IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO. 530 of 2018

CARLA CADLE GILLETT **CLAIMANT**

AND

KAREN FROYCE CADLE **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearings - 2019
21st January
Written Submissions
Claimant – 6th February, 2019
Defendant – 11th February, 2019
Oral Submissions
13th February, 2019
Decision
13th February, 2019

DeShawn Arzu Torres for the Claimant
Hubert Elrington SC for the Defendant.

Keywords: Probate – Validity of Will - Execution by Testator – Terminally Ill - Execution in the Presence of Two Witnesses - Revocation by later Will – Later Will Already Pronounced Against – Wills Act Cap. 203

JUDGMENT

1. Wilburn Cadle died on the 16th May, 2016. The Defendant, Karen Froyce Cadle (his wife), presented a will dated the 29th April, 2016 (the Will) which she intends to probate as his last will and testament.

2. In an earlier Claim (brought by this same Claimant), Carla Cadle Gillett, (Wilburn Cadle's daughter and the Defendant's step daughter) sought and succeeded in the revocation of a grant of probate of a will. That will was dated the 3rd May, 2016 and was purportedly signed by Wilburn Cadle. That matter was dealt with summarily, the Defendant having failed to file a defence to the fixed date claim form. Declaratory orders were made that the said will had not been signed by Wilburn Cadle nor had it been signed by him in the presence of two witnesses, both being present at the same time.

3. Ms. Gillett claims, similarly, that the Will was not signed by Wilburn Cadle nor signed by him in the presence of two witnesses, present at the same time. She also claims that the Will had been revoked by the one dated 3rd May, 2016 which has already been declared invalid. She asks that the Will be pronounced against and be declared revoked.

4. With the agreement of Counsel on both sides, the Court finds the following are the issues to be determined:

1. Whether the Will dated 29th April, 2016 is valid:

   a. Whether the Will was executed by Wilburn Cadle.

   b. Whether the Will was executed in the presence of two attesting witnesses.

2. If the Will dated 29th April, 2016, is valid, was it revoked by the Will dated 3rd May, 2016.

1a. Whether the Will was executed by Wilburn Cadle:

5. Counsel for the Claimant begun her submissions by explaining that where a will appears regular on its face, there is a presumption of due execution. She reminded the Court that this presumption was rebuttable. Although a Court ought not to be too hasty to defeat the intention of a testator, a careful consideration of all the circumstances surrounding the execution of the will must be made, before any determination is reached on the applicability of that presumption.

6. The degree of suspicion which arises is rightly informed by the particular circumstances of each case. If the suspicions are well grounded and strong, the burden of proof may shift to whomever believes the will to be valid. It is then for that person to prove, not only, that the deceased signed the document, but that he also approved of its contents and was aware of what he was doing.

7. The Claimant says the testator was too ill (terminally, with cancer) and frail to sign the Will. She testified that by the time he purportedly signed he: *"was ailing from cancer and died shortly thereafter."* She admitted that although she was present during his final days, she was not able to visit him as often as she would like because she was pregnant. But during that time *"he could barely speak or write. His mobility was severely restricted and could not breathe on his own and had a respirator which aided his breathing."*

8. When the Will was executed the testator was certainly ill and he died seventeen days later. None of that is disputed. However, nowhere in her testimony does she speak to his mental capacity nor does she provide any

other evidence in this regard. A physical illness need not reduce a person to a state of mental incapacity. There is no presumption either that the will of a person who is terminally ill will be pronounced against merely because of the degree of his illness. What must be proven is either that he did not have the mental or physical capacity to approve its contents or execute it respectively. The Claimant's testimony leaves much to be desired. It is noteworthy that the Claimant's submissions does not discuss her evidence at all.

9. On the other hand, the Defendant says the testator signed it in her presence. He was admittedly very ill but he was also strong and alert and knew exactly what he wanted. He had been hospitalized for six weeks when she was told there was nothing further than could be done for him. She took him home and made him as comfortable as she could. He was confined to bed. She continued to work while he stayed home alone. She said that is what he wanted, so she obliged. She would go home at lunch time to feed him and give him his medication then return in the evening after work. That does not seem to me to be a man who was too feeble to know his own mind or to sign a document.

10 . The two attesting witnesses also say the testator signed the Will in their presence. Ms. Carla Banner, one of the witnesses, said during her visits with the testator and on the day he signed the Will *"he conversed intelligently and never had any lapse of memory, forgetfulness or anything of that sort, even though at times he appeared to be suffering from pain and discomfort."*

11. Under cross examination she did not waiver. She explained that she felt his memory was good because she asked him directly if he knew who she was.

He was able to give her full name, including her surname, correctly and without hesitation. She also said he asked for his glasses and put them on so that he could read and sign the Will. He even conversed with other persons in that room.

12. Andrew Staine, the other witness, said that Wilburn Cadle was *"fully alert and understood what we said to him and conversed normally and clearly with us."* He said that when he arrived, he asked Wilburn Cadle how he was doing. Wilburn acknowledged him directly and called him by name. He too spoke of Wilburn Cadle putting his glasses on, reading the Will and then signing it.

13. The testator's daughter, Sharmayne Saunders, testified that she had drafted the Will according to her father's wishes. She had no benefit under the Will and in fact would be a beneficiary if Wilburn Cadle died intestate. The sole beneficiary under the Will was her step mother. She said she knew how to draft wills and had drafted others. She then had it typed up and had arranged for the two witnesses and a Justice of the Peace, Ion Cacho, to be present to witness the Will. She said her father had specifically asked for two witnesses and that Ion Cacho be present during the signing.

14. Her father called for the Will and a pen and Karen Froyce brought them to him. He then asked for his glasses and was similarly attended. After her father signed, it was realized that there was no space for the witnesses to sign so two lines were inserted for them in the only available space which was above where her father (the testator had signed). None of the attesting witnesses said anything about this process and the Court noted that there was some space below where the testator had signed but it was also below where the Justice of the Peace signed.

15. Dr. Saunders accepted that at the time of execution, Wilburn Cadle was battling cancer. However, although he would often be in great pain and discomfort, his mind was always clear, his memory was good and he knew exactly what he wanted to do. She too did not bend or break under cross examination and I could find no reason to disbelieve her testimony.

16. Finally, Ion Cacho testified that as a Justice of the Peace he was familiar with the signing of Wills. He saw the testator read the Will over and sign of his own free will and with a clear mind. Under cross examination, he revealed that he, Ion Cacho, had read the Will out loud. He then asked Wilburn Cadle *"if it was fine with him, if it was what he wanted. He said yes."* Wilburn Cadle then reached for his glasses, put them on and signed the Will.

17. The only other witness who spoke of Mr. Cacho reading the Will is Andrew Staine under cross examination. The Court duly notes that Andrew Staine alone gave evidence on the second day of the two day trial.

The Expert Report:

18. The Claimant's own handwriting expert, Ms. Genoveva Marin, found that the signature on the Will *"had significant similarities to specimen signatures."* The pen lift on certain letters were also similar. Even the wavy and uneven construction found on the Will were also found in the Holy Redeemer Credit Union (HRCU) account card which was dated 14th April, 2016. This date was very close to that of the execution of the Will. This would mean that the testator could sign his name as recently as the 14th April, 2016.

19. Counsel for the Claimant relied on **Fuller v Strum [2000] ALL ER [D] 2392** and encouraged the Court to *"examine Ms. Marin's methodology, findings and conclusion, the reasoning behind the conclusion and whether the Court can draw*

upon any inferences for itself." She referred to questions that she had posed to the expert, following the initial report, which she said were not answered with sufficient clarity. Although she said there were *"several questions"* she highlighted only one. It concerned the presence of the letters *"JP"* at the end of the testator's signature on the Will. Counsel said she found this to be unusual since *"the specimens utilized for the purpose of the analysis did not contain the letters...."*

20. It is, perhaps, unfortunate that this is the query which Counsel chose to raise since the Court is aware that the letters *"JP"* do appear at the end of the Holy Redeemer Credit Union specimen cards dated 4.9.98 and 6.2.12 which were used as comparables. Agreeably they do not appear on the card dated April 14th 2016 which is the comparable made most contemporaneously with the purported execution of the Will. However, I am not of the view that an explanation on this issue could properly have been expected of the handwriting expert. It required the expert to make assumptions and speculations which she had no right to make. The Court is not at all surprised that her answer lacked clarity since the query was, itself, inappropriate.

21. At best, Counsel could seek to have the Court consider all the evidence provided and draw its own inference, rather than impugn the expert's report on the ground presented. In fact, that is precisely what **Fuller (ibid)** determined when considering whether the signatures on duplicate wills had been forged. Although the expert found them to be a forgery, the Court, considering all the circumstances, found that it was extremely improbable that the witnesses could have been party to such a fraud. Since this did not reconcile with the expert's opinion, the Learned Judge rejected the expert's

evidence stating that *"some expert evidence may amount to no more than drawing inferences from facts observable as much by the expert as by a lay witness; and the inferences to be drawn from those facts may be capable of being drawn as much by the expert as by a lay witness. Of course, in such a case, the views of the expert are entitled to be given greater weight. After all, the expert's training and experience will have equipped him or her to draw these inferences."*

22. This Court finds no evidence on which to draw any such inferences adverse to the expert's opinion.

Finding:

23. The Court finds that the Will dated 29th April, 2016 was signed by the testator Wilburn Cadle.

1b. Whether it was executed in the presence of two attesting witnesses:

24. The Wills Act states:

> *"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."*
>
> *"8.-(1) Every such will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid, if the signature is so placed at, or after, or following, or under, or beside, or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.*
>
> *(2) No such will shall be affected by the circumstances that -*
> *(a) …*
> *(b) …*
> *or (c) the signature is placed among the words of the testimonium clause or of the clause of attestation, or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, or under, or beside the names or one of the names of the subscribing witnesses."*

25. The position of a signature on a will is not conclusive evidence of the actual sequence of events nor does it invalidate a will. What is important is that the testator signs at the foot of the Will and does so or acknowledges his signature in the presence of two witnesses, both being present together. There can be no doubt that the first requirement has been met. The question which remains is whether the second has likewise been met.

26. To determine this the Court must again consider all the evidence provided by the attesting witnesses, the Justice of the Peace and the eyewitnesses. The Court is in a most fortunate position that so much has been presented for consideration. The testimony of the stated witnesses was similar in every material particular. They all saw the testator read the will, he then signed it, the witnesses Andrew and Carla signed and the Justice of the Peace Ion Cacho signed and stamped last.

27. Counsel for the Claimant painted all of the Defence witnesses as witnesses of mistruth. She tried to make much of slight discrepancies in the testimonies of these witnesses. For example whether the Will was presented by Sharmayne Saunders or Karen Froyce; whether the testator's glasses were on the bed or elsewhere; whether Mr. Cacho read the Will aloud and if he did whether that was before or after the testator had signed; whether Carla Banner had been asked to attest on the day of execution or earlier, whether Andrew Staine was summoned to sign on the 29th April, 2006 or some other time; whether lines had been drawn for the witnesses to sign on and how long the signing took.

28. On all of this, the Court states simply that the signing allegedly occurred almost three years ago. While the Court expects the pertinent information to remain somewhat intact, the issues, here, where there are discrepancies could easily have been forgotten or become muddled with time. What is important to note is that none of the witnesses were so far off as to cause alarm in the Court's mind. I, therefore, do not find any of that to have successfully damaged any of the defence witnesses' credibility.

29. Next, Counsel attacked Ms. Froyce's credibility because she was adamant that Wilburn Cadle had signed the Will of 3rd May, 2016. What Counsel may not have realized was that Ms. Froyce never defended the earlier matter so there were no pleadings nor testimony on her behalf. The order had been made summarily, from what had been presented by the Claimant only. The weight the Court can give to such a decision must be somewhat different to one that has been arrived at after contest.

30. Counsel also asked the Court to consider that the will which had already been declared invalid, was made some four days after the first. Ms. Froyce explained that on taking the Will to an Attorney she was informed that there was no executor named so a new will ought to be prepared. She followed those instructions. The Court found this to be quite plausible and could not accede to Counsel for the Claimant's request to reject same as a mistruth.

31. Counsel then submitted that the very appearance of the Will is instructive. She highlighted where the witnesses' signatures were inserted and asked the Court to make a finding that they were inserted someplace else and after the testator had allegedly signed. She also drew the Court's attention to the absence of the usual attestation clause. She asked the Court to consider Mr.

Cacho's and Dr. Saunders evidence that they were both familiar with the preparation and signing of a will. If indeed that were true, she posits, the Will ought to have been properly drafted.

32. It is true that in considering whether the signatories intended to sign as witnesses, the position of their signatures may be important. ***Williams, Mortimer and Sunnucks Executors, Administrators and Probate 16th ed at pg 133*** refers to the case of ***Braddock (1876) 1 P.D. 433*** and quotes the words of Sir James Hannen at pg 434: "*The law does not require that the attestation should be in any particular place, provided that the evidence satisfies the Court that the witnesses in writing their names had the intention of attesting.*"

33. In the case at bar the witnesses have each signed on a line marked witness, they both testified that they had been asked to be present as witnesses to testator's will, they saw the testator sign and then they signed. Nothing to the contrary has been produced by the Claimant. With this evidence, even where the regular and highly desirable attestation clause is absent, the Court may still assume that the requirements of the Act as to due execution have been met.

34. As it relates to Dr. Saunders and JP Cacho, neither have any admitted legal training and the mere fact that there was no attestation clause and they allowed the witnesses to sign above the testator's signature casts serious doubt on their own alleged familiarity with the drafting and signing of wills. That takes us no closer to proving that the Will was not executed in accordance with the law.

35. The Court accepts that the attesting witnesses did see the testator read the document and affix his signature, thereafter the attesting witnesses then

placed their signatures. The execution was thereby duly accomplished and the validity of the Will will accordingly be declared. The Claimant has failed to meet her evidential burden.

2. If the Will dated 29th April, 2016, is valid, was it revoked by the Will dated 3rd May, 2016:

36. Counsel for the Claimant chose wisely not to address the Court on this issue, and neither did. Counsel for the Defendant. But since it was accepted as a live issue by the parties, the Court will address it very briefly.

37. Pursuant to section 18 of the Wills Act, a Will may be revoked:

> *"(a) by marriage as provided by section 16.*
>
> *(b) by another will or codicil executed in accordance with section 7; or*
>
> *(c) by a written revocation executed in the manner in which the will was executed or*
> *(d) by the burning, tearing or otherwise destroying of it by the testator, or by some person in his presence and by his direction with the intention of revoking it by the testator, or by some person in his presence and by his direction with the intention of revoking it."*

38. This means, therefore, that the later will has to have been duly executed in accordance with section 7 (already reproduced at paragraph 24). The later Will was found by a competent Court, inter alia, not to have been signed by the purported testator. It was consequently not duly executed and could not possibly revoke an earlier Will even if it also contained a revocation clause. The issue of revival does not arise. This claim also fails in its entirety.

Disposition:
It is ordered:

1. The Claim is dismissed with costs to the Defendant in the sum of $6,000.00.

SONYA YOUNG
JUDGE OF THE SUPREME COURT