

TESTATE ESTATE OF FELICIDAD ESGUERRA ALTO-YAP DECEASED. FAUSTO E. GAN, PETITIONER AND APPELLANT, VS. ILDEFONSO YAP, OPPOSITOR AND APPELLEE.

G. R. No. 12190. August 30, 1958

Ponente: BENGZON, J.

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BENGZON, J.:

On November 20, 1951, Felicidad Esguerra Alto Yap died of heart failure in the University of Santo Tomas Hospital, leaving properties in Pulilan, Bulacan, and in the City of Manila.

On March 17, 1952, Fausto E. Gan initiated these proceedings in the Manila court of first instance with a petition for the probate of a holographic will allegedly executed by the deceased, substantially in these words:

"Nobyembre 5, 1951

Ako, si Felicidad E. Alto-Yap, may asawa, at ganap na pagiisip, ay nagsasalaysay na ang aking kayamanan sa bayan ng Pulilan, Bulacan ay aking ipinamamana sa aking mga kamaganakang sumusunod:

Vicente Esguerra, Sr 5 Bahagi

Pausto E. Gan 2 Bahagi

Rosario E. Gan 2 Bahagi

Filomena Alto 1 Bahagi

Beatriz Alto 1 Bahagi

'At ang aking lahat ng ibang kayamanan sa Maynila at iba pang lugar ay aking ipinamamana sa aking asawang si Ildefonso D. Yap sa kondisyong siya'y magpapagawa ng isang Health Center na nagkakahalaga ng di kukulangin sa halagang P60,000.00 sa bayan ng Pulilan, Bulacan, na nakaukit ang aking pangalang Felicidad Esguerra-Alto. At kung ito ay may kakulangan man ay bahala na ang aking asawa ang magpuno upang matupaa ang aking kagustuhan.'

(Lagda) Felicidad E. Alto-Yap"

Opposing the petition, her surviving husband Ildefonso Yap asserted that the deceased had not left any will, nor executed any testament during her lifetime.

After hearing the parties and considering their evidence, the Hon. Ramon R. San Jose, Judge,[1] refused to probate the alleged will. A seventy-page motion for reconsideration failed. Hence this appeal.

The will itself was not presented. Petitioner tried to establish its contents and due execution by the statements in open court of Felina Esguerra, Primitivo Reyes, Socorro Olarte and Rosario Gan Jimenez, whose testimonies may be summarized as follows:

Sometime in 1950 after her last trip abroad, Felicidad Esguerra mentioned to her first cousin, Vicente Esguerra, her desire to make a will. She confided however that it would be useless if her husband discovered or knew about it. Vicente consulted with Fausto E. Gan, nephew of Felicidad, who was then preparing for the bar examinations. The latter replied it could be done without any witness, provided the document was entirely in her handwriting, signed and dated by her. Vicente Esguerra lost no time in transmitting the information, and on the strength of it, in the morning of November 5, 1951, in her residence at Juan Luna Street, Manila, Felicidad wrote, signed and dated a holographic will substantially of the tenor above transcribed, in the presence of her niece, Felina Esguerra (daughter of Vicente), who was invited to read it. In the afternoon of that day, Felicidad was visited by a distant relative, Primitivo Reyes, and she allowed him to read the will in the presence of Felina Esguerra, who again read it.

Nine days later, he had other visitors: Socorro Olarte a cousin, and Rosario Gan Jimenez, a niece. To these she showed the will, again in the presence of Felina Esguerra, who read it for the third time.

When on November 19, 1951, Felicidad was confined at the U.S.T. Hospital for her last illness, she entrusted the said will, which was contained in a purse, to Felina Esguerra. But a few hours later, Ildefonso Yap, her husband, asked Felina for the purse; and being afraid of him by reason of his well-known violent temper, she delivered it to him. Thereafter, in the same day, Ildefonso Yap returned the purse to Felina, only to demand it the next day shortly before the death of Felicidad. Again, Felina handed it to him but not before she had taken the purse to the toilet, opened it and read the will for the last time[2]

From the oppositor's proof it appears that Felicidad Esguerra had been suffering from heart disease for several years before her death; that she had been treated by prominent physicians, Dr. Agerico Sison, Dr. Agustin Liboro and others; that in May 1950 husband and wife journeyed to the United States wherein for several weeks she was treated for the disease; that thereafter she felt well and after visiting interesting places, the couple returned to this country in August 1950. However, her ailment recurred, she suffered several attacks, the most serious of which happened in the early morning of the first Monday of November 1951 (Nov. 5). The whole household was surprised and alarmed, even the teachers of the Harvardian Colleges occupying the lower floors and owned by the Yap spouses. Physician's help was hurriedly called, and Dr. Tanjuaquio arrived at about 8:00 a.m., found the patient hardly "breathing, lying in bed, her head held high by her husband. Injections and oxygen were administered. Following the doctor's advice the patient stayed in bed, and did nothing the whole day, her husband and her personal attendant, Mrs. Bantique, constantly at her side. These two persons swore that Mrs. Felicidad Esguerra Yap made no will, and could have made no will on that day.

The trial judge refused to credit the petitioner's evidence for several reasons, the most important of which were these: (a) if according to his evidence, the decedent wanted to keep her will a secret, so that her husband would not know it, it is strange she executed it in the presence of Felina Esguerra, knowing as she did that witnesses were unnecessary; (b) in the absence of a showing that Felina was a confidant of the decedent it is hard to believe that the latter would have allowed the former to see and read the will several times; (c) it is improbable that the decedent would have permitted Primitivo Reyes, Rosario Gan Jimenez and Socorro Olarte to read her will, when she precisely wanted its contents to remain a secret during her lifetime; (d) it is also improbable that her purpose being to conceal the will from her husband she would carry it around, even to the hospital, in her purse which could for one reason or another be opened by her husband; (e) if it is true that the husband demanded the purse from Felina in the U.S.T. Hospital and that the will was there, it is hard to believe that he returned it without destroying the will, the theory of the petitioner being precisely that the will was executed behind his back for fear he will destroy it.

In the face of these improbabilities, the trial judge had to accept the oppositor's evidence that Felicidad did not

and could not have executed such holographic will.

In this appeal, the major portion of appellant's brief discussed the testimony of the oppositor and of his witnesses in a vigorous effort to discredit them. It appears that the same arguments, or most of them, were presented in the motion to reconsider; but they failed to induce the court a quo to change its mind. The oppositor's brief, on the other hand, aptly answers the criticisms. We deem it unnecessary to go over the same matters, because in our opinion the case should be decided not on the weakness of the opposition but on the strength of the evidence of the petitioner, who has the burden of proof.

The Spanish Civil Code permitted the execution of holographic wills along with other forms. The Code of Civil Procedure (Act 190) approved August 7, 1901, adopted only one form, thereby repealing the other forms, including holographic wills.

The New Civil Code effective in 1960 revived holographic wills in its arts. 810-814. "A person may execute a holographic will which must be entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form and may be made in or out of the Philippines, and need not be witnessed."

This is indeed a radical departure from the form and solemnities provided for wills under Act 190, which for fifty years (from 1901 to 1950) required wills to be subscribed by the testator and three credible witnesses in each and every page; such witnesses to attest to the number of sheets used and to the fact that the testator signed in their presence and that they signed in the presence of the testator and of each other.

The object of such requirements it has been said, is to close the door against bad faith and fraud, to prevent substitution of wills, to guarantee their truth and authenticity (*Abangan vs. Abangan*, 40 Phil., 476) and to avoid that those who have no right to succeed the testator would succeed him and be benefited with the probate of same. (*Mendoza vs. Pilapil*, 40 Off. Gaz., 1855). However, formal imperfections may be brushed aside when authenticity of the instrument is duly proved. (*Rodriguez vs. Yap*, 40 Off. Gaz. 1st Supp. No. 3 p. 194.)

Authenticity and due execution is the dominant requirement to be fulfilled when such will is submitted to the courts for allowance. For that purpose the testimony of one of the subscribing witnesses would be sufficient, if there is no opposition (Sec. 5, Rule 77). If there is, the three must testify, if available. (*Cabang vs. Delfinado*, 34 Phil., 291; *Tolentino vs. Francisco*, 57 Phil., 742). From the testimony of such witnesses (and of other additional witnesses) the court may form its opinion as to the genuineness and authenticity of the testament, and the circumstances of its due execution.

Now, in the matter of holographic wills, no such guaranties of truth and veracity are demanded, since as stated they need no witnesses; provided however, that they are "entirely written, dated, and signed by the hand of the testator himself." The law, it is reasonable to suppose, regards the document itself as material proof of authenticity, and as its own safeguard, since it could at any time, be demonstrated to be—or not to be—in the hands of the testator himself. "In the probate of a holographic will" says the New Civil Code, "it shall be necessary that at least one witness who knows the handwriting and signature of the testator explicitly declare that the will and the signature are in the handwriting of the testator. If the will is contested, at least three such witnesses shall be required. In the absence of any such witnesses, (familiar with decedent's handwriting) and if the court deem it necessary, expert testimony may be resorted to."

The witnesses so presented do not need to have seen the execution of the holographic will. They may be mistaken in their opinion of the handwriting, or they may deliberately lie in affirming it is in the testator's hand. However, the oppositor may present other witnesses who also know the testator's handwriting, or some expert witnesses, who after comparing the will with other writings or letters of the deceased, have come to the conclusion that such

will has not been written by the hand of the deceased. (Sec. 50, Rule 123). And the court, in view of such contradictory testimony may use its own visual sense, and decide in the face of the document, whether the will submitted to it has indeed been written by the testator.

Obviously, when the will itself is not submitted, these means of opposition, and of assessing the evidence are not available. And then the only guaranty of authenticity^[3]—the testator's handwriting—has disappeared.

Therefore, the question presents itself, may a holographic will be probated upon the testimony of witnesses who have allegedly seen it and who declare that it was in the handwriting of the testator? How can the oppositor prove that such document was not in the testator's handwriting? His witnesses who know testator's handwriting have not examined it. His experts can not testify, because there is no way to compare the alleged testament with other documents admittedly, or proven to be, in the testator's hand. The oppositor will, therefore, be caught between the upper millstone of his lack of knowledge of the will or the form thereof, and the nether millstone of his inability to prove its falsity. Again the proponent's witnesses may be honest and truthful; but they may have been shown a faked document, and having no interest to check the authenticity thereof have taken no pains to examine and compare. Or they may be perjurers boldly testifying, in the knowledge that none could convict them of perjury, because no one could prove that they have not "been shown" a document which they believed was in the handwriting of the deceased. Of course, the competency of such perjured witnesses to testify as to the handwriting could be tested by exhibiting to them other writings sufficiently similar to those written by the deceased; but what witness or lawyer would not foresee such a move and prepare for it? His knowledge of the handwriting established, the witness (or witnesses) could simply stick to his statement: he has seen and read a document which he believed was in the deceased's handwriting. And the court and the oppositor would practically be at the mercy of such witness (or witnesses) not only as to the execution, but also as to the contents of the will. Does the law permit such a situation?

The Rules of Court, (Rule 77) approved in 1940, allow proof (and probate) of a lost or destroyed will by secondary evidence—the testimony of witnesses, in lieu of the original document. Yet such Rules could not have contemplated holographic wills which could not then be validly made here. (See also Sec. 46, Rule 123; Art. 830—New Civil Code.)

Could Rule 77 be extended, by analogy, to holographic wills?

Spanish commentators agree that one of the greatest objections to the holographic will is that it may be lost or stolen ^[4]—an implied admission that such loss or theft renders it useless. "

This must be so, because the Civil Code requires it to be protocolled and presented to the judge, (Art. 689) who shall subscribe it and require its identity to be established by the three witnesses who depose that they have no reasonable doubt that the will was written by the testator (Art. 691). And if the judge considers that the identity of the will has been proven he shall order that it be filed (Art. 693). All these, imply presentation of the will itself. Art. 692 bears the same implication, to a greater degree. It requires that the surviving spouse and the legitimate ascendants and descendants be summoned so that they may make "any statement they may desire to submit with respect to the authenticity of the will." As it is universally admitted that the holographic will is usually done by the testator and by himself alone, to prevent others from knowing either its execution or its contents, the above article 692 could not have the idea of simply permitting such relatives to state whether they know of the will, but whether in the face of the document itself they think the testator wrote it. Obviously, this they can't do unless the will itself is presented to the Court and to them.

Undoubtedly, the intention of the law is to give the near relatives the choice of either complying with the will if they think it authentic, or to oppose it, if they think it spurious.^[5] Such purpose is frustrated when the document

is not presented for their examination. If it be argued that such choice is not essential, because anyway the relatives may oppose, the answer is that their opposition will be at a distinct disadvantage, and they have the right and privilege to comply with the will, if genuine, a right which they should not be denied by withholding inspection thereof from them.

We find confirmation of these ideas—about exhibition of the document itself—in the decision of the Supreme Court of Spain of June 5, 1925, which denied protocolization or probate to a document containing testamentary dispositions in the handwriting of the deceased, but apparently mutilated, the signature and some words having been torn from it. Even in the face of allegations and testimonial evidence (which was controverted), ascribing the mutilation to the opponents of the will. The aforesaid tribunal declared that, in accordance with the provision of the Civil Code (Spanish) the will itself, whole and un mutilated, must be presented; otherwise, it shall produce no effect.

"Considerando que sentado lo anterior, y estableciendose en el parrafo segundo del articulo 688 del Codigo civil, que para que sea valido el testamento olografo debiera estar escrito todo el y firmado por testador, con expression del año, mes y dia en que se otorque, resulta evidente que para la validez y eflcacia de esos testamentos, no basta la demostracion mas o menos cumplida de que cuando se otorgaron se llenaron todos esos requisitos, sino que de la expresada redaccion el precepto legal, y por el tiempo en que el verbo se emplea, se desprende la necesidad de que el documento se encuentre en dichas condidones en el momento de ser presentado a la Autoridad competente, para su adveraci6n y protocolizacion; y como consecuencia ineludible de ello, forzoso es afirmar que el de autos carece de validez y aficacia, por no estar firmado por el testador, cualquiera que sea la causa de la falta, de firma, y sin perjuieio de las acetones que puedan ejercitar los perjudicados, Men para pedir indemnizacion por el perjuicio a la persona culpable, si la hubiere, o su castigo en via criminal si procediere, por constituir dicha omision un defecto insubsanable * * *."

This holding aligns with the ideas on holographic wills in the Fuero Juzgo, admittedly the basis of the Spanish Civil Code provisions on the matter.[6]

"PRECEDENTES LEGALES—Fuero Juzgo, libro segxmdo, titulo V, ley 15—E depues que los herederos e sus fijos ovieren esta manda, fasta xxx annos muestrenla al obispo de la tierra, o al juez fasta VI meses y el obispo o el juez tomen otros tales tres escritos, que fuesen fechos por su mano daquel que fizo la manda; e por aquellos escriptos, si semjara la letra de la manda, sea confirmada la manda. E depues que todo esto fuere connoscido, el obispo o el juez, o otras testimonios confirmen el escripto de la manda otra vez, y en esta manera vala la manda." (Art. 689, Scaevola—Codigo Civil.)

(According to the Fuero above, the will itself must be compared with specimens of the testators handwriting.)

All of which can only mean: the courts will not distribute the property of the deceased in accordance with his holographic will, unless they are shown his handwriting and signature.[7]

Parenthetically, it may be added that even the French Civil Law considers the loss of the holographic will to be fatal. (Planiol y Ripert, *Derecho Civil Frances*, traduccion por Diaz Cruz, 1946, Tomo V, page 555).

Taking all the above circumstances together, we reach the conclusion that the execution and the contents of a lost or destroyed holographic will may not be proved by the bare testimony of witnesses who have seen and/or read such will.[8]

Under the provisions of Art. 838 of the New Civil Code, we are empowered to adopt this opinion as a Rule of Court for the allowance of such holographic wills. We hesitate, however, to make this Rule decisive of this controversy, simultaneously with its promulgation. Anyway, decision of the appeal may rest on the sufficiency, rather the insufficiency, of the evidence presented by petitioner Fausto E. Gan.

At this point, before proceeding further, it might be convenient to explain why, unlike holographic wills, ordinary wills may be proved by testimonial evidence when lost or destroyed. The difference lies in the nature of the wills. In the first, the only guarantee of authenticity is the handwriting itself; in the second, the testimony of the subscribing or instrumental witnesses (and of the notary, now). The loss of the holographic will entails the loss of the only medium of proof; if the ordinary will is lost, the subscribing witnesses are available to authenticate.

In the case of ordinary wills, it is quite hard to convince three witnesses (four with the notary) deliberately to lie. And then their lies could be checked and exposed, their whereabouts and acts on the particular day, the likelihood that they would be called by the testator, their intimacy with the testator, etc. And if they were intimates or trusted friends of the testator they are not likely to lend themselves to any fraudulent scheme to distort his wishes. Last but not least, they can not receive anything on account of the will.

Whereas in the case of holographic wills, if oral testimony were admissible^[9] only one man could engineer the whole fraud this way: after making a clever or passable imitation of the handwriting and signature of the deceased, he may contrive to let three honest and credible witnesses see and read the forgery; and the latter, having no interest, could easily fall for it, and in court they would in all good faith affirm its genuineness and authenticity. The will having been lost—the forger may have purposely destroyed it in an "accident"—the oppositors have no way to expose the trick and the error, because the document itself is not at hand. And considering that the holographic will may consist of two or three pages, and only one of them need be signed, the substitution of the unsigned pages, which may be the most important ones, may go undetected.

If testimonial evidence of holographic wills be permitted, one more objectionable feature—feasibility of forgery—would be added to the several objections to this kind of wills listed by Castan, Sanchez Roman and Valverde and other well-known Spanish Commentators and teachers of Civil Law.^[10]

One more fundamental difference: in the case of a lost will, the three subscribing witnesses would be testifying to a fact which they saw, namely the act of the testator of subscribing the will; whereas in the case of a lost holographic will, the witnesses would testify as to their opinion of the handwriting which they allegedly saw, an opinion which can not be tested in court, nor directly contradicted by the oppositors, because the handwriting itself is not at hand.

Turning now to the evidence presented by the petitioner, we find ourselves sharing the trial judge's disbelief. In addition to the dubious circumstances described in the appealed decision, we find it hard to believe that the deceased should show her will precisely to relatives who had received nothing from it: Socorro Olarte and Primitivo Reyes. These could pester her into amending her will to give them a share, or threaten to reveal its execution to her husband Ildelfonso Yap. And this leads to another (point: if she wanted so much to conceal the will from her husband, why did she not entrust it to her beneficiaries? Opportunity to do so was not lacking: for instance, her husband's trip to Davao, a few days after the alleged execution of the will.

In fine, even if oral testimony were admissible to establish and probate a lost holographic will, we think the evidence submitted by herein petitioner is so tainted with improbabilities and inconsistencies that it fails to measure up to that "clear and distinct" proof required by Rule 77, sec. 6.^[11]

Wherefore, the rejection of the alleged will must be sustained. Judgment affirmed, with costs against petitioner.

Paras, C. J., Padilla, Montemayor, Reyes, A., Bautista Angelo, Concepcion, Reyes, J. B. L., Endencia and Felix, JJ., concur.

[1]Now a member of the Court of Appeals.

[2]The contents of the alleged will are for the purposes of this decision, immaterial.

[3]"Una forma de testamento" (holographic will) "en la que toda la garantia consiste en la letra del testador." (Scaevola,Codigo Civil, Tomo 12, p. 348.)

[4]V. Sanchez Roman, Derecho Civil (2nd Ed.) (1910) Vol. 6 pp. 343, 350; Castan, Derecho Civil Español (1944) Tomo 4 p. 337; Valverde, Derecho Civil (1939) Vol 5, p. 77.

[5]V. Sanchez Roman Op. Cit. Vol. 6, p. 357.

[6]Manresa, Codigo Civil, 1932, Vol. 5, p. 481.

[7]We have no doubt that this concept and these doctrines concerning the Spanish Civil Code apply to our New Civil Code, since the Commission in its Report (p. 52) merely "revived" holographic wills, i.e., those known to the Spanish Civil Law, before Act 190.

[8]Perhaps it may be proved by a photographic or photostatic copy. Even a mimeographed or carbon copy; or by other similar means, if any, whereby the authenticity of the handwriting of the deceased may be exhibited and tested before the probate court.

[9]We are aware of some American cases that admitted lost holographic wills, upon verbal testimony. (Sec. 41, American Law Reports, 2d. pp. 413, 414.) But the point here raised was not discussed. Anyway it is safer to follow, in this matter, the theories of the Spanish law.

[10]Justice Jose B. L. Reyes, professor of Civil Law, makes this Comment:

"Holographic wills are peculiarly dangerous in case of persons who have written very little. The validity of these wills depends, exclusively on the authenticity of handwriting, and if writing standards are not procurable, or not contemporaneous, the courts are left to the mercy of the mendacity of witnesses. It is questionable whether the recreation of the holographic testament will prove wise." (Lawyer's Journal, Nov. 30, 1950, pp. 556-557.)

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