

IN THE SUPREME COURT OF BELIZE, A.D. 2015

CLAIM NO. 561 of 2014

ONORIO PEREZ

CLAIMANT

AND

ORLANDO PEREZ

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings

2015

23rd March

16th April

Mr. Hubert Elrington, SC for the Claimant.

Mr. Edwin Flowers, SC for the Defendant.

Keywords: Wills – Testamentary Capacity – Validity – Due Execution – Witness Attestation – Constructive Trust – Ownership of Property – Wills Act Cap 203.

JUDGMENT

1. The Claimant (now 74) and the deceased, Tomasa Perez, were married in 1961 and remained so until her death on 29th January, 2012. In 1967 a property located at 59 West Canal Street, Belize City, which we shall refer to as No. 59 was bought in the deceased's name for \$600.00. The union produced six children, one being the Defendant who is also the executor and sole

beneficiary of the deceased's estate. The only property referred to by name in that Will is No. 59, which the testatrix describes as "my property".

The Issues:

2. There are two clear issues before the court. The Claimant disputes the validity of the Will. He seeks a declaration to this effect and a consequential order revoking the grant of probate issued to the Defendant on the 16th April, 2012. In the alternative, a declaration that he is entitled to one half of No. 59, it having been held on trust for him by the deceased.

The Will:

3. It is the Claimant's pleaded case that Tomasa Perez had been ailing for some time and in November 2011 her condition had worsened. She was unable to do anything for herself and was assisted constantly by their daughter Maria Perez. She would therefore not have been able to sign her Will unaided and in any event, would never have neglected to provide for her five surviving children. Maria Perez, one of the attesting witnesses thereto also denies seeing her mother execute the said Will. Since testamentary capacity has been raised slightly, but with little supporting evidence it shall be discussed first.

Testamentary Capacity:

4. In *Banks v Goodfellow (1870) LR 5 QB 549, 565* Cockburn CJ set out the standard requirements in this classic statement:

"It is essential ... that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections,

pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.”

5. As to the testatrix’s intelligence and volition at that time, all three eye witnesses, including the Claimant’s own witness, agree that the testatrix questioned Maria as to her surname – whether she carried McGill, to which Maria responded no, she would be Perez until she died. It was at that point that the testatrix directed her (Maria) where to sign. To my mind perhaps the testatrix was simply trying to ensure that Maria’s name was correctly stated on the Will, hence her question. It shows a level of cogency, analytical thought and the ability to follow through by then directing Maria where to sign. Both eyewitnesses giving evidence for the defence agree that the testatrix first read her Will aloud before calling Maria into the room. The Defendant also testified that the testatrix asked that the Will be prepared in the said terms. Both he and his wife explained that it was her intention to ensure that her ill granddaughter (their daughter) was adequately provided for after her death.
6. Whatever the reason, this court is of the view that the contents of her Will were her own true and perfect intention. The exclusion of her other children raises no suspicion or uncertainty as to her knowledge and approval of its contents.
7. **Validity of a Will:**

To be valid a Will must have been signed by the testatrix in the presence of two competent witnesses – Section 7 of the Wills Act Cap 203 (hereinafter 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*

The Evidence:

8. One begins on the premise that the Will on its face is duly executed. At the foot of the Will there is clearly stated that Tomasa Perez signed *“in the presence of us both being present at the same time who at her request in her presence and in the presence of each other have hereunto subscribed our names as witnesses.”* Next to this appears Tomasa Perez’s signature and on either side just below are the signatures (accepted as their own) of each witness. The first question which arises is why would anyone sign such a statement knowing it to be untrue. Such a clause therefore raises a strong presumption of due execution *“omnia praesumuntur rite esse acta.”*
9. Since there is no issue as to the competency of the witnesses there must now be a proper consideration of the eye witness testimony provided so that the true circumstances may be revealed. We are in the fortunate position, in this case, to have the tested testimony of both witnesses to the Will and another eyewitness who stood next to the testatrix throughout the entire episode.

10. Maria Perez was the only witness for the Claimant with first hand knowledge of the execution of the Will. Although the Claimant purported that the testatrix could do nothing for herself and was basically invalid, it is Maria's own evidence that the testatrix called her from one room away. When she arrived she met her seated at a dining table. She says nothing of the testatrix being aided to maintain her seat or how this incredibly ill woman was able to make her voice heard. The court also considers the evidence provided by Harith Moralez the other witness to the said Will. He claimed that when he arrived to witness the Will, Thelma Perez assisted the testatrix from one room into the dining room. The testatrix used a walker. She was mobile and sat alone and unaided. Thelma Perez, the other eyewitness and wife of the executor, corroborates this.
11. The Claimant made much about the secrecy surrounding the Will and that he never knew that it had been made until after the death of his wife. *Tyrell v Painton (1894) P. 151* considers the circumstances where such secrecy could raise a well grounded suspicion which, if not removed by affirmative proof, could be fatal to the Will. In that case no one else was present except the Defendant's son (who had prepared the new Will in favour of the Defendant) and his friend. In the present case it is the Claimant's own daughter and witness who attested the Will. What secrecy could there really be in such circumstances. The Claimant was simply not told of the Will which does not by itself prove secrecy on the part of the testatrix or anyone else associated with that Will.
12. It is Maria's evidence that she did not know what her mother had asked her to sign. That is immaterial see *Daintree v Butcher and Fasulo (1888) 13 PD*

102, CA. She also claims that she did not see her mother sign that Will. Yet in her own witness statement she states “*After all the signing ...*” When cross-examined on the precise meaning of that phrase, the witness was unable to give a useful answer. She simply maintained that she saw neither the testatrix or the other witness sign.

13. Harith Morales on the other hand states that in his presence and that of Maria Perez, the testatrix, slowly and seemingly with difficulty signed her Will, then she questioned and directed Maria to sign. He signed last. That would satisfactorily explain what Maria Perez meant by “*after all the signing.*” The issue also arose of the testatrix being unable to sign unaided. In as old a case as *Wilson v Beddard (1841) 12 Sim 28* a mark sufficed as a signature where the testator’s hand was guided by another. In any event the Claimant produced no evidence at all to support this purport.
14. I found Harith Moralez to be a forthright and frank witness and I could see no reason to doubt his version of the events. Maria Perez spoke haltingly and seemed somewhat evasive as to the exact sequence of events. I rejected her evidence and find, therefore, that the testatrix signed her Will in the presence of two witnesses who thereafter signed in full compliance with The Act. There being no reason otherwise to find issue with the execution of this Will, I hold that it is valid. I decline to issue an Order for the revocation of the Grant of Probate.

Ownership of No. 59:

15. We turn our attention now to the ownership of this property. The Claimant says that he and his wife both bought the property. He explains that he

instructed that it be placed in her name alone as he was often away on business and was not always available to execute necessary documents. He relates how during the currency of their marriage they borrowed the money from her uncle to purchase the property and repaid it in installments from the rental it generated and the proceeds of the business they conducted. When they sold their original joint business the money was invested in No. 59.

16. The story he tells is of a man and woman cooperating and struggling to raise an expanding family and build a business. The property was their matrimonial home and business place for many years. Both worked in their joint business and there is no evidence that the testatrix had any other income or purchased the property with monies other than that generated by the joint business and rental of the said property. There is no evidence that they kept their finances separate.
17. The Defendant was but a child at that time, if he was yet born (he is the youngest child of the union). He admitted that at best he could only repeat stories he had heard. The court could not place much reliance on his view of how the property was bought. What he did reveal, however, was that both his parents built the business and during his life time they both renovated and expanded the building at No. 59. As a child he lived and worked at No. 59 with his parents.
18. It is clear that the testatrix viewed No. 59 as her own as it is so stated in the Will. The Defendant corroborates this and urges that her uncle bought the property for her and not for both of his parents. Perhaps that is so, nonetheless one cannot simply overlook the contributions the Claimant also clearly made.

This court finds that the Claimant made direct contributions to the purchase price of the property and a common intention could therefore be inferred. His continued investment in the development of No. 59 was certainly detrimental and clearly in reliance on that common intention. He must have formed the reasonable expectation that he would have an interest in the property.

19. The Claimant was unable to present evidence of financial contributions made. Many years had passed so that is understandable. A strict mathematical exercise could not be conducted. Instead, the court must consider the whole course of conduct between the parties *Oxley v Hiscock (2005) Fam 211*. When the sparse evidence is considered in its totality one must conclude that the property was bought and developed by both the Defendant and the deceased and that in all fairness they contributed equally to same. Equity is equality and will construe a tenancy in common where no alternative is proven. By the Claimant's very request for a one half share he is accepting that there never was an intention to create a joint tenancy. The deceased's attempt to devise the property also militates against the presumption of a joint tenancy.

20. As such this court finds that No. 59 was owned by the Claimant and the deceased as tenants in common in equal shares and that the deceased held same on constructive trust for him. Since the Defendant is not a bona fide purchaser for value equity allows the court to trace the property into his hands. As the executor he will now take the position as trustee in relation to the Claimant's interest in the property and holds said property on trust for sale. The Claimant is entitled to half of the proceeds of same. The other half goes to the estate of the deceased to devolve according to her Will. Because both

parties have had some level of success in this matter and in consideration of the circumstances of this case and the relationship of the parties I make no order as to costs.

Order:

21.
 1. It is hereby declared that the Claimant is the beneficial owner of a one half share in the property known as No. 59 West Canal Street, Belize City, Belize.
 2. The property is to be sold and the proceeds divided equally between the Defendant and the Estate of Tomasa Perez.
 3. The portion belonging to the Estate of Tomasa Perez is to devolve in accordance with her Will dated 28th November, 2011.
 4. No order as to costs.

SONYA YOUNG
JUDGE OF THE SUPREME COURT