IN THE SUPREME COURT OF BELIZE, A.D. 2020

IN THE ESTATE OF WENDEL WHITE a.k.a. WENDELL WHITE, DECEASED

CLAIM NO. 125 OF 2019

BETWEEN

CHERYL WHITE SMITH	**CLAIMANT**
AND	
RITA BETSON WHITE	**1st DEFENDANT**
BEVERLY WHITE SANCHEZ	**2nd DEFENDANT**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Decision Date:

28th October, 2021

Appearances:

Mr. Mark Williams, Counsel for the Claimant

Mr. Emmertice Anderson, Counsel for the Defendant

KEYWORDS: Probate - Wills - Validity - Due Execution - Testator's Signature - Testamentary Capacity - No evidence by Defendants/ Counter Claimants - No Will attached to Witness Statements - Affidavit of Testamentary Script - Wills Act Chapter 203, Laws of Belize

JUDGMENT

1. The Defendants, the wife and daughter, respectively of Wendel/Wendell White (the Deceased) had previously lodged a caveat against the sealing of a grant of probate of a will purporting to be that of the Deceased (the Will).

2. Rather than warn the caveat, the Claimant, as the sole executor named in the Will, brought this Claim for a grant of probate in solemn form.

3. In their Defence and Counterclaim, the Defendants assert that the Will was fraudulent and invalid and ought to be pronounced against.

4. It is their case that not only is the signature on the Will dramatically different from that of the Deceased, but so too was the distribution of the estate in relation to what they had been informed by the Deceased prior to his death. The Will, they said, even sought to bequeath property which was in fact jointly owned and it did not provide for the First Defendant in any way.

5. Further, they pleaded that the Deceased lacked the mental capacity to execute the Will as he had been diagnosed with breast cancer and suffered from mental illness. The Defendants and other family members had noticed significant changes in his behavior prior to his death where he often appeared muddled and incoherent in speech. He was not even capable of signing his name.

6. They asked that Letters of Administration be granted to them both with costs against the Claimant.

7. All these allegations were vehemently denied by the Claimant who asserted that the Deceased did execute the Will while being fully aware of and agreeing to its contents. He, admittedly, did become quite ill in 2018, but he was certainly not suffering from any mental illness. While he was under the influence of his prescribed medication, he was sometimes heavily sedated but this was long after he had already executed the Will.

Preliminary Matters:

8. On the 12th April, 2021, the Court made Case Management Orders which directed trial dates of the 22nd and 23rd September, 2021, the filing and exchanging of witness statements and the filing of a joint Pre-trial Memorandum. The Claimant complied with these directives but the Defendants did not.

9. No applications were made for relief from sanctions or extension of time. At Pre-trial review on the 15th June, 2021, the trial dates were confirmed. No applications were made then or prior to the trial dates. On the date of trial when the Court raised the state of the evidence before it, Counsel for the Defendant inquired whether it was too late to ask to be removed from record.

10. This type of application is to be made on paper and must be on notice to the Client/party. The Court refused to entertain the application at that late stage and proceeded to trial.

The Issues:

1. Whether the Will is valid?

a) Was the Will signed by the deceased?

b) If the Will was signed by the deceased, was the deceased of sound mind when he executed it?

2. Whether the Will ought to be admitted to probate in solemn form?
3. Whether the Counter Claimants ought to be granted leave to apply for Letters of Administration?

Preliminary Issue:

Failure to attach the Will to any Witness Statement:

11. This issue affects every other issue so the Court felt it best to deal with it before treating with the ones stated above.

12. Counsel for the Claimant recognized the lacuna but maintained that the Will had been lodged with the Court by way of an affidavit of testamentary script sworn to by the Claimant. He said it was, therefore, unavailable to be exhibited otherwise. He relied on Atkins Court Forms, Probate - Volume 29 at para 51 [251] and assured that the issue had been remedied where the attesting witness had actually made himself available to testify and be cross-examined.

13. In the alternative, he invited the Court to use its discretion under Rule 26.9 of the Supreme Court (Civil Procedure) Rules to put matters right. He urged that since the Will had been disclosed and the Claimant had complied with every other rule and order of the Court, it should suffer no consequences for its omission in failing to attach a copy of the Will to any of its witness statements. Rather, the Court should allow the Will to be admitted as evidence in the trial.

14. The Defence, on the other hand, submitted that the failure to produce and exhibit the Will resulted in the Claimant not being able to prove her case on a

balance of probabilities. She opined that it was imperative that Mr. Trujeque, one of the attesting witnesses, to identify the Will in his witness statement or viva voce evidence and his failure to do so was fatal.

The Court's Consideration:

15. Rule 67.5 of the Supreme Court (Civil Procedure) Rules (CPR) directs that the filed affidavit must only describe the original testamentary script which is to be lodged at the court. Once it is lodged, any other party to the probate proceedings is allowed to inspect any affidavit filed and/or the testamentary script lodged once they too have sworn an affidavit of testamentary script. The Court, through an order, is also empowered to allow inspection otherwise.

16. In the matter at bar, the Claimant duly filed and served the affidavit of testamentary script, which annexed an ordinary office copy of the Will. The affidavit informed that the original had been lodged with the Probate Registry. The Defendants filed their own affidavits as well and so they were free to inspect the Will at their convenience.

17. Further, the Claimant, in compliance with an order for the Court for standard disclosure, duly disclosed the existence of the Will. Although she in error offered viewing of the original at her Counsel's office, the original was always available to the Defendants for inspection at the Probate Registry and they were very well aware.

18. This means that the Defendants were not uncertain as to what testamentary script the Claimant and her witnesses were referring to nor could they be

mistaken as to what document the attesting witness, Mr. Trujeque said he placed his signature upon.

19. Mr. Trujeque not only named himself and the other attesting witness - Janelle Guitierrez. He also gave a date around which it was executed - March, 2013. He named the testator - Wendell White, as well as the attorney who prepared the document - Lionel Welch. All this information conforms with that appearing on the face of the Will lodged.

20. If there is any remaining issue as to whether the Court is allowed to consider the affidavit of testamentary script as part of the evidence in this matter, the Court relies on **Rule 29.2** which bears the side note evidence at trial. At **Sub Rule (3)** it reads *"Any evidence taken at the trial or other hearing of any proceedings may be used subsequently in those proceedings."* By its footnote it refers the reader to Part 30 which deals with Affidavit Evidence.

21. For completion, the Court finds it imperative to state that while the Claimant says the original Will was no longer in her possession she could easily have sought a certified copy from the Probate Registry and exhibited that instead. The very section of Atkins on which the Claimant sought to rely made it quite clear that this was expected and acceptable at trial.

Whether the Will is valid?

Was the Will signed by the deceased?

22. The evidence of the Claimant is that the deceased was of sound mind when he made the Will. He used to visit her in the United States but later became very

ill. She took care of him with help from Marie Longsworth, her sister. In 2018 his health rapidly deteriorated.

23. She recalled that in 2012 while she was in Belize, he asked her whether she 'wanted up or down' referring to the floors of the house. She requested 'down' as she had issues with her knees. However, it was her sister Marie Longsworth who eventually told her about the Will.

24. On one occasion, while again present in Belize, she saw her father give Marie the Will to place in his tool box for safe keeping while explaining he had paid $350.00 for it and did not want it to be misplaced. She was certain that in 2013 when the Will was made the deceased was of sound mind and memory and was working at Brodie's.

25. Lydia Marie Longsworth also testified for the Claimant. She knew that her father had gone on his own, to lawyer Welch, to have the Will prepared in 2013. She could not recall the month. He had asked each child what they wanted. She had chosen the back house. Her mother had insisted that Beverley be executrix but her father chose Cheryl. Her mother was well aware of the Will and she had even agreed to the contents.

26. The Deceased had shown the Will to Lydia. Later he had given his toolbox with all his important papers to her so that she could take care of the Will. She also testified that her father was in good health at the time he made the Will and was then employed. He died in 2019.

27. Dale Trujeque testified that in March 2013 he was a witness to a will executed by Wendell White late of Bocotora Street, Belize City. He, Mr. Trujeque, was then working at the law office of the late Lionel Welch and he recalled the deceased coming to the office on two (2) occasions.

28. It was he who, in fact, prepared the Will from notes handed to him by Mr. Welch. He knew Mr. White had given the instructions as Mr. Welch's office door remained open during the visit and he, Mr. Trujeque, could hear what transpired inside. He remembers the case well because as he overheard the conversation he was able to identify the relevant property, its layout and location.

29. Mr. Welch also told him that when Mr. White returned both he, Mr. Trujeque and his co-worker, Janelle Gutierrez, were to sign as witnesses to the will, as they usually did. Both he and Ms. Gutierrez signed the Will in Mr. White and Mr. Welch's presence. Although Mr. Welch appeared frail; he was otherwise alert, coherent and seemed of sound mind.

The Claimant's Case

30. The Claimant asked the Court to find that the three (3) witnesses presented were forthright and candid and ought to be believed. This is more significantly so because the Defence offered no evidence whatsoever. Counsel then asked the Court to draw an adverse inference of the absence of their witnesses and he relied on the Supreme Court of Washington's case ***Wright v Safeway Stores Inc. No. 27980***.

31. He also drew the Court's attention to the fact that only two (2) of the Claimant's witnesses had been cross-examined. The witness, Mr. Trujeque, who testified to the due execution of the Will was never subjected to cross-examination so *"there is absolutely nothing on record to challenge his very clear testimony as to the due execution of the Will….."* Counsel added that *"in the absence of any cross-examination of this witness, his testimony can hardly be faulted…."*

The Defendant's Case:

32. The Defendants submit that even in the absence of cross-examination, Mr. Trujeque's evidence was insufficient. Although the general effect of failure to cross-examine is that the statement of the witness is not disputed and may lead the Court to infer that the evidence presented by that witness is accepted (***Brown v Dunn (1894) 6 R. 67, HL***), a judge is not bound to accept unchallenged evidence (***Various Claimants v Giambrone & Law (a firm) & ors [2015] EWHC 1946 (QB)***).

33. Counsel then urged the Court to find that the statement made by the attesting witness was lacking. She referred to Section 7 (1) (b) of the Wills Act which reads:

> *No will shall be valid unless it is in writing and executed in manner hereinafter mentioned, that is to say,*
>
> *(b) such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.*

34. She continued that at no time did Mr. Trujeque indicate to the Court that he saw the deceased sign the Will and that the deceased did so in Mr. Trujeque's presence and that of the other attesting witness, at the same time. This omission, she concluded, meant that the will had not been duly executed. Pursuant to

section 7 (1) (b) of the Wills Act.

35. Finally, she insisted that the witnesses were not credible and ought not to be believed. She asked the Court to consider certain discrepancies in the testimony of both the Claimant and Ms. Longsworth.

36. She highlighted that one witness said the testator had died in 2018 and the other said 2019. In her witness statement, Ms. Longsworth swore that she had been told about the Will by the Claimant but then under cross-examination she stated that she had seen the testator give the Will to the Claimant to place in his tool box. She felt it strange that the Claimant had never referred to this scenario but had only said that her father gave her his toolbox containing the Will for safekeeping.

The Court's Consideration:

37. The Defence offered no evidence and the Court is allowed to draw certain inferences from this. Counsel for the Claimant found the Supreme Court of Washington's case ***Wright v Safeway Stores Inc. No. 27980*** to be instructive.

38. Here, the court discussed when it would be proper to draw an adverse inference where material witnesses were absent without explanation and the nature of the inference which ought properly to be drawn. The court considered the case of ***Rosenstrom v North Bend Stage Line, 154 Wn. 57, 280 P.932*** which instructed:

"Whenever it develops in the course of a trial that there are witnesses available to one party or the other who, if called, could testify to material facts favorable to such party, then if such party fails to call such witnesses, or to explain his failure so to do, you are justified in

assuming that, if called, said witnesses would have testified adversely to the interest of such party."

39. This led that court to eventually conclude that:

"In not every case where a party to an action has failed to produce a witness or witnesses under his control, who could have testified to material facts favorable to such party, and has failed to explain his failure so to do, can it be inferred that the testimony of such witness or witnesses, if produced, would have been unfavorable to such party, but a court or jury may draw such inference only when under all the circumstances of the case the failure to produce such witness or witnesses, unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony."

40. This Court finds much value here as the USA is also a common law jurisdiction, but will also rely on the statement of a similar principle by Brooke LJ in ***Wisniewski v Central Manchester Health Authority [1998] PIQR P323 at P340*** where he said:

"In R v IRC ex parte T. C. Coombs & Co [1991] 2 AC 283 Lord Lowry explained at p. 300 the benefit which a court may be willing to confer on a silent defendant who gives some sort of explanation for his failure to give evidence, even if it is not a very good one. He said: "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favor of the other party may be either reduced or nullified."
From this line of authority I derive the following principles in the context of the present case: (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

41. Not only is this Court willing to make an adverse inference in this case but it is also ready to make a presumption of due execution. The Claimant's witnesses seemed honest and forthright. The Claimant and Lydia Longsworth both spoke to the testator's desire to make a will and what he did in preparation.

42. Although Counsel for the Defendant attempted to draw attention to certain discrepancies, they were not of a nature which would lead the Court to believe that those witnesses were attempting to mislead.

43. The issue as to the date of death is easily verifiable and has no bearing on the issues at hand. The testator is, admittedly, dead. The difference in recollection of how the Will was kept or handed over neither adds nor takes away anything from the evidence given by these witnesses.

44. In any event, the Court considers primarily the testimony of the attesting witness Mr. Trujeque and could find no reason to doubt it. He informed that he remembered quite clearly the circumstances surrounding the preparation and execution of the Will and he explained why.

45. He spoke of the attorney taking instructions for the preparation of the Will, his drafting it and the testator returning to sign. He also revealed that both he and the other witness signed the Will in the testator's presence.

46. The Court also considers that the Will was prepared and signed in the presence of an attorney. It also contains a formal attestation clause and this raises a strong presumption of the due execution.

47. At page 135 of Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, the author explains:

> *"There is no absolute necessity for positive evidence of due execution in order 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. What those circumstances are may be gathered from the words of Dr. Lushington in Thomson v. Hall:*
>
> *'The character of the witnesses, the length of time which has elapsed since the transactions took place, the nature of the facts deposed to – whether they are likely or not to have made an impression on the minds of the witnesses- are circumstances to be taken into account, to which is to be added this consideration also, whether the case admits of the principle- the presumption- omni rite esse acta.'"*

48. While Counsel for the Defendants sought to make much about the lack of positive evidence as to due execution that is certainly not necessary in light of all that is before the Court. Particularly where the Defendants themselves have offered nothing to rebut, this very strong presumption. This Court, therefore, finds that the Will was signed by the deceased.

If the Will was signed by the deceased, was the deceased of sound mind when he executed it?

The Claimant's Case:

49. The Claimant says that the Defendants have offered no evidence whether medical or otherwise to prove its Claim so that it is doomed to fail. The Court must accept the evidence of the Claimant's witnesses that the testator was of sound mind when he executed the Will.

The Defendant's Case:

50. The Defendant asked the Court to find that the Claimant's witnesses were not credible so their testimony as to the mental capacity of the testator ought to be disbelieved.

The Court's Consideration:

51. The Court reminds that he who asserts must prove. It is the Defendants' Counterclaim which asserts that the testator lacked the testamentary capacity to make the Will. They have presented no evidence whatsoever so the Court has nothing to examine which could possibly contradict what the Claimant has asserted.

52. This Court is satisfied that the testator knew of and approved the contents of the Will and it ought, therefore, to be admitted to probate in solemn form. The Counterclaim must necessarily fail.

Determination:

1. Judgment for the Claimant on both the Claim and the Counterclaim.
2. The Will of Wendell Lloyd White dated the 25th March, 2013 is proved in solemn form and may be admitted to probate.
3. The caveat against the sealing of a grant of probate of the Will of Wendell Lloyd White lodged by the Defendants is to be removed forthwith.
4. Costs to the Claimant in the agreed sum of $6,000.00.

SONYA YOUNG

SUPREME COURT JUDGE