IN THE COURT OF APPEAL OF BELIZE, A.D. 2011

CIVIL APPEAL NO 10 OF 2010

IN THE ESTATE OF SANTIAGO JUAN

RODOLFO JUAN **Appellant**

AND

TRINIDAD SANTIAGO JUAN

MARIA AZUCENA JUAN de MAHMUD

and

IRIS LUCIA JUAN de CAMPOS **Respondents**

BEFORE:

The Hon Mr Justice Sosa	**-**	**President**
The Hon Mr Justice Morrison	**-**	**Justice of Appeal**
The Hon Mr Justice Alleyne	**-**	**Justice of Appeal**

Mrs Melissa Balderamos-Mahler for the appellant
Rodwell Williams SC and Mrs Julie-Ann Ellis-Bradley for the respondents

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13 June 2011, 22 May 2012

SOSA P

[1] I concur in the reasons for judgment and orders proposed in the judgment of Morrison JA, which I have been privileged to read in draft. It needs to be added, in view of the lengthy delay in the delivery of this judgment, that, with his usual diligence and keen sense of duty, my learned brother passed me what was then his final draft judgment (but to which paras [34] and [35] have since had to be added), which I read and concurred in with all possible promptness, as long ago as the

October 2011 sitting of the Court. Most regrettably, however, delays (caused primarily by factors outside not only his control but also mine) subsequently crept in.

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SOSA P

MORRISON JA

Introduction

[2] This is a family story. It is also the story of a great and life-long love, between Santiago Juan ('Santiago'), late of San Ignacio Town in the Cayo District of Belize, who died on 27 April 2001, and his wife, Carlota Galvez de Juan ('Carlota'), who died on 3 April 2004. The appellant ('Rodolfo') and the respondents ('Trinidad', 'Maria' and 'Iris') are the children of that union. Santiago and Carlota, who were not married to each other when the children were born, were married on 13 May 1993, after having lived together as man and wife for close to 50 years. This case is in essence a dispute between their offspring as to the disposition of Santiago's considerable estate.

[3] What is not in dispute is the fact that Santiago made a will, which was dated 1 July 1986 ('the will'), and of which the Rodolfo and Trinidad are the named executors. In an action filed in the Supreme Court on 10 August 2005, Rodolfo sought an order from the court pronouncing for the force and validity of the will in solemn form of law, and for a grant of probate to himself of the will and estate of Santiago. He also sought a declaration that he was entitled to and had an interest in a portion of Santiago's estate, known as 'San Lorenzo Farm', by virtue of a document ("Agreement between Father and Son") executed by Santiago on 10 July

1997. The claim was opposed by Trinidad and his sisters, who contended that the will had been revoked by Santiago's marriage to Carlota on 13 May 1993. They therefore counterclaimed for an order that the court pronounce in solemn form against the will and declare that Santiago died intestate. They also challenged Rodolfo's claim that the document dated 10 July 1997 vested San Lorenzo Farm in him.

[4] The main issue before the trial judge (Awich J) was whether the will was revoked by the marriage of Santiago and Carlota on 13 May 1993, or whether it was saved by virtue of having been made in contemplation of that marriage, within the meaning of section 16(1) of the Wills Act ('section 16(1)'). A related, but subsidiary, issue had to do with the nature of the interest, if any, created in Rodolfo's favour by the document dated 10 July 1997. On 12 November 2009, after hearing evidence of the origins and growth of the family built by Santiago and Carlota, Awich J pronounced for the force and validity of the will and made an order that Probate of the will be granted to Rodolfo and Trinidad, as the named executors, with a power reserved to Trinidad to renounce the grant if he so wishes. The judge also ordered that the document dated 10 July 1997 was ineffective to convey any interest in San Lorenzo Farm to Rodolfo and that the property accordingly fell into intestacy.

[5] Neither side being completely satisfied by this outcome, Awich J's judgment was challenged by Rodolfo, by a notice of appeal dated 10 March 2010, and by his siblings, by way of a respondents' notice dated 23 March 2010. At the outset of hearing of the appeal, learned counsel for the respondents, Mr Williams SC, conceded the single point raised by Rodolfo's appeal. That point was that the judge had erred in making an order that San Lorenzo Farm fell into intestacy, the contention being that if, as the judge found, the property had not been successfully alienated by Santiago in his lifetime, it was therefore covered by the residuary clause in the will. The appeal therefore proceeded on the single issue raised by the respondents' notice, that is, whether Awich J was correct in finding that the will was made in contemplation of marriage within the meaning of section 16(1).

The background

[6] Before coming to the grounds advanced by the respondents' notice, I must give a brief account of the background to the case (which I have for the most part extracted, with gratitude, from Awich J's detailed written judgment). On 5 November 1939, Carlota, who was then a single woman of 23 years, married the 29 year old Jorge Hegar ('Jorge'). In that same year, the second great war of the last century was launched and, shortly after the wedding, Jorge left for the United Kingdom with the intention of enlisting for service in the army. Carlota, who remained in Belize, soon gave birth to the son of this marriage, Antonio Hegar (who plays no further part in this story), but she would hear nothing of Jorge again in his lifetime. A few years later, Carlota, as the judge put it (at para. 9 of his judgment), "started or renewed a relationship" with Santiago and in due course they commenced living together as man and wife. Rodolfo, their eldest child, was born on 27 July 1947, followed by Trinidad, Maria and Iris.

[7] Rodolfo's pleaded case was that Carlota and Santiago underwent a ceremony of marriage at their house in San Ignacio Town in November or December 1980. He also gave evidence to this effect at the trial, supported by the evidence of his wife, Margaret Mary Juan. However, Rodolfo was unable to produce a copy of a marriage certificate or any other document in relation to this "marriage" and, when he was cross-examined, it turned out that he had not even tried to obtain a copy of the marriage certificate from the appropriate registry. Both Trinidad and Maria, who also gave evidence at the trial, disputed Rodolfo's claim in this regard, telling the court that all that had happened in 1980 was that, on the advice of their parish priest, Carlota and Santiago had obtained the blessing of the church to enable them, despite the fact that Carlota was still a married woman and they were not married to each other, to receive holy communion. The judge found (at para. 25) that "the ceremony in November or December 1980 was not proved to be a celebration of marriage" and there is no appeal from that finding. In the will, Santiago twice described Carlota as "my common-law wife Carlota Galvez de Hegar" (a fact which the judge, in my view, correctly took into account in concluding that, whatever it was that had actually taken place in December 1980, it was not a ceremony of marriage – see para. 25 of the judgment).

[8] In or about July 1992, Maria, to use her words, "decided to investigate the life and whereabouts of Jorge". For this purpose, Maria and Carlota engaged the services of an attorney-at-law, who, in the last week of April of the following year, was able to obtain a certified copy of an extract of an entry in a Register of Deaths for the United Kingdom, which indicated that Jorge Hegar had died on 5 March 1986, at the Isle of Bute in Scotland. Thus it was that, some 53 years after Jorge's departure from Belize, it now turned out that Carlota was a widow and was accordingly free to marry Santiago. In short order, a date for the wedding was set and it is common ground that Carlota and Santiago did in fact go through the ceremony of marriage on 13 May 1993 at the Sacred Heart Church in San Ignacio Town. The witnesses were Maria and Rodolfo, through whom a certified copy of the marriage certificate was tendered and accepted by the court as an exhibit in the case.

What the judge found

[9] The question which Awich J was required to determine at the trial called for a consideration of the meaning and effect of section 16(1), which provides as follows:

> "A will shall be revoked by the subsequent marriage of the testator except a will expressed to be made in contemplation of that marriage."

[10] As I have already indicated, the judge found that no ceremony of marriage had taken place between Carlota and Santiago in December 1980. However, he also found, on what was plainly irresistible evidence, that the ceremony which took place on 13 May 1993 was a valid marriage. The question that therefore arose for his decision was whether, pursuant to section 16(1), the marriage had the effect of revoking the will, or whether its validity was preserved by virtue of it having been made in contemplation of that marriage. In approaching this question, Awich J considered (at para. 31) that the question whether a particular marriage was in contemplation when a particular will was made is "a matter of construction of the will, based on the meaning of the words of the will in the first place, and secondly if necessary, based on the meaning of the words taking into consideration the circumstances, that is, the facts prevailing". He also took the view that "evidence of

surrounding circumstances is admissible provided the meaning from the words used in the will is first sought".

[11] Despite his "immediate view', as the learned judge put it (at para. 30), that the will had been revoked by the marriage of Santiago and Carlota on 13 May 1993, after having considered the terms of the will, as well as the surrounding circumstances, he concluded as follows (at paras 35 – 36):

> "In this claim Santiago knew that Carlota was married to Hegar and that he could not marry her until she divorced Hegar. In 1980, after some fourty [sic] years of living together, they attempted to marry, apparently relying on presumption of death of Mr. Hegar. I have already decided that the ceremony was not a marriage. In 1986, Santiago wrote the will in which he acknowledged that they were not married by referring to Carlota as, "my common-law wife." In my view, that in the context of the entire will, also expressed his intention to marry her once her marriage to Hegar was out of the way. Then having learned in 1992 that Hegar had died, Santiago married Carlota in a matter of months on 13.5.1993. The facts are similar to those in the **Pilot v Gainfort** case which was held to be a marriage in the contemplation of the testator, and did not revoke his will.
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> . My interpretation of the will of Santiago Juan, especially of the reference to Carlota in paragraphs 2 and 7, is that Santiago had in contemplation the marriage with Carlota that he intended, but had been restrained from for a long time by the fact that she was still married to Hegar. Accordingly it is my decision that the marriage of Santiago Juan to Carlota Valdez De Juan on 13.5.1993, did not revoke the will made by him earlier on 1.7.1986, because the marriage was in the contemplation of Santiago when he made the will."

The respondents' notice

[12] The grounds upon which the respondents contend that the judgment of the trial judge should be varied are as follows:

> "1. The learned trial judge erred in law and misdirected himself in holding at paragraph 31 of the reasons for the decision that the operation of Section 16 of the Wills Act was a matter on which extrinsic evidence of intention or purpose was [admissible].
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> 2. The learned trial judge erred in law and misdirected himself in holding at paragraphs 35 and 36 of the reasons for decision that the marriage of Santiago Juan to Carlota Valdes de Juan on May 13th, 1993, did not revoke the will made by him on July 1st, 1986, because the marriage was in the contemplation of Santiago Juan when he made the will by referring to her as 'my common law wife.'"

The submissions

[13] Mr Williams submitted that the judge's decision should be varied, on the basis of his failure to appreciate the "cultural nuance of the phrase 'common law wife'", which resulted in his having misconstrued the evidence and thereby falling into error. Mr Williams pointed out that the appeal in this case was by way of rehearing and that it was therefore open to the court, having considered the evidence which Awich J had before him, to substitute its own decision for that of the judge. The question in this case raised an issue of the construction of section 16 (1) and the words of the section, which were clear and unambiguous, require that the contemplation of marriage should be expressed in the will. In the instant case, the will was not so expressed and it was not open to the court to impose such contemplation, whether by inference or implication, based on extrinsic evidence. Specifically as regards the phrase 'common law wife', Mr Williams submitted that, "in the Belizean parlance", it is apt to describe a woman to whom a man is not legally married. It was therefore not an expression of an intention to marry, but "merely a social reference to a *de*

facto status". It is precisely because common law unions were not regarded as marriages that modern legislation has extended recognition and protection to persons in such unions (as, for example, by section 148D of the Supreme Court of Judicature (Amendment) Act 2001).

[14] In her submissions, Mrs Balderamos-Mahler for the appellant accepted the proposition that the question whether the exception to section 16(1) applies depends on the true construction of the will and that, for it to apply, the will must be expressed to be made in contemplation of marriage. As regards the admissibility of extrinsic evidence in the construction of wills generally, we were referred to a number of cases by Mrs Balderamos-Mahler, to make the point that Awich J had properly inquired "into the surrounding circumstances at the time when Santiago Juan made his will in 1986 to determine his intentions at that time." As Mr Williams had done, Mrs Balderamos-Mahler also pointed out that, although there was no legal definition of the phrase 'common law wife' in 1986, Carlota and Santiago had at that time cohabited as man and wife for over 40 years and she submitted further that there had been, as the judge found, an "attempted" marriage in 1980.

The applicable principles – what the cases say

[15] We were referred by counsel on both sides to a number of cases in support of their respective submissions and, by referring to some only of them in this judgment, I naturally intend no disrespect to either counsel. However, the issues raised by this appeal fall to be resolved, it seems to me (in agreement with counsel), on the proper construction of section 16(1) in the light of some fairly well settled principles.

[16] The rules of construction of wills are well known. In **Re Jebb [1966] Ch 666, 672**, Lord Denning MR said this:

> "In construing this will, we have to look at it as the testator did, sitting in his armchair, with all the circumstances known to him at the time. Then we have to ask ourselves: 'What did he intend?' We ought not to answer this question by reference to any technical rules of law. These technical rules of law have only too often led the courts astray in the

construction of wills. Eschewing technical rules, we look to see simply what the testator intended."

(See also **In the Estate of Henry McGrath (1975) 23 WIR 406, 408**, in which Parnell J took it to be "a cardinal rule of construction that a will should be so construed as to give effect to the intention being gathered from the language of the will read in the light of the circumstances in which the will was made"; and the recent decision of this court in Civil Appeal No. 9 of 2010, **Ava Garcia v Florecilda Quiria Marin**, judgment delivered 26 March 2011, in which Carey JA, in a judgment with which the other members of the court agreed, stated that "The law is well settled that it is the language of the will which must govern the ascertaining of the testator's intention" and that "background evidence, that is, evidence of facts of which the testator could be taken to be aware, is permissible – paras [10] and [12]".)

[17] In **Re Jebb**, the Master of the Rolls went on to issue a caution against applying previous decisions as to the meaning of particular words in wills uncritically, pointing out (at page 672) that "The only legitimate purpose is to use [previous cases] as a guide towards the meaning of words, so as to help in the search for the testator's intention…[t]hey should never be used so as to defeat his intention".

[18] But although the circumstances surrounding the making of the will are thus obviously relevant – and, in a proper case, perhaps decisive – factors, it is clear that the first duty of the court in seeking to construe the will is to have regard to the actual language used by the testator. This is how Farwell J put it in **re Hodgson [1936] Ch 203, 206**:

> "I think that it comes to this: the duty of the court in the first place is to read the will itself. The Court is bound in the first instance to read it, giving the words used their primary and proper meaning. The court is then entitled to look at the surrounding circumstances. If the surrounding circumstances are such that the words of the will, if construed in accordance with their primary meaning, are not apt to apply to any of the circumstances, then the Court is entitled, having regard to the surrounding circumstances, to see whether the language

used is capable of some meaning other than its ordinary meaning, not for the purpose of giving effect to what the Court may think was the intention of the testator, but for the purpose of giving effect to what the intention of the testator is shown to be from the language used having regard to the surrounding circumstances. In other words, the court is not entitled to disregard the language which the testator has used in order to give effect to what the Court may think to have been the intention, but the Court is entitled to say that the words which the testator used were not intended to have their primary meaning if the surrounding circumstances are such as to lead inevitably to that conclusion."

[19] Turning now to some cases having to do with the construction and application of provisions equivalent to section 16(1), Mrs Balderamos-Mahler placed great reliance (as did the judge) on **Pilot v Gainfort [1931] P 103** and **In the Estate of Langston [1953] P 100.** In **Pilot v Gainfort** the testator was married to a woman who had left him some years before and had not been heard of since. Subsequently, shortly after he had bequeathed the whole of his estate to another woman, with whom he had been living and whom he described in the will as "my wife", he married the woman in question, relying on the legal presumption of the death of his wife. The learned President of the Probate, Divorce and Admiralty division, Lord Merrivale P, held (at page 104) that the marriage did not affect the validity of the will, which "practically expresses…[the] contemplation [of marriage] and is good…" In **In re the Estate of Langston**, the testator devised property "unto my fiancée Maida Edith Beck" and the question was whether, he having married subsequently, the will was revoked or whether it was saved by virtue of it having been made in contemplation of the marriage. Davies J considered it (at page 103) to be clear that "when the testator used the words 'unto my fiancée Maida Edith Beck' he was expressing a contemplation of marriage to that named lady".

[20] On the other side of the line is **Sallis and another v Jones** [1936] P 43, in which the testator by his will dated 27 June 1927 declared, "that this will is made in contemplation of marriage", and on 27 November 1927 he married the defendant. The question for the court was therefore whether the will was revoked by the

subsequent marriage of the testator to the defendant and evidence was called for the purpose of proving that as at the date of the will the testator had in mind marriage to the defendant (although the defendant's evidence, which the judge accepted, was that the testator had not proposed to her until some date in August 1927, that is, after the will had been made). However, Bennett J did not find it necessary to decide whether or not that evidence was admissible, having taken the view (at page 46) that, upon a strict construction of section 177 of the Law of Property Act, 1925 (which was in terms similar, if not identical, to section 16(1)), the revocation of a will by a subsequent marriage was only avoided if "the will made before marriage is expressed to be made in contemplation of a particular marriage and is followed by the solemnization of that marriage". The section therefore had no operation "unless there is found in the will something more than a declaration containing a reference to marriage generally." The will in the instant case, which declared no more than that it was made "in contemplation of marriage" was therefore revoked by the testator's subsequent marriage.

[21] We were also referred by Mr Williams to **Burton v McGregor [1953] NZLR 487**, a decision at first instance from New Zealand. In that case, F.B. Adams J had before him for consideration section 7(1) of the New Zealand Law Reform Act, 1944, which was again in similar, if not identical, terms to section 16(1). It was held that in order for a will to have been "made in contemplation of a marriage", within the meaning of section 7(1), the testator must have contemplated and intended that it should remain in operation after, and notwithstanding, the marriage. Further, in order to comply with the section, such contemplation and intention must be sufficiently expressed in the will itself. It what the testator has said in the will is consistent with a possible intention that the will should not operate after the marriage, the will is not one "made in contemplation of" the marriage within the meaning of the section.

[22] Thus, in that case, in which the deceased, who was engaged to be married to the defendant, made a will describing her as "my fiancée", it was held that that description was insufficient for the purposes of section 7(1), as the will was not "expressed to be made in contemplation of" the testator's intended marriage. Consequently, the will was revoked by the subsequent solemnisation of the

marriage. In a passage which repays careful reading and which I cannot avoid setting out in full, F. B. Adams J considered and commented on some of the relevant authorities, including **Pilot v Gainfort**, as follows:

> "With regard to such a will, the nearest English decision is *Pilot v Gainfort*…(*Lord Merrivale, P.*), and it was on this decision that counsel relied. There the testator, who had been deserted by his first wife some years earlier, lived with the plaintiff as man and wife from 1924 onwards. In 1927, he made a holograph will bequeathing all his worldly goods to "Diana Featherstone Pilot my wife" – that is to say, to the plaintiff – and in 1928 he married her. The learned President held that the will was "in contemplation of the subsequent marriage, and practically "*expresses that contemplation* and is good"…The phrase I have put in italics appears in the *Law Reports* and the *Law Journal Reports*, but not in any of the other reports, all of which agree in quoting the learned Judge as saying simply there could be no doubt that the will was made in contemplation of the marriage which subsequently took place, with the result that it was a good will. The words "practically expresses" which are the only words referring to expression in the will, may perhaps be a correction, intended to indicate that the learned President did have the point in mind. But, even in the two reports in which those words appear, the quotation of the statute in the judgment omits the words "expressed to be."
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> It appears from the reports other than the *Law Reports* that the marriage had been in contemplation for a long time, the intention of the parties being to marry after the expiration of the period of seven years from the disappearance of the first wife. Though relatives had been made defendants, the case was uncontested.
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> The decision is not cited in *Jarman on Wills*, 8th Ed. (1951). *Theobald on Wills,* 10th Ed. 37, said that it "seems open to question: the will did not express that the marriage was in contemplation, but that it had 'already taken place'". This refers, no doubt, to the fact that the plaintiff

was described as testator's 'wife' and by his surname. The further comment may be made that the case resembles others in which testators have deserted their paramours as wives, and in some at least of which it would be difficult to suggest that the description implied an intention to marry. With all respect, it seems to me that the testator did no more than apply to the plaintiff the name of description which she had acquired by repute, and that it is impossible to say anything was 'expressed' in the will with reference to the intention to marry. Incidentally, it was – like the will in the present case – a will made by a layman, who probably knew nothing about revocation of wills by marriage and had no thought of expressing any intention on the point.

In *In re Taylor* [1949] V.L.R. 201, *O'Bryan, J*., declined to follow *Pilot v Gainfort* in a case in which he regarded as indistinguishable. He said: 'Can it be said that because he described her as 'my wife' and "gives her his name "Taylor' that he was giving expression to his contemplation of marrying her? It is with regret that I answer that question, No. I can read no more into his description of her than that that was how he regarded her – as his wife, Mrs. Taylor; not that he was making his will in contemplation of marrying her … Were I at liberty to go outside the will, I would find extrinsic evidence that at this point he did say he was going to marry her in the near future. But I am not at liberty to look at that evidence.'"

[23] Further, as regards the role of extrinsic evidence in this context, F.B. Adams J considered (at page 491) that although such evidence might be admissible for the purpose of identifying the person named or referred to in the will, "extrinsic evidence is not admissible merely for the purpose of ascertaining the testator's intention, or, in other words, of showing that the will was made in contemplation of a marriage…[t]hat contemplation or intention must, in order to comply with the statute, be sufficiently expressed in the will itself".

[24] Several of the relevant authorities, including those to which I have already referred, were fully and very helpfully reviewed by Megarry J in **In re Coleman,**

Dec'd **[1976] Ch 1**. That was a case in which the testator, in his will dated 10 September 1971, made a specific devise in favour of a lady, who he described as "my fiancée Mrs. Muriel Jeffrey" and whom he married on 18 November 1971. After his death a year later, the question arose whether the will was revoked by the testator's subsequent marriage, or whether the will was saved by virtue of having been made in contemplation of the marriage. Some evidence was tendered on behalf of the executor seeking to prove the will in solemn form, with a view to establishing the testator's intention at the time he made the will by reference to discussions which had taken place between himself and his solicitor, who drafted the will. In holding that this evidence was inadmissible, Megarry J said this (at page 11):

> "In my judgment, none of this evidence is admissible. The question is one of construction: the court must determine whether the words of the will, on their true construction, satisfy the language of the section, on its true construction. For this purpose I cannot see how evidence of what the testator told his solicitor he wanted, or what his solicitor advised him, can possibly be admissible. The evidence is not evidence that is tendered merely for the purpose of identifying the widow, or proving the marriage, or for some other admissible factual purpose…If I am wrong in this, then I cannot see anything in the evidence to alter the conclusion that I have reached without its aid; indeed, it would reinforce it."

(Megarry J's judgment in **In re Coleman** is also cited by the editors of Williams' Law relating to Wills (6th edn, volume 1, page 139) as authority for the statement that the operation of the equivalent of section 16(1) is "a matter of construction on which extrinsic evidence of intention or purpose was inadmissible".)

[25] However, on the facts of **In re Coleman** itself, Megarry J considered, contrary to the view preferred by F. B. Adams J in **Burton v McGregor**, that, "unless curtailed by the context, a testamentary reference to 'my fiancée X' per se contemplates the marriage of the testator to X, as well describing an existing status" (page 8). In coming to this conclusion, the learned judge took the view that, "in ordinary parlance a contemplation of marriage is inherent in the very word 'fiancée'…it not only

describes an existing state of affairs, but also contemplates a change in that state of affairs".

[26] This necessarily selective review of the authorities appears to me to support the following propositions:

(i) In construing a will, the court looks in the first place at the actual language used by the testator, giving the words used their primary and proper meaning in the context in which they appear. The court then looks at the surrounding circumstances, as known to the testator at the time of making the will ("sitting in his armchair"), which may assist in elucidating the intention of the testator, where it does not appear clearly from the words of the will, but cannot be used to change or modify the meaning of the words themselves where this is clear and unambiguous.

(ii) In order to avoid the operation of the rule (which is a rule of law) stated in section 16(1) that a will "shall be revoked by the subsequent marriage of the testator", the will in question must have been "expressed to be made in contemplation of that marriage". The question whether or not the will was so expressed gives rise to a pure question of construction of the will itself, in respect of which extrinsic evidence of the testator's intention or purpose is inadmissible.

(iii) In construing the will in question, previous decisions of the courts are to be treated as guides to the meaning of particular words in the context in which they were used in the search for the testator's intention, and not as binding precedents of interpretation of the meaning of the words in every case.

Applying the principles

[27] Awich J relied on Santiago's reference in the will to Carlota as "my common-law wife Carlota Galvez de Hegar" as an expression of "his intention to marry her once her marriage to Hegar was out of the way" (para 35). Putting on one side for the moment the question of surrounding circumstances (to which I will have to return), it seems to me that it is impossible, as a pure matter of construction, to discern from the actual words used by Santiago, any expression of his intention to marry Carlota at any time in future. In the context in which it appears, the phrase "common-law wife" is in my view purely descriptive of Carlota's status at the time and cannot support an implication that, at the time he made the will, he was contemplating marriage to her. Legislation such as the Supreme Court of Judicature (Amendment) Act, 2001, to which both counsel made reference in passing, which was enacted with the explicit aim of extending to parties to a "common law union" similar treatment in respect of the distribution of property upon separation and the provision of maintenance, to that available to married persons, seems to me to be an acknowledgement of a Belizean reality, that is, continuous and stable cohabitation of men and women who are not legally married to each other (see section 148D of the Act for definition of the phrase 'common law union').

[28] But in any event, for the purposes of section 16(1), neither an implication nor an inference of the contemplation of marriage by the testator will ordinarily suffice: what the section requires is that the will must have been "expressed to be made in contemplation of [the subsequent] marriage." As Megarry J also observed in **In re Coleman** (at pages 9 – 10):

> "If all that Parliament required was something in the will which showed that when the testator made it he was contemplating a particular marriage, thereby demonstrating that he had marriage in mind when he made his dispositions, I do not see why Parliament did not speak simply in terms of requiring the will to express such a contemplation. Instead, Parliament used the stricter and more specific language which requires that the 'will' should be 'expressed to be made' in that contemplation."

[29] Awich J also took the view that, as an aid to the construction of the will, it was open to the court to take "into consideration the circumstances, that is, the facts prevailing" (see para 31). In so saying, the learned judge felt able to disagree with the view of Megarry J in **In re Re Coleman** that extrinsic evidence of intention is inadmissible in the construction of the English equivalent of section 16(1), citing in support (at para 31), "several case authorities which acknowledge that, evidence of surrounding circumstances is admissible provided the meaning from the words used in the will is first sought".

[30] With the greatest of respect to the judge, it seems to me that there is in fact no conflict whatever between the propositions that, for the purposes of construction of a will, the court (i) is entitled – indeed required – to have regard to the actual words used by the testator, the context in which they appear and, as Lord Denning MR put it in **Re Jebb** (at page 672), "all the circumstances known to him at the time"; but (ii) is not entitled to use extrinsic evidence to alter or modify the plain language used by the testator. This distinction in fact clearly appears from **Re Hynes [1950] 2 All ER 879** and **Re Hodgson [1936] Ch 203**, both of which were cited by the judge. In **Re Hynes**, the court was concerned to discover the meaning to be given to the phrase "personal belongings". After taking into account the language of the will as a whole, in the light of "the surrounding circumstances properly to be regarded" (per Sir Raymond Evershed MR, at page 880), the court concluded that the words could not be given an extended meaning, so as to cover stocks and shares and bank balances. Similarly, in **In re Hodgson**, Farwell J, after stating (at page 205) that "I am entitled to know the surrounding circumstances at the time the will was made, and at the time of the death", then went on to consider those circumstances. However, he found himself unable to give the word 'money' a meaning other than its ordinary meaning and therefore held that it did not include national savings certificates and a certain amount of war stock.

[31] In my respectful opinion, therefore, the views of F.B. Adams J and Megarry J on the admissibility of extrinsic evidence in the context of section 16(1), in **Burton v McGregor** and **In re Coleman** respectively, are accurate statements of the law and Awich J was wrong to disregard them. But even assuming (as Megarry J also did in

In Re Coleman – see para. [24] above) that I am wrong on this point, it is not at all clear to me how such evidence could have had the effect of diverting Awich J from his "immediate view" that the marriage of Carlota and Santiago on 13 May 1993 had revoked the will. By the time the will was made in 1986, the couple had already lived together as man and wife in a common law union for over 40 years and their four children had all become adults. There is absolutely no evidence to support the view of the judge that they had "attempted to marry" in 1980, "apparently" in reliance on the presumption of the death of Jorge (para. 35), and that, in so doing, Carlota "took the risk in the presumption based on unchecked facts" (para. 26). That, yet again with the greatest of respect to the learned judge, is pure speculation, entirely unwarranted by the evidence.

Disposal of the case

[32] It follows from all of the above that, in my view, the respondents' have made good the grounds of their notice dated 23 March 2010. Although the result of Mr Williams' entirely proper concession at the outset of the hearing of the single ground of Rodolfo's appeal would ordinarily have been an order setting aside the judge's order that San Lorenzo Farm fell into intestacy, that result has now plainly been entirely overtaken by the success of the respondents' notice. In the result, it therefore seems to me that Awich J's order must be varied and replaced by an order in the terms prayed for by the respondents, viz., (i) a finding that the will of Santiago Juan dated 1 July 1986 was not expressed to be made in contemplation of marriage within the meaning of section 16(1) of the Wills Act and was as a consequence revoked by the subsequent marriage of Santiago Juan to Carlota Galvez de Juan on 13 May 1993; (ii) a pronouncement in solemn form against the will of Santiago Juan dated 1 July 1986; and (iii) a declaration that Santiago Juan died intestate.

[33] I would also make an order that both the appellant's and the respondents' costs of this appeal are to be costs in the administration of the estate of Santiago Juan.

[34] I have been authorised by Alleyne JA, who is no longer a member of the court, to say that he agrees with this judgment and concurs in the orders which I have proposed at paras [32] and [33] above.

[35] And finally, I must apologise for the inordinate delay in delivering this judgment, a draft of which was in fact completed as long ago as the end of October 2011. As is often the case in such matters, there are a number of reasons for the delay, but I cannot possibly proffer any of them to the parties and counsel in the case as an excuse in the circumstances.

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MORRISON JA