th February

Oral Submissions

7th February, 2019

Decision

7th February, 2019

Mr. Darrell Bradley for the Claimant.

Mr. Jaraad Ysaguirre for the Defendant.

**Keywords: Probate – Testamentary Capacity – Due Execution of a Will –
Witnesses Being Present Together and Seeing the Testatrix Sign – The Wills
Act Cap 203**

JUDGMENT

1. Gorgina Majarrez is Ofelia Majarrez’s granddaughter. She says that Ophelia, who died on the 11th January, 2017 at the age of 93, had made a will which named both Jose and her as the executors and which left her estate (a residential property) jointly to them both, with two others of Ofelia’s sons.

Gorgina is now contesting a later will (the Will) dated 19th August, 20014, which is purported to be made by Ofelia, and which names Jose Majarrez as the sole executor and beneficiary of the same property that had previously been left to the four persons jointly.

2. Gorgina says that the Will was not executed in accordance with the provisions of the Wills Act. At the time when the Will was allegedly signed, Ofelia lacked the necessary testamentary capacity to do so, due to her illness. She adds that the Will does not truly reflect Ofelia's wishes and intention, as Ofelia never discussed its contents with her during the many regular conversations they had had. In fact she pleads that it must have been procured by fraud but she neglects to outline any particulars thereto.
3. She prays that the Will be pronounced against, that an earlier will dated 8th September, 2006 be declared to be Ophelia's last will and testament and it be allowed to be probated in the usual way. Finally, she asks that Jose be made to render an account of all sums of money derived from all the properties forming part of Ophelia's estate.
4. Jose strenuously denies each and every one of Gorgina's claims. He says not only was the Will duly executed but it revoked any earlier will which Ofelia may have made. He insists that Ofelia did have the requisite testamentary capacity and she had in fact shared her intention to make a new will with Gorgina. He puts Gorgina to strict proof of her allegation of fraud.

The issues to be determined:

5. 1. Whether the Will was executed in accordance with the Wills Act
(A) Whether due to her dementia or any other illness, Ofelia Majarrez

lacked the necessary testamentary capacity to execute a will;

(B) Whether the witnesses to the Will appeared together to witness Ophelia Majarrez sign the Will (as agreed to be live by the pretrial memorandum (the PTM) made jointly).

6. The allegation of fraud forms no part of the PTM and seems wisely to have been abandoned, particularly in light of the state of the pleadings and the findings of the Claimant's own handwriting expert.

Whether the Will was executed in accordance with the Wills Act:

a. Whether due to her dementia or any other illness, Ophelia Majarrez lacked the necessary testamentary capacity to execute a will:

7. A duly executed will can only be admitted to probate where the testator is proven to have understood and approved the contents of the will. A person who is of unsound mind or memory is therefore not capable of making a will. Not only must he be able to understand what he is doing but he must also be able to remember his property, his potential beneficiaries and what he would have wanted to give to them.
8. In this case the testator's dementia has been pleaded. It is for the Claimant to prove the state of Ofelia's mind at the time of the purported execution of the Will and for this we must earnestly consider the facts presented.

The Evidence:

9. We learn from Gorgina that she grew up with her grandmother, Ofelia, and shared a close relationship with her. It seems that she was like a mother to her. Even after she migrated to the United States in 1996, Gorgina continued to send money, clothing, a vehicle and other amenities, effect repairs to her

home and communicate with Ofelia almost every day. All this she did out of genuine love and affection for Ofelia. On the two occasions that she visited Belize she stayed with Ofelia and there had never been any dispute between them. She was aware that Ofelia wanted her residential property to go to all her children, including Gorgina jointly and had made a will to that effect because she, Ofelia had discussed its contents with her. It was usual for her grandmother to confide in her.

10. She informed that Jose and his family lived with Ofelia up until the time of her death. They had moved in with Ofelia around 2000 partly for their own benefit and partly to take care of Ofelia who had begun to decline. She often discussed her grandmother's welfare with Jose and other family members. She herself noticed that Ofelia's memory seemed to be deteriorating. She had difficulty remembering names and by 2014 she did not even realize it was her own birthday and appeared disoriented during their conversations. She endeavoured to keep her as comfortable as possible and allow the inevitable. Ofelia died on 11th January, 2011. The last time she had seen Ofelia alive was in 2006.
11. After her death, Jose presented the Will which was contrary to what Ofelia had always firmly stated. The Will had never been discussed with her by Ofelia. She was therefore very doubtful that the Will was Ofelia's particularly since, by the time of its alleged execution, Ofelia was in need of constant care and could not even remember where she was or who her family members were.
12. Gorgina's uncle and Ofelia's nephew (unclear), Armando Vasquez also testified to the close relationship Gorgina and Ofelia shared throughout their

lifetime. He referred to the many tender phone calls between them, the repairs to the house, the vehicles (now in Jose's name) and the remittances which Gorgina sent regularly for Ofelia's care and other expenses. Under cross examination it was realized that much of this information would have been relayed to Armando by Gorgina. He really had no personal knowledge.

13. Armando also explained the provenance of Ofelia's residential property as being family land subdivided between his father and Ofelia. He and a sister now reside on his father's portion which is within close proximity to Ofelia's home. While Ofelia was alive he visited her regularly and she confided in him. So great was her trust in him that she had him witness two of her wills, one in 2004 and another in 2006. Her intention was made quite clear to him that she wanted the residence to go to her three boys and Gorgina jointly. He knew of no other will.
14. He testified that he visited Ofelia regularly. He noticed that later in life, perhaps from 2013, Ofelia became forgetful. She forgot people's names, could not remember who she was or where she was and would start an entirely new and unrelated conversation in the middle of another. She worsened in 2014 when she could no longer recognize people. It was obvious to him that something was wrong. Eventually she needed a caregiver to address her personal needs. Her decline saddened him immensely.
15. Dr. Kishorn Punjab, a general practitioner, testified to his actual knowledge of and involvement with Ofelia. He explained that Ofelia was a patient at his clinic since December, 2014. The records relating to her, however, were limited and his recollection was poor. Although he had encountered her in

2014 and 2015 due to falls and sundry pains, he had not documented any signs of cognitive loss then. He notes that she was brought to him on the 28th October, 2016 when her family complained of her *“looking lost. They refer to her having episodes of forgetfulness in the past few days.”* She was examined and found to be *“a poor historian of her symptoms....Patient was suspected to have dementia but cause was not confirmed.”*

16. He explained that his examination would have included simple questions about the date, time, how she felt and where she was. He would have also asked her to follow certain instructions. Ofelia was unable to respond. He classified her condition then as *“loss of cognitive function and behavioral changes suspicious of dementia at the age of 92. It is difficult to say when the exact onset of the dementia in Mrs. Majarrez may have been and the specific cause.”* He elucidated that cognitive function was about being in a state of non-responsiveness, loss of memory and executive function. He would therefore have diagnosed her as having moderate to severe dementia at that time. He recommended a CT scan and saw her again on January 7th, 2017 when a similar complaint, of her frequently appearing lost, was made.
17. The Defendant presented four witnesses including his good self. He informed that Ofelia lived with him and his family and he took care of her. He hired the caregiver. He or his wife took her to the doctor as needed. Ofelia had nine children, one now deceased. She raised Gorgina but at some point there was a *“falling out”* between them. That was when Ofelia told him she wanted to draft a new will. It is important to state here that he could not explain how he came to know of this alleged falling out and he somehow omitted to expanded on any particulars in his witness statement. This is the same

Gorgina whom he admits kept in constant contact with him concerning Ofelia's condition right up until her death.

18. Jose said it was Ofelia who got Javier Ayuso to prepare the Will and she asked him (Jose) to take her to Alfredo Majarrez, a Justice of the Peace and a family member so she could sign it. He, Jose also asked Mr. Portillo to sign as witness and he obliged. He saw his mother sign and at that time she had no medical issues which affected her capacity to sign. He never knew her to be a forgetful person, unaware of what she was doing. He recollects that shortly before she passed, his mother went to the doctor for a fever and back pain.
19. Ofelia's care giver Joana Tun also testified. She was hired around 2015 until Ofelia passed. She said she gave Ofelia her baths, did laundry, worked around the house and took her outside and brought her back inside as she desired. She had conversations with Ofelia and she seemed cognizant. As far as she was aware Ofelia was not forgetful and there were no issues which would have affected Ofelia's mental capacity.
20. Jose Portillo and Alfredo Majarrez both testified to the execution of the Will. Alfredo says that Ofelia (his cousin), her son Jose and his wife came to his home on the 19th August, 2014 so that he could act as witness to the Will. He says it was Jose who had prepared the Will and had invited him to sign at Ofelia's insistence. That day, he and Jose Portillo were together when they both saw Ofelia sign the Will. When she signed she did so consciously and seemed to be in good health. He often visited Ofelia and knew of her having no issues which would affect her mental capacity.

21. Jose Portillo says he was aware that the document was the Will. Ofelia was also aware of the document. He watched Ofelia sign of her own free will, while Mr. Alfredo Majarrez was also present. He then signed and then Mr. Majarrez signed. He too claims to know of no condition that would affect Ofelia's testamentary capacity at that time. She appeared to be in good physical and mental health.

Consideration:

22. While the Dr. who treated Ofelia could not remember the family members who brought her to him in 2016 and 2017, for the complaint of her "*looking lost*," on a balance of probability I find that it must have been either Jose or his wife. Jose was adamant that they were the only ones who ever took her to the doctor. Also instructive is that Jose admits to taking her to a doctor at Five Rivers Medical Centre for a fever and an issue with her back in 2017. That is the same clinic at which Dr. Punjabi worked.

23. It also seemed highly suspicious that Gorgina knew Dr. Punjabi to be Ofelia's doctor. The doctor himself, who must be presumed to be an independent witness, attested to having treated Ofelia repeatedly, but Jose knew nothing of his existence or his diagnosis and saw no symptoms of Ofelia's memory loss. Although none of the doctor's evidence speaks to Ofelia's condition in 2014 it certainly raises doubt in the Court's mind as to the credibility of the Defendant.

24. Next, the Court considered Joanna Tun the caretaker, if the doctor realized that Ofelia's mind was obviously failing in 2016 how could her caretaker not ever notice this and if she did notice then why would she be less than frank with the Court. The witnesses to the Will were the ones on whom the Court

ought to rely and they both say that she appeared to have the necessary capacity and she did not appear forgetful to them. The Court notes here that they never expanded, in a significant way, their reasons for believing this to be the state of affairs.

25. While all of this may cast suspicion, the Claimant must still conclusively show the condition of Ofelia's mind at the time of the purported execution. Because the doctor had not seen Ofelia between 2014 and September 2016, his evidence did not persuade the Court that Ofelia's condition could have been so dire as to cripple her testamentary capacity. He explained that the onset could be slow or rapid and he could not conclusively say what type Ofelia had since she had not done the recommended CT scan. Further, none of the witnesses, whether for the Claimant or the Defendant, ever found reason to take her or to recommend that she be taken to a physician for the degree of memory loss she may have been suffering. It is important to note that in October, 2016 her condition was of such concern that her family was prompted to do so.
26. Finally, the Court considered the expert's evidence. Ms. Marin was appointed with the agreement of the parties to examine the Will and determine whether or not in her opinion it had been signed by the Ofelia Majarrez. She compared that signature with Ofelias' original passport dated 8th August, 2007, her voter's identification card issued on the 11th August 1997 and her Social Security card issued on 4th November, 2002. She found certain similarity (letter formation, arrangement, slant proportion and angle) between the Will and the comparatives. She felt there was a strong probability that the Will was signed by Ofelia and any variation in the

signature could be characteristics of deterioration of pen grip as a result of old age. She asked for the original copy of the Will and more recent comparables since she had only been provided with those that were dated more than ten years earlier. Nothing further was provided to the expert.

27. It seemed to the Court that if Ofelia could properly sign her name perhaps her mind was sufficiently intact to execute the Will. You see a person need not have a perfect mind to have testamentary capacity. Many of us may fail to achieve this if that were the standard. The Court can only really rely on the evidence of the lay witnesses. Perhaps she was somewhat forgetful, but she was old and that was to be expected. Also to be expected, is that a person could change their mind as time progressed. What was presented raised no real doubt and was not sufficient for the Court to conclude that Ofelia was in fact in such a mental state that when she signed the Will she lacked the requisite testamentary capacity. This claim fails and we move now to consider issue b.

b. Whether the witnesses to the Will appeared together to witness Ophelia Majarrez sign the Will (as agreed to be live by the pretrial memorandum (the PTM) made jointly).

28. The Wills Act states at Section 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.”

29. The thrust of the Claimant's case seemed to be that the witnesses were not together to witness Ofelia's signing. Again we must scour the evidence thoroughly. From what has been provided by the witnesses to the Will there can be little doubt that the Court could find that the witnesses were together when they allegedly saw Ofelia sign The Will.
30. Counsel for the Claimant asked the Court to find that sufficient suspicion had been raised about the execution, that the burden of proof ought to have shifted to the Defendant. He presented **Sherlett Anita Martinez v India Arzu Belize Claim No. 210 of 2012** where Madame Justice Joseph-Olivetti while discussing the law relating to suspicious circumstances attendant on making a will, quoted the following with approval:

"Williams on Wills edn. pp 66-69-

"The presumption which applies in ordinary circumstances- that the testator who was of testamentary capacity and who duly executed his will knew and approved of its contents- does not apply if the will was prepared and executed under circumstance which raise a well-grounded suspicion that the will, or some provision in it, did not express his mind. In that event the will (or the provision in it) is not admissible to probate unless the suspicion is removed by affirmative proof of the testator's knowledge and approval.

*In **Barry v Butlin, Parke B** referred to the classic instance of suspicious circumstances: "*

If a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased". If, however, the benefit taken by the person who has prepared the will is small in relation to the size of the estate, this does not, of itself, raise a suspicion.

Another example of suspicious circumstances is where a person takes an active part in obtaining a will under which he obtains a substantial benefit by, for instance, suggesting the terms of the will to the testator and then taking the testator to a solicitor whom he has chosen himself." Emphasis mine.

And Williams on Wills provides further – “FORMS OF PROOF. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient. If it is read over to the testator, this must be done in a proper way so that the testator hears and understand what is read. Another form of affirmative proof is to establish that the testator gave instructions for his will and that the will was drafted in accordance with those instructions.

Reading over is not conclusive. There used to be a rule of evidence that a competent testator who had read a will, or had it read over to him, and had executed it, must be taken to have known and approved of its contents unless fraud had been practiced on him. Over the years the rigidity of this rule has gradually been eroded and it has been suggested that nowadays the rule “does not survive in any shape or form. The fact that the will was read over by, or to, the testator must be given the weight appropriate to it in all the circumstances of the case, but it is not conclusive.” (Emphasis added)

*P67- “Affirmative proof where there are suspicious circumstances: The greater the degree of suspicion, the stronger must be the affirmative proof required to remove it. The leading case is **Wintle v. Nye.**”*

- 31 Counsel then asked the Court to consider a number of factors; the age of the testatrix, that by 2016 she had been diagnosed with dementia, the drastic changes in the Will and that it was the sole beneficiary who had made all the arrangements for the preparation and execution of the Will. Whether the arrangements were at Ofelia’s directive or not, it ought still to arouse suspicion, especially where it was the Defendant’s friend who was one of the witnesses. He then drew the Court’s attention to the golden rule that where a will is being drawn for an aged or very sick testator it should be witnessed by a medical practitioner who should record his examination.
32. While it may not always be practical, the golden rule still stands as a good rule of practice even today, see **Scammell and another v Farmer [2008] ALL ER (D)296** presented by Counsel for the Defendant. **Williams Mortimer and Sunnucks Executors Administrators and Probate 16th Ed at p152** observes that “(o)ther precautions were that if there was an earlier will it

should be examined and any proposed alterations should be discussed with the testator.”

There can be no doubt that the Will was vastly different to the earlier one.

33. From all that, I agree with Counsel for the Claimant that the burden did indeed shift. So, the Court considered the obvious scarcity of the evidence, of the actual execution of the Will, presented in the witness statements of the attesting witnesses. Neither of them said anything about the particulars of that signing. The important things that would convince the Court of their actual presence at the integral time. For example there was no evidence as to where at Alfredo's house the signing was done, if Ofelia acknowledged the document to be her will, if she read it over, if either of them read it over. It was instructive that Jose said nothing either although he was apparently present. This only heightened the court's suspicion.
34. Matters worsened when under cross examination Alfredo said they witnessed and signed the Will inside the house at a table in his parlor. The other witness, Jose Portillo said he was outside the house and Ofelia was in a car. Counsel for the Claimant, found this to be quite significant, while Counsel for the Defendant referred to it as "*confusion*". Now, the Court can well appreciate memory fading with time, but something as significant as where you were at that particular time ought not to fade to such an extent that what occurred outside, suddenly shifted to inside or vice versa. For this reason the Court was convinced that the testimony of the attesting witnesses was unreliable in its entirety. The defence had therefore failed to meet their burden, so the Claimant must succeed.
35. The Will, having been found not to have been executed in accordance with the Wills Act must be declared void.

Disposition:

1. Judgment for the Claimant.
2. The purported Will dated 19th August, 2014 was not executed by Ofelia Majarrez in the presence of two attesting witnesses as required by Section 7 of the Wills Act.
3. The purported Will dated 19th August, 2014 is pronounced against.
4. Leave is granted for an application to be made for The Will dated 8th September, 2006 to be probated as the Last Will and Testament of Ofelia Majarrez.
5. Costs to the Claimant in the sum of \$6000.00 as agreed.

**SONYA YOUNG
JUDGE OF THE SUPREME COURT**