IN THE SUPREME COURT OF BELIZE A.D.2012

CLAIM NO. 210 OF 2012

BETWEEN

(SHERLETT ANITA MARTINEZ	**CLAIMANT**
(	
(AND	
(	
(INDIRA ARZU	**DEFENDANT**

Before: Mde Justice Rita Joseph-Olivetti

Appearances: Mr. Hubert E.Elrington S.C. of Hubert Elrington & Co. of counsel for the Claimant.

Mr. Estevan Perera of Glenn D. Godfrey & Company LLP of counsel for the Defendant.

J U D G M E N T

Dated: 2013, 8 October

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1. **Joseph- Olivetti J**: - Which of two purported wills should the court uphold- that is the question. The contenders are the Claimant, Ms. Sherlett Martinez, a teacher who lived with Mr. Arzu, the testator, as his wife for about 11 years whilst he was married and estranged from his wife and the Defendant, his grown up daughter, Ms. Indira Arzu, an accountant. Curiously, both wills were probated- some untoward mistake on the part of the Probate Registry I will hazard. At the heart of this dispute lies the dwelling house in which Mr. Arzu and Ms. Martinez cohabited as it appears that Ms. Martinez is bent on securing her home which by the earlier will was devised to her and which subsequently by the later will to Ms. Arzu. And, Ms. Arzu is equally determined to have the benefits given to her and has already obtained title to the former home of her father and Ms.Martinez.

R**elief claimed.**

2. First, the relief sought by Ms. Martinez. In her claim she asks the court to pronounce against the validity of Will 2 on the ground that it was not duly executed and that at the time of its alleged execution Mr. Arzu was incapable because of illness of signing his name. She therefore asked that the court: - (1) revoke the Grant of Probate of Will 2, and (2) Pronounce for Will 1 in **solemn form of law** and declare the validity of Probate thereof; (3) order Ms. Arzu to deliver to her all the assets of the Estate of Mr.Arzu including moneys from the bank accounts;(4), such other relief as may seem just, and (5) costs.
3. Second, the relief sought by Ms. Arzu. In her Defence, Ms. Arzu denied the allegations that her father was incapable of executing Will 2and in turn clamed in para. 3 that Ms. Martinez must prove Will 1 **in solemn form** as it appears to be forged in that, "**on the**

face of it the Claimant wrote the Defendant's father's name wrongly and the signature appears to be forged". And further by para. 4 that in any event Will 1 was revoked by Will 2 in its specific terms. (Emphasis mine).

The main issues for determination.

4. Although the validity of each will is disputed by the opposing party they do not dispute that on 8 April 2009 Ms. Arzu was granted Probate of the second will dated 27 October, 2008 ("Will 2") and that Ms. Martinez obtained Probate on 29 September, 2009 of the first will dated 24 August, 2008 ("Will 1").Clearly, both wills cannot stand as they each purport to deal with the entire estate of Mr.Arzu. Therefore the main issues arising are (1), whether Will 1 is a valid will and not a forgery as alleged by Ms. Arzu, and (2), whether Will 2 is valid and revoked Will 1. Of course, the validity or otherwise of Will 1 is of little moment if Will 2 is valid and properly revokes Will 1. Therefore, I shall consider the issues relating to Will 2 first.
5. To answer whether or not Will 2 is valid and revoked Will 1 the court must determine whether –

    a. At the time he is alleged to have given instructions for and signed Will 2 whether Mr. Arzu was of sound mind and memory and fully understood the nature and effect of Will 2. In other words, did he have testamentary capacity to make Will 2?
    b. If he did have testamentary capacity and did make Will 2 the effect of the revocation clause in Will 2.

Court's observations on the witnesses and factual findings.

6. I find it helpful to set out my general observations on the witnesses first. Ms. Martinez was her only witness at trial although she had filed several witness statements from other persons including two affidavits from the alleged attesting witnesses to Will 1, Mr Singh and Mr. August. After the close of the case the court afforded time to Mr. Elrington S.C. learned counsel for Ms. Martinez to attempt to reach at least one of the alleged attesting witnesses and we adjourned to the next afternoon. This was an unusual step but I considered it in the interests of justice to do so. On the next day Mr. Elrington reported that one of the witnesses, Mr. Singh, a Justice of the Peace ("JP") who they had intended to call had left the country before trial without informing them. He was able to contact the other, Mr. Edgar August also a JP and a tour guide but Mr. August at the time was at work in Placencia in the far south of the country and was expected to return to Belize City the next morning. At Mr. Elrington's request we adjourned to the next day at 1 p.m. but Mr. August did not appear as it appears that this was insufficient time for him to complete his work and return to Belize City in time for the hearing. No further requests were made, no doubt in light of the strenuous opposition from Mr. Perera, learned counsel for Ms. Arzu, to the earlier adjournments.

7. Ms. Arzu testified and called three witnesses- Ms Ruth Pandy- Garcia, Mr. Mario Gonzalez (both JPs) and Ms. Karen Patten.

8. Having heard and observed the witnesses the court makes the following observations. Ms. Martinez was straightforward and gave the impression of being an honest witness. Mr. Perera did attempt to cast doubt on her credibility by cross-examining her vigorously and in particular by asking her about the whereabouts of the written instructions for Will I which she testified that Mr.Arzu made and which, upon his

request, she had taken to a lawyer to have Will I drawn up. By her failure to put those instructions into evidence, counsel sought to ask the court to infer that they did not exist and that Ms. Martinez was not to be believed. However, it transpired that although the instructions were not put in evidence that they had been disclosed by Ms. Martinez and copies were on the court file among the disclosed documents. That line of questioning was therefore unfair as Mr. Pererra ought to have been aware of the disclosure. When the court pointed out their existence to him subsequently he refrained from asking further questions about them.

9. Mr. Perera also cross- examined Ms. Martinez at length about her testimony that Mr. Arzu during his last stay in hospital was very weak and unable to speak. I accept that despite her somewhat laboured attempts to explain, that he could speak but not clearly as he murmured, which to her mind was equivalent to him having no speech at all. And I do not regard this as a discrepancy of any significance. The fact too that in cross-examination Ms. Martinez said that she could not recall what Mr. Arzu said to her at the hospital at Dangriga in October 2008 is of little moment having regard to the time that has elapsed and that nothing of consequence is alleged to have been said to her. In fact, Mr. Arzu's manner of speaking at all relevant times was apparent from the video recording that Ms. Arzu so thoughtfully saw fit to make and put in evidence. That Mr. Arzu had difficulty in breathing, speaking and that others had difficulty hearing him is beyond question. This was no doubt compounded by the fact that he was intubated.

10. Now to the Defendant's witnesses. Ms. Arzu presented as a poised, intelligent and very confident young woman. However, my distinct impression was that she was not at all candid with the Court and was only bent on serving her own ends. For example, she

omitted to tell the court in her examination in chief that she actually left her ailing father at the hospital and drove to pick up the Justices of the Peace, that she at some time had instructed her aunt to get a solemn declaration form and, most telling, insisted in cross examination that he was sitting up and spoke in a strong voice. She said in chief - "**My father was very cognizant of the entire event. He was active and understood the content of the will. He was not only speaking to me but was also singing along with Mr. Mario Gonzalez on his guitar. My father was very particular about his signature since he was a calligrapher**". And she made no reference whatsoever to the tubes in his nostrils; this last not even in cross- examination. And this, despite the video depicting her as trying to adjust the mask on one occasion. I cannot regard that as a slip of memory as her father's last illness must have had a great impact on her plus she at all times had the video from which to refresh her memory before taking the stand. I also note that although she expressly put Ms. Martinez to proof of her father's illness and medical treatment in her Defence, thus leading one to the infer that she knew little or nothing of them, she on cross-examination professed to know all about his illnesses and moreover claimed to have paid some of the bills.

11. I found Mr. Gonzales, a teacher, to be an honest witness who was careful to point out that this event took place about five years ago and so he could not be expected to recall everything. This I accept. However it is curious though that he said nothing of accompanying Mr.Arzu on his guitar, an event so singular in the those circumstances that if one had participated one would have been expected to remember it.
12. Ms. Pandy- Gracia., also a JP and teacher, I did not find so straightforward. For example, she said that she knew Mr. Arzu very well and that he recognized her when she

came to his hospital room. This is incorrect as in the video Mr. Arzu is heard inquiring as to who the people in his room including her and Ms Patten were. She also said that he made small talk with them- something so incredible having regard to the condition of the man as depicted in the video. As to Ms. Patten, a beautician and old friend of Ms. Arzu, she was a person whose manners belied her handsome face. She was discourteous, argumentative, overtly hostile to Ms. Martinez and careless with the truth. She claimed she was well acquainted with Mr. Arzu whom she called "Uncle Cherry" but on the video he is seen inquiring as to who she was and what is more she is seen greeting him as '**Paps**'. He does not respond to her. Either he had lost his memory altogether and could not recall an almost niece, his daughter's alleged friend of long standing and an alleged frequent visitor to his home or she was being untruthful. The evidence favours the latter as human experience shows that a fond, familiar name is invariably used when greeting a sick person and "Paps" in those circumstances strike a dissonant chord of disrespect and indifference, unfitting for the sick bed of a respected older friend. I have no doubt that Ms. Patten came not to tell the truth so much but to help out her good friend Ms. Arzu and I will say no more.

13. Now to findings of facts. Mr. Isodore (a.k.a. Isidoro) Cherrington Arzu is the alleged testator under both instruments. He was a retired teacher and appears to have been a headmaster at one time and Ms Garcia-Pandy's supervisor/vice-principal).

14. Until the date of his death Mr.Arzu enjoyed an intimate relationship with Ms. Martinez and they lived together as man and wife at 12 Far West Street, Punta Gorda for about 11 years before his death. However, it appears from the marriage certificate (tendered by Ms. Arzu) that he was still married to his wife (Ms. Arzu's mother) from whom he had

been estranged for numerous years and so their relationship in law did not qualify as a common law union. There's the rub or part thereof. I must say I find it hard to believe Ms. Martinez that she did not know he was still married.

15. In December 2007 Mr. Arzu became seriously ill. He first received medical attention at Punta Gorda town then he and Ms. Martinez travelled first to Belize City, and next to Chetumal, Quintana Roo, Mexico to seek further medical attention. They returned to their home at Punta Gorda in July 2008. There his condition worsened. They went again to Belize City and next to Chetumal where he had some form of surgery. Next they returned to Belize City on July 31 and stayed until August 24, 2008. After that they returned to their home. Apparently Mr. Arzu's condition did not improve – at home he needed constant care and he had difficulty breathing and began spitting blood. He was admitted to the hospital at Punta Gorda in October 2008. It appears that his condition worsened and that he could not get the care he needed there so Ms. Martinez had him transferred to the Southern Regional Hospital in Dangriga, Stann Creek District, Belize ("the SRHospital") on 26 October 2008. She continued to care for him until his death, on 2 November, 2008 barely one week after his admission there. He was 57 years old. His death certificate (admitted by consent) recorded his cause of death as pneumonia. However, he also suffered from a bad heart and had had some form of heart surgery in the United States of America as both Ms. Martinez and Ms. Arzu testified.

16. I emphatically reject Ms. Arzu's testimony in chief that Ms. Martinez abandoned her father in the SRHospital as in cross- examination she was constrained to admit that she meant that when she was at the hospital she did not see Ms. Martinez. Clearly, she based her tale of abandonment on this. It is a long way from saying someone abandoned a

person from simply saying, when I visited him I did not see her there. Add to that, Ms. Arzu reluctantly admitted that Ms. Martinez was with Mr. Arzu when he died and that Ms. Martinez was the one who actually made all the arrangements for his burial and met the funeral expenses. Ms. Arzu claimed not to have participated as Ms. Martinez had all his documents. Why would the possession of a deceased person's documents by another prevent anyone and indeed the deceased's appointed executor, a fact know to the executor, from assisting with funeral arrangements? That is an executor's prerogative. And further, why did not Ms. Arzu acquaint Ms. Martinez on her father's death that she was his executor having been recently appointed? There is no evidence that she did so, now for that matter did Ms. Martinez describe the existence of Will1. Both were playing their cards close it seems.

17. Now to the wills and to the circumstances of their making. First Will 1. On August 24, 2008 whilst in Belize City, Mr. Arzu made and executed Will I. I accept Ms. Martinez' testimony that he wrote those instructions in Chetumal and in Belize City himself and that at his request she took them to a lawyer in Belize City who prepared Will I based on those instructions. Again I accept Ms. Martinez's evidence in chief that she was present and saw Mr. Arzu sign Will I in the presence of two witnesses both being present at the same time. They were Mr. August and Mr. Singh. I also note that no questions were put to her about this or about her having forged Mr. Arzu's signature- the lynch-pin of the Defendant's case against the court propounding for the validity of Will1 as set out in her Defence. Therefore, Ms. Martinez's evidence on this stands uncontroverted although when assessing her evidence I have borne in mind that Ms.

Martinez is the sole beneficiary under Will1 and that this could have coloured her evidence.

18. By Will I Mr. Arzu appointed Ms. Martinez as his executrix and made her his sole heir and specifically devised their home at 12 Far West Street, Punta Gorda to her. Will I was probated by Ms. Martinez on 29 September 2009.

19. Now to Will 2. I find that Ms. Arzu went to the SRHospital on 27 October 2008, that very day travelling many hours and hundreds of miles from Corozal, in the far north where she lived and worked at the Princess Casino in the Free Zone on the northern border with Mexico to Dangriga in the south of the country. I infer from all the circumstances that her main purpose for this visit was to ensure that her father make a will before he died. On the way she collected her friend, Ms. Patten, who worked and resided in Belize City. She then continued to the SRHopsital in Dangriga where at some point she rendezvoused with her aunt, Ms. Carla Thompson (her evidence and that of her witnesses is not clear as to whether she met Ms Thompson at the hospital when she got there around early afternoon at visiting time or whether Ms Thompson came to the hospital later) and summoned and actually went to collect not one but two JPs, both known to her aunt. She made sure she was equipped with a solemn declaration form.(I do not know what legal magic she thought resided in such a form but the legendary Merlin the Kingmaker no longer lives to render by his potent powers such forms instruments to aid in the amassing of wealth). Ms. Arzu said in cross examination that she requested her aunt to buy a form for her when her father said he wanted to make a will. How the sequence unfolded is misty but clearly there was much “toing and froing” in that same hospital room that day where apart from the patient there were sometimes 6

persons present and certainly they were all there when the video recording was being made. They were – Ms. Arzu, her aunt, Ms. Thompson, her friend Ms Patten, Ms. Agnes Castillo a former paramour of Mr.Arzu and mother of his daughter Adela, Mr. Gonzalez and Ms Pandy-Garcia.

20. At the hospital, in a private room with no nurse or other medical person in attendance, Ms. Arzu proceeded to record on that magical form what she termed her father's instructions for a will. She did not see fit to obtain the services of a lawyer to consult with and advise him beforehand or afterwards or to ensure some privacy for her father during the process. The procedure she employed is clear from the video recording which she, assisted by Ms. Patten, recorded on her cell phone. She asked her father questions about his property, and she appeared to be writing down his answers on the magical form. She was also prompted by at least one other person in the room.

21. I do not for one moment believe the tale told by Ms. Arzu and Ms. Patten that the recording was done for the family archives. If so why did they trust to a cell phone? Why not employ a professional for such an important documentary especially as this was the only recording Ms. Arzu took of her father. Further, Mr. Arzu's permission was not even sought so that he might make his best appearance and perhaps send a fond greeting to his family if he so wished. And, Ms Patten had the effrontery or ignorance when questioned as to whether Mr. Arzu's permission had been obtained to make the recording to pretend that it was not necessary. To my mind no right thinking person could so invade another's privacy especially a sick room without the patient's permission. Mr. Arzu's comfort or feelings did not appear to trouble Ms. Arzu or her good friend Ms. Patten; no: it appeared to be strictly business for them.

22. Ms. Arzu said in chief at paras.11 and 12 of her witness statement and they are worth setting out in full -

> **"11. After the will was prepared by the attorney, I presented it to my father. I then went over the contents with my father. He had requested that I accept the role as the executrix of the will and that I see to it that the will was followed.**
>
> **12. My father was very cognizant of the entire event. He was active and understood the contents of the will. He was not only speaking to me but was also singing aloud with Mr. Mario Gonzalez on his guitar. My father was very particular about his signature since he was a calligrapher."**

23. And Ms Patten bears out her good friend at para.9 of her witness statement-"**Mr. Isidoro Arzu was very cognizant and alert at the time of executing the said will. He was not only conversing with those around him at the time but was also singing along with Mr. Gonzalez on his guitar. Mr. Arzu was an articulate person and knew what he wanted up to the very last day".**

24. Ms. Arzu was adamant on cross- examination that her father was sitting up, active that he spoke in a strong, clear voice. And Ms Pandy –Garcia too said that he even sang at least one gospel song, the Old Rugged Cross, during that visit and made "chit chat" with them whilst they awaited the return of Ms. Arzu from the lawyer. Yet, it was Mr. Gonzales and none of those good ladies who told us that Mr. Arzu had a tube in his nostrils and that he had difficulty breathing.

25. I remark the distressed and pitiable condition of Mr. Arzu at the end of that short recording of him giving those so -called instructions for a will. It is difficult to

contemplate that a person in that condition would make a miraculous recovery which would enable him a short time after (Ms. Arzu said she was away for about half-an hour having the will drawn up) when he signed the will to be so articulate and active and in good voice making desultory conversation with his visitors and singing, in any comprehensible manner.

26. I remark in particular Mr. Gonzales's evidence that he was not comfortable with the situation and advised Ms. Arzu to get a lawyer as the making of a will was a legal matter and he was not in a position as a JP to advise her. This she did. She took the so called instructions to a lawyer, Ms. Antoinette Moore who prepared Will 2 immediately that same day. Ms. Arzu paid for it, took it back to the hospital where her father signed it. (I note that the Statement of Claim alleged that Mr. Arzu did not sign Will 2 but that subsequently Mr. Elrington in his submissions properly conceded that they accepted that Mr. Arzu signed Will 2 but were contesting his testamentary capacity to do so).

27. (I am constrained to observe that I am not familiar with the practice here but I am well acquainted with the practice in many common law jurisdictions where whenever a lawyer draws up a will for someone who is unable to attend at chambers, he/she first attends on the person to take the instructions, next draws up the will and later returns with witnesses (often secretaries from his/her offices) to the testator's home or hospital bed to ensure that the will is fully understood and executed. Oftentimes in the hospital scenario one of the testator's medical personnel is asked to be attesting witness. This practice was referred to by Cornelius J in **Vida I. Elcock and Yvette O. Elcock v Athiel A Elcock** Barbados High Court No.1914 of 2003 (unreported) 12 June 2013 para.96. It is a salutary one for the obvious reasons).

28. At all relevant times attendant on the making of Will 2, Mr. Arzu was on medication. Ms. Arzu admitted that she knew that her father was on medication, but, not the effect or type of medication. However, when asked whether the medication was such as might have affected his state of alertness she glibly responded she was not a medical practitioner and so could not say. Yet, as astute as she seems, that factor, her father's ability to comprehend fully what he was doing, apparently did not concern her at the time.

29. What is of alarming significance on looking closely at the video recording, the transcript thereof and comparing it with what is written by Ms. Arzu on the statutory declaration form which she properly tendered, is that they do not correspond. The video recording as borne out by the transcript is more like a list of assets than instructions for a will. Mr. Arzu in the video recording is not heard to name an executor, or more importantly to identify the persons who are to be beneficiaries and what property they are to inherit. And he tells Ms. Arzu to fill in the blanks but does not give her the information with which to do so. The form as tendered has complete devises and bequests to specific persons.

30. The relevant excerpt from the transcript is instructive and I set it out in full-

> **"Isidore- "good everybody is here, Meka ahm.. Meka ahm…sign y ya**
>
> **Indira –But then you have to…**
>
> **Isidore- All you need now is the dash and names**
>
> **Indira - I have the things, you just <u>want me to push a dash and a name beside the</u>"**

Isidore - Yeah, Yeah. Give me the pen. Just sign it in front of the JP and that's it. I tired.

Ïndira - sign right here so

Isidore- Just put name and ahm…

Indira - ahm.. da only copy we have for right now because we have to do the original.

Isidore - same line".

Indira- aha ..same line..Ok.. I will just put the dash and the name…"

31. Further, although he signs what she puts before him as the instructions they are not read over to him. In fact he interrupts her when she tries to read it over and only corrects the spelling of his name. In the attempted reading over she gets no further than his name. Mr.Arzu is clearly tired, he said so himself, and apparently wants it over with. At the end he appears to collapse.

32. How then could Ms. Arzu have us believe that the will she had the lawyer draw up represented her father's instructions? Evidently, Ms. Arzu had a will drawn up to dispose of her father's property as she saw fit making sure that she got the lion's share of the estate and Ms.Martinez nothing. And, from the evidence of her witnesses I cannot be certain that Will 2 was indeed read over to Mr. Arzu before he signed it or that he understood the full significance of it. My impression is bolstered by the way he dealt with the so called instructions and the way he presented at the end of the video and his utterances. He looked ill, exhausted and in pain and had to be assisted to lie back on his bed. The words he uttered then in context are indeed troubling –

"Isidore – one more copy or you will photocopy it.

Indira- Yes I will photocopy it

Isidore –One more copy

Indira- "Okay, sit down, sit down now, come"

Isidore -"Aye … wait hold on- aye… can't take it … aye."

33. Mr. Arzu was apparently in distress. Surprisingly Ms. Arzu's immediate response was not to comfort her suffering parent or summon medical help but to issue a directive to her recorder to stop recording- **"Out it, Out it**" as if the video were a bright light she had to snuff out. That video depicts her demeanor throughout- her apparently gum-chewing and stolid mien is faithfully recorded - she strikes me as being very businesslike and prosaic, a very Reagan or Goneril and certainly not a fond Cordelia as she would have us believe she is.

The Submissions.

34. The parties were ordered to exchange and lodge written submissions within seven days of trial, that is, by 8 August, 2013. Mr. Perera duly submitted his but not Mr. Elrington SC who only did so on 27 September, explaining in his letter dated 26 September to the Registrar that this oversight was attributable to two deaths in his family. In the interests of justice the court has considered both submissions as it does not consider that Ms.Arzu has suffered any untoward prejudice thereby.

35. . Mr. Elrington submits, surprisingly, that his client's claim for the pronouncement for the validity of Will 1 should be dismissed as he did not believe that the issue of the validity or invalidity of Will 1 was properly before the court. That the procedure governing the grant of probates is set out in Cap 82 of the subsidiary laws. This requires inter alia, a petition to the Chief Justice for a Grant of Probate. In the process the

application is advertised and if someone objects to the grant he or she must file a caveat and if the caveat is not withdrawn then the petitioner can file a claim to pronounce on the validly of the will in solemn form and that it is at that stage that the contentious probate proceedings begin. That a petitioner cannot herself choose to have the will proved in solemn form without complying with those rules.

36. And further counsel submits that Will 1 was not put in evidence and no evidence in support of Will 1 was adduced. He therefore contends that the court must dismiss the application on the above grounds and also on the ground that the Claimant ought to follow the procedure under Cap 82 of the subsidiary laws.

37. With respect to Will 2 Mr. Elrington, in summary, submits that the court should pronounce against the validity of Will 2.He submits, properly, that if Will 2 is found to be valid then it by law revokes Will 1. He also properly concedes that Will 2 was indeed signed by Mr. Arzu. However, he posits that the main issue here is whether Mr. Arzu acted of his own free will in making it. He contends that he did not as it was his daughter Ms. Arzu who wanted a will made and set about ensuring that he did make a will. Counsel contends that the evidence surrounding the making of Will 2 shows clearly that Mr. Arzu lacked the physical and mental strength to resist the pressure placed upon him by his daughter's actions.

38. Counsel relied, inter alia, on **Barry v Butlin** (1838) 2 Moo.P.C. 480 -"**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 cause 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".

39. In opposition, Mr. Perera submits in essence first that Ms. Martinez's claim to pronounce for the validity of Will 1 in solemn form must be dismissed as she failed to prove her will in solemn form. She did not tender Will 1 and the Probate thereof in evidence. And the suspicious circumstances surrounding Will 1 was that the signature purporting to be that of Mr. Arzu on Will 1 was not similar to other signed documents and Ms .Martinez did not call any of the attesting witnesses.

40. Counsel states at para. 3 of his submissions- "**According to Tristram and Cootes Probate Practice 21st edn. p. 581-"the question involved when proving a will in solemn form is whether a will or other testamentary paper is or is not in whole or in part valid as a testamentary instrument".**

41. And at para 4 he contends: **"At page 585 of Tristram and Cootes Probate Practice the author states that at the hearing of any cause the court must be satisfied upon the examination of one or more witness (<u>if available),</u> of the due execution of the will. To prove the due execution of a will, it is necessary to examine one only of the attesting witnesses, provided he deposes to its due execution."Emphasis mine.**

42. Second, with respect to Will2 Mr. Perera contends in brief that Ms. Arzu has satisfied the court of the validity of Will2 and that she has proved Will 2 in solemn form and that the court should so declare and award her costs. Counsel argues that the onus is on her as the party propounding Will 2 to, "**satisfy the conscience of the court that the instrument is indeed the last will and testament of a free and capable testator", citing** Blenman J (as she then was) in **Melbourne Smith et al v. Eldridge Browne (**260

of 2004 High Court of Antigua and Barbuda (30/09/08)) and that she has done so and has proved that the testator had the mental capacity to execute the will.

43. Counsel argues further that where a duly executed will is rational on the face of it (as in the present case) this created a rebuttable presumption that the testator possessed the requisite testamentary capacity to make the will. (I have no law in support of this statement; and having regard to the law all the circumstances must be given their proper weight).The burden then shifted to Ms. Martinez to rebut that evidentiary presumption and that she failed to do so. That Ms. Martinez did not adduce any evidence (medical or otherwise) to prove that Mr.Arzu was suffering from senile dementia or Alzheimer's or any other medical condition preventing him from possessing the requisite testamentary capacity when he executed Will2. Counsel relies also on **Barry v. Butlin**, **Cleare** 1869 LT 1 P &D 655 and **Vida I Elcock** case.

44. Mr. Perera submits additionally that Will 2 has been shown to comply with the formalities prescribed by s. 7 of the Wills Act Cap 203 and that he was relying on the test of testamentary capacity established by **Banks v Goodfellow** (1870) LR 5 QB549 as explained by **Parry and Clark, The Law of Succession** 10th edn p.64-67. He also submitted that Will 2 expressly and by effect of law revoked Will 1.

Court's Analysis and Conclusions.

45. I shall consider first the submissions that the claim in respect of Will 1 should be dismissed. With due respect to both counsel their positions seems too facile and tempting for the court to adopt in these circumstances. Firstly, this is a contentious probate action and the rules referred to by Mr. Elrignton apply to non -contentious probate matters or in other words, common form probate. Indeed, both Ms. Martinez and Ms. Arzu have followed the common form route having both applied to the Chief Justice and obtained grants for the respective wills. Therefore, it makes little sense to say that Ms. Martinez has to again apply and then wait for Ms. Arzu to challenge. Further, to allow this question of the validity of Will 1 to become an issue in another trial does not strike me as a proper course to adopt as in my judgment the court's process has been properly engaged under the contentious probate procedure as set out in RSC CPR 2005 Part 67(Contentious Probate Proceedings). [1] I note in particular the definition of "probate action," -**"probate action means an action for the grant of the will, or letters of administration of the estate of a dead person or for the revocation of such grant or <u>for a decree pronouncing for or against the validity of an alleged will,</u> not being an action which is non-contentious or common form probate business'.** This to my mind contemplates that a claimant who is aware that a will of which she is executrix is contested can herself bring a claim. Each party had the opportunity to raise all relevant issues. Whether they did so or not is another matter.

[1] I remark s.161 of the RSCJ Act which provides that any party interested in a will may compel, and any executor or party desiring or having execution of a will may have, proof thereof in solemn form in accordance with the practice now obtaining in the Probate Division of Her Majesty's High Court of Justice in England and that by s. 165 rules of court may be made to regulate the practice and procedure in probate and administration matters, including both noncontentious and contentious business. Hence CPR Part 67.

46. True, the omission by her counsel to have Ms. Martinez tender Will 1 and the Probate thereof undoubtedly hampers this process. But can this be cured without employing the drastic measure of striking out the claim in respect of Will 1 on that ground alone?

47. I note that both Will 1 and the Probate thereof were disclosed as part of standard disclosure by Ms. Martinez and are on the court's file. I also remark that Ms. Arzu is very much aware of the form and content of Will1 as she makes specific reference to Will1 to ground her allegations of forgery in her defence. Thus she can be regarded as being wholly familiar with the document.

48. And, by CPR r. 67.4 both parties were required to lodge the Probates in the Supreme Court within 7 days of issue of claim if the Grant had been issued to the Claimant and within 14 days of service of the claim if the Defendant had the Grant. I see no indication from the court's file that this was done. Had this been done the court would have been able to have recourse to them by virtue of that rule and I anticipate no harm in the court rectifying this irregularity by the power given to the court by CPR r.26.9 and in the meantime treating the copies disclosed as lodged pursuant to that rule for these purposes.Will1 and the probate thereof is thus deemed to be properly before the court. I therefore order each party to lodge her Grant of Probate with the court within 7 days hereof, that is, on or before Monday 21 October 2013 having regard to the intervening weekend and public holiday when the court office is closed.

49. Now to consider whether the court should dismiss the claim in respect of Will1 because of the claimant's failure to call any of the attesting witnesses to Will 1 as prayed for by Mr. Perera. The very authority relied on by counsel speaks to where those witnesses are available, but what obtains when they are not available, as here? Must such a claim

automatically fail for lack of an attesting witness? Attesting witnesses have been known to travel, to die, to simply disappear-what then?"

50. In considering this issue I found it useful to determine what it means to prove a will in solemn form. I can do no better than refer to the explanation given by **Tristram and Coote's Probate Practice** 13 edn at **Para 26.03.**

> **Para 26.03 "... a will is proved in "common form" where its validity is not contested or questioned. The executor, or the person entitled to administration with the will annexed, brings the will into the Principal Registry or a district probate registry, and obtains the grant notwithstanding the absence of the other parties interested, upon his own oath and any further affidavits which may be required. A will is proved in " solemn form" by the executor or a person interested under the will, propounding it in <u>a claim to which the persons prejudiced by it have been made parties, and by the court, upon hearing evidence,</u> pronouncing for the validity of the will and ordering the issue of a grant".** Emphasis mine.

51. From the foregoing it is clear that the court adjudicates on the issue upon hearing evidence, not upon hearing only the evidence of the attesting witness. The general rule is that in respect of proof of execution of a document requiring attestation, like a will, that one of the attesting witnesses must be called, if available. See **Phipson on Evidence** 17th edn para. **40-24.** However, other evidence can be adduced if the attesting witness is not available. See **Phipson op.cit para. 40-26** - "… **And where on the trial of an**

action to prove a will in solemn form neither witness was available, the execution was proved by the affidavit of one of them made before the commencement of the litigation for the purpose of obtaining probate in common form. When but only when this species of proof is unobtainable, the execution may be proved by other means eg admission, the testimony of the maker of the will, proof of his handwriting or presumptive evidence".

52. From the foregoing I therefore conclude that the mere fact that Ms Martinez failed to call an attesting witness does not follow that she has not proved her claim and I will not strike out the claim for that omission but rather the claim must fall to be considered on its merits.

53. Now I turn to the relevant law on the central issues here. The formalities governing the making of a will are contained in the Wills Act Cap 203 and in particular s.7 which stipulates that no will shall be valid unless it is in writing, and signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest and subscribe the will in the presence of the testator.

54. And. s. 18 provides that a will shall only be revoked by marriage; o*r* by another will or codicil executed in accordance with section 7; o*r by* a written revocation executed in the manner in which the will was executed.

55. As I said before I shall consider the issues relating to Will 2 first as if it is a valid will then by virtue of it being the later will and also by the express revocation clause contained in it, it will have the legal effect of revoking Will 1.

56. I do not believe that there is any real dispute as to the applicable law here having regard to the submissions on testamentary capacity, the dispute arises as to its application to the evidence. The learning at **Halsbury's Laws of England** Vol 50 4th edn. reissue is instructive.-

> **"274. Sound of mind, memory and understanding**. **It is necessary for the validity of a will that the testator should be of sound mind, memory and understanding words which have consistently been held to mean sound disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature.**
>
> **275. Want of knowledge or approval**. **Although knowledge of the contents of a will and approval of it by the testator are essential to the validity of the will, this is normally assumed in the case of a competent testator from the fact that he has duly executed it. However, whenever the circumstances under which the will has been prepared raise a well- grounded suspicion that it does not express the testator's mind, the court ought not to pronounce in favour of it unless that suspicion is removed".(Barry v Butlin** and **Tyrrell v Painton** and **Wintle v Nye** are cited in support of this proposition).

57. I understand from the tenor of Mr. Elrington's submissions that he is relying on the law relating to suspicious circumstances attendant on the making of a will and that contrary to the submission of Mr.Perera, he is not saying that Mr. Arzu was suffering from any form of mental illness.

58. Further elucidation on the issue of suspicious circumstances can be found at **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.

59. 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."

60. Applying the law to the facts as found, in my judgment, Will 2 cannot stand. I find the circumstances surrounding the making of Will 2 arouse the highest degree of suspicion. Mr. Arzu was by all accounts a very ill man. Yet, his daughter, without consultation with any member of his medical team at the hospital, on the very next day after he was transferred from one hospital to another, proceeded in the presence of at least five other persons to have him try to dictate what amounted to no more than a list of his property to her .She then of her own accord filled in the blanks in the document and took the document which she termed her father's instructions for a will to a lawyer to have it drawn up. In the will she had herself named as the executrix and given the lion's share of the estate. And significantly, Mr. Arzu's partner of many years, Ms. Martinez, who lived with and cared for him for many years right up to the moment of his death, was wholly excluded from sharing in the estate. No doubt Ms Martinez would have us believe that her father deliberately did so because Ms Martinez abandoned him at the hospital when all the evidence points otherwise.

61. Furthermore, Mr. Arzu was given no opportunity to privately or even publicly consult a lawyer or anyone for that matter. His poor physical condition at the time he gave those so called instructions and signed that will also caused the court grave concern. And, the fact that he died some four days later exacerbates our concerns.

62. Moreover, the attempt to establish that Will 2 was based on and consonant with the instructions of Mr. Arzu in my view failed miserably. It is abundantly clear from the video and the transcript of it that Mr.Arzu did not dictate any specific devise or bequest

to any specific person but merely listed his property. How then did these specific devises come about? We are left to speculate as neither Ms. Arzu nor her witnesses gave any explanation. Further it is also glaring from the video that at the end of that short session that Mr. Arzu virtually collapsed and was past caring about what he did and one can easily conclude that he simply signed what his daughter later put before him as his will without understanding its full significance and import.

63. The overall impression was that Ms. Arzu, as Mr. Elrington submitted, executed and oversaw the whole operation in a manner that was highly questionable as she was focused on ensuring that her gravely ill sire make a will of which she approved and under which she and only those she cared about benefitted.

64. I therefore conclude that Will 2 was made in highly suspicious circumstances and that Ms. Arzu has not been able by cogent **affirmative proof** to allay those suspicions. Accordingly the court cannot in all good conscience uphold the validity of Will 2. I therefore declare that Will 2 is invalid and the Probate thereof is hereby revoked. Ms. Arzu shall bring in the Grant of Probate as ordered.

65. Now to Will 1. Despite her allegations in her pleadings and in her evidence in chief Ms. Arzu did not cross-examine Ms. Martinez on the issue of forgery. He who asserts must prove. She has failed to do so. That was the only challenge to Will1 posed by Ms. Arzu as she relied on the validity of Will 2 and its effect, if valid, of revoking Will 1 by its express provision and also by operation of law.

- I find on the evidence of Ms. Martinez which I have already alluded to, that Will 1 was made in accordance with written instruction given by Mr. Arzu. Ms. Martinez spoke to those instructions and the fact that though disclosed they were not put in evidence does

not detract from their existence. I remark that counsel for Ms Arzu had every opportunity to put any discrepancy between those instructions and Will 1 to Ms Martinez and from the fact that he did not do so one can only infer that there were no such discrepancies**. Ex abundantia** and mindful that the charge of forgery is a serious one, not to be lightly leveled or lightly treated and also mindful of the court's duty and powers under the **Supreme Court of Judicature Act** Cap.91s.38[2] the court also examined the instructions disclosed by Ms Martinez on the court's file and I am satisfied that same appears to bear the signature of Mr. Arzu and that the instructions are consistent with Will1.

66. I am satisfied therefore from the unchallenged evidence of Ms. Martinez who was present when Will 1 was signed and the other matters adverted to hereunder that Will 1 was duly executed by Mr. Arzu in the presence of both Mr. Singh and Mr. August both being present at the same time. The fact that neither witness to the will was available at trial is not detrimental to Ms. Martinez's case. In their absence any person who was present and witnessed the execution of the will can give evidence of its execution and Ms Martinez has done so.

67. . The court, to my mind, can also take account of the fact that Probate of Will I was granted **well before these proceedings commenced** and that as a matter of law at least one attesting witness is required to file an affidavit in support of the Probate application.

[2] s. 38 .the court shall, in every cause or matter pending before it, grant, either absolutely or on such terms and conditions as the Court thinks just, all such remedies whatever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided.

And from the fact that the probate was granted one can infer that this was done and the will found to have been properly executed.

68. Furthermore I note that on the face of Will 2 itself that it appears to have been properly executed and in particular contains a proper attestation clause. I thus apply the learning in **Halsbury's Laws of England** op.cit at para. 319-**"Presumption of due execution. There is a presumption of due execution where there is a proper attestation clause, even though the witnesses have no recollection of having witnessed the will, but this presumption may be rebutted by evidence of the attesting witnesses or otherwise. Where however the testator's mental capacity is in question the evidence of a witness impeaching the will inasmuch as he is thereby impeaching his own act is viewed with extreme caution and is not general accepted without corroboration. Where there is no attestation clause and the attesting witnesses are dead the presumption of due execution may be applied but this is done only where the evidence can by be produced as to the circumstances of the signing of the documents**.' Emphasis mine.

69. Thus the presumption is a strong one. And, further, there is nothing before the court to establish that Mr.Arzu did not have the testamentary capacity to make Will 1.The only challenge posed to Will 1 was that it was a forgery butt no evidence was led as to this. Accordingly, taking all these matters into consideration I find that Will 1 has been properly proved. As Will 1 has already been probated I thus need only declare and confirm that it is a valid will and probate thereof properly granted to Ms Martinez. It follows that certain other consequential orders have to be made as Ms. Arzu has intermeddled in the estate.

70. Accordingly, the court hereby makes the following additional orders- 1. Ms Arzu shall return all property and effects comprising the estate including all monies held at any bank to Ms Martinez within 10 days hereof; 2, Ms Arzu shall deliver up to the court within 10 days hereof the certificate of title to the home which she conveyed to herself pursuant to the purported Will 2 and the Registrar of Lands is directed to rectify the register on the ground of mistake and to issue a new certificate to Ms Martinez.; 3, Ms. Arzu is to render a full inventory and account of all the assets of the estate which came into her possession as executrix under the invalid Will 2 and a full account of all her dealings with the estate within 21 days of this order and serve a copy on Ms Martinez; 4, Ms. Arzu is to pay to Ms. Martinez prescribed costs in accordance with the default value of claim ($50,000.00) as provided for in CPR64.5.

71. This case raised many important issues and I must record my appreciation for the assistance rendered by both counsel in their written submissions.

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Rita Joseph-Olivetti

Supreme Court Judge Ag. Belize C.A