THE SUPREME COURT OF BELIZE 2005

ACTION NO.229 of 2005

BETWEEN: RODOLFO JUAN CLAIMANT

AND

1. TRINIDAD SANTIAGO JUAN
2. MARIA AZUCENA JUAN de MAHMUD
3. IRIS LUCIA JUAN de CAMPOS DEFENDANTS

Ms. Melissa B. Mahler for the claimant.
Mr. Rodwell Williams, S.C; for the defendants.

AWICH J.

12.11.2009 J U D G M E N T

1. *Notes: Probate claim: whether a will has been revoked by subsequent marriage; whether there was a codicil to the will; ss:7, 16, 18 and 19 of Wills Act Cap. 203; whether a side agreement between father and son can be enforced after the death of the father; whether the testator married the mother of the parties who are brothers and sisters, on two different occasions, and whether any of the ceremonies was a valid marriage; s: 61 of Marriage Act, Cap.174. Presumption of death of the first husband.*

2. The parties cited in this contentious probate claim do not reflect the way the proceedings were commenced. According to the statement of claim of Rodolfo Juan, the claimant, the proceedings commenced on 12.7.2001, when his mother, Carlota Galvez de Juan, also the mother of the defendants, applied for grant of letters of administration, '***in common form',*** of the estate of their deceased father, Santiago Juan who died on 27.4.2001. Grant of letters of administration or of probate ***in common form*** is made when an application is not contested, that is, not opposed in the so called 'non - contentious business' procedure. Letters of administration are authority granted to a specific person or persons when the deceased died without leaving a will, for the administration of the estate, that is, for the collection of the assets of the deceased, payment of funeral expenses and debts, and the distribution of the estate to beneficiaries. In short, letters of administration are simply authority for the administration of intestate estate.

3. Rodolfo opposed the application of his mother. On 24.7.2001, he entered ***a caveat*** as required by the Rules. The caveat must have been warned; Rodolfo entered appearance, but the mother did not issue a

claim form before she died on 3.4.2004, three years and nine months later. There has been no information about her application or claim, if any, after the entry of caveat.

4. Then on 10.8.2005, one year and four months after the death of his mother, Rodolfo issued the claim form the subject of this claim, regarding the estate of their father, Santiago Juan, not the estate of their mother. He cited his brother, Trinidad Santiago Juan, and his sisters, Maria Asucena Juan de Mahmud and Iris Lucia Juan de Campos as defendants. It is not stated whether Rodolfo had applied for grant of probate in common form and the brother and sisters opposed the application by entering a caveat, leading to this contentious probate claim.

5. Despite probable irregularity leading to or preceding the citing of the brother and sisters as the defendants, they proceeded to file their joint defence as if they had been parties right from the commencement of the proceedings. They did not raise any objection; and no prejudice has been occasioned to them.

6. I waived any irregularity and regarded the proceedings as a contentious probate claim by Rodolfo Juan against his said brother and sisters for grant of probate to him ***'in solemn form'.*** Grant of probate ***in solemn form*** is made to a successful claimant in a contested probate claim in the so called 'contentious business' for the grant of probate.

7. Rodolfo brought this claim in order to propound the will of their father and obtain a declaration (or pronouncement in solemn form) that, the document dated 1.7.1986, exhibit C (RJ)2, is the last and valid will of their father Santiago Juan; and in order to obtain grant of probate ***in solemn form*** to himself Rodolfo. He also claimed a court declaration that, by a separate document titled, "Agreement Between Father and Son", dated 10.7.1997, exhibit C(RJ)3, he alone is, "entitled to and has interest in Lorenzo Farm", part of the deceased estate.

8. The will in question seems to have granted to Rodolfo a larger share of the estate than the share of each defendant, although the share of Trinidad is also a very large one. The defendants wish the will

declared revoked by subsequent marriage of their father Santiago Juan, to their mother Carlota Galvez de Juan; and that their father be declared to have died intestate. They did not say, but it follows that in that event, all the children would be entitled to equal shares in the estate, in accordance with the Administration of Estates Act, Cap. 197, Laws of Belize.

9. ***The Facts.***

The facts of the case are somewhat intriguing. On 5.11.1939, Mr. Jorge Hegar married Miss Carlota Galvez at Sacred Heart Church, Cayo District, Belize. He was 29 years old, she was 23. He was the first husband of Carlota. The marriage was evidenced by Form 8, "Duplicate Original Marriage Register", commonly referred to as, 'marriage certificate'. They had a son, Antonio Hegar, not a party to this claim. Shortly after, Jorge left for the United Kingdom (the UK.) intending to join the army and serve in the second world war. His wife Carlota, remained behind in Belize. She did not hear from him. She started or renewed a relationship with Santiago Juan, the testator, in the nineteen fourties. They cohabited as man and woman, and had Rodolfo their eldest child, now the claimant, and the three defendants,

Trinidad Santiago Juan, Maria Azucena Juan de Mahmud and Iris Lucia Juan de Campos.

10. Rodolfo says, in November or December 1980, at their home in Cayo, Santiago and Carlota married in a church mass conducted by a Catholic Church priest, Father Ruoff. A church document or a marriage certificate was not produced in evidence. The defendants on the other hand say, the ceremony was merely a mass to bless their parents so that they would be able to receive holy communion at church, despite the fact that Carlota, a married person, was cohabiting with Santiago.

11. About six years later on 1.7.1986, Santiago Juan made the paper writing exhibit C(RJ)2, which he described as his last will. He appointed his sons Rodolfo and Trinidad the executors of the will. The paper was witnessed by two persons. He was a wealthy man. He devised and bequeathed to all his children various lands and chattels though not to the same extent. The sisters received less shares. To their mother Carlota, their father Santiago made the following gifts:

"2. I devise my freehold dwelling houses and properties described in the first schedule hereto to my common-law wife Carlota Galvez de Hegar during her life, and after her death to my two sons as follows…

…

7. All my personal estate whatsoever including money and furniture, I leave to my said common-law wife Carlota".

12. In 1992, fifty three years after Hegar had left, and twelve years after the ceremony by a mass at home in Cayo, Carlota and daughter Maria, made inquiries about Jorge Hegar. They obtained an extract from the Register of Deaths in Scotland, the U.K; it showed that Jorge Hegar had died on 5.3.1986, at Laidlaw Memorial Home, Ascog Bute, Scotland, the U.K. All parties regarded it as a common fact that Mr. Hegar died on 5.3.1986.

13. The next material event took place on 13.5.1993. Rodolfo and the defendants testified that on 13.5.1993, their parents exchanged marriage vows again, this time at a church, Sacred Heart Church, Cayo. Rodolfo explained that the ceremony was, "a mere formality",

because Carlota and Santiago had considered themselves married earlier. Testimonies for the defendants were generally to the effect that, the ceremony on 13.5.1993, was a marriage for which a marriage certificate, exhibit C(RJ) 4, issued, and it was the only marriage between their father and mother.

14. Santiago Juan died on 27.4.2001, at San Ignacio, Cayo District, Belize. He left the paper writing dated 1.7.1986, exhibit C (RJ) 2, which Rodolfo says is the last and valid will of their father. Carlota died on 3.4.2004, leaving no will. It was not in the evidence whether administration of her estate has been granted to anyone. Her estate is not an issue in these proceedings.

15. ***Determination.***

For the claimant, it has been submitted that the only marriage between their parents was by the ceremony in November or December 1980, before their father made the will on 1.7.1986, so the will was not revoked by subsequent marriage of their parents. It was submitted further that, the ceremony on 13.5.1993 was, "a mere formality", not a

marriage, and could not have the effect of revoking the will under s: 16 of Wills Act.

16. Despite their avernment in the memorandum of defence, the defendants do not contend that the paper writing, exhibit C(RJ)2, was not made by their father; they contend that it is not operative as a will. It was submitted by their learned counsel Mr. Rodwell Williams S.C, that by operation of law, s:16 of Wills Act, Cap.203, Laws of Belize, the will was revoked by the subsequent marriage of the parents on 13.5.1993. It is the case for the defendants that, their father be regarded as having died intestate. In that event, letters of administration would be granted to an administrator or administrators of the estate, and the estate would be distributed according to the law applicable to intestate estate.

17. The defendants also contend that the paper writing, the Agreement Between Father and Son, did not vest any interest in Lorenzo Farm, part of the deceased estate, in Rodolfo. Their counsel submitted that the agreement was neither a will nor a codicil to a will, because the agreement was not witnessed by two witnesses present when their

father signed it; the requirement for formalities in making a will, under s:7 of Wills Act, was not complied with.

18. *The Agreement Between Father and Son.*

I shall consider the agreement between father and son, first. It was entirely hand written, a holograph. It was in regard to two periods namely; the period when Rodolfo and his father were both alive, and the period following the death of the father. In these proceedings Rodolfo does not raise any claim under the agreement in regard to the running of Lorenzo Farm, and sale of produce from it when his father was alive. If there be any, it may be raised appropriately with the executors or administrators as the case may be, in the course of the administration of the estate, after this judgment.

19. The agreement made it clear that the father was the owner of Lorenzo Farm. He donated authority to manage the farm and benefits of the produce therefrom to Rodolfo, but the father retained, "veto power". The agreement concluded by stating: "… upon my death the farm will pass over to my son Rodolfo". That statement is a disposition of property, Lorenzo Farm, belonging to the father. The disposition was

to take effect on the death of the father. Such a disposition can be made only in a will, or if no will has been made, the property may be disposed of in accordance with the law applicable to intestate estate. A document which is short of a will cannot make the disposition.

20. I accept the submission by Mr. Williams that, the agreement was not a will or a codicil because it did not comply with the formalities for making a will or a codicil required by Wills Act. ***Section 7 of Wills Act,*** provides that a will be in writing, which the agreement is. The section also provides that two persons be present at the same time when the testator, the maker, signs the will, and that the two sign as witnesses. The agreement was signed only by Rodolfo and his father Santiago; it does not qualify as a will. Our law does not exempt a holograph (as Roman – Dutch Law does) from the formalities required in making a will. The same requirements obtain for the making of a codicil – see ***s: 18(b) and 19 of the Act.*** For the reasons that the agreement fails as a will, it also fails as a codicil meant to add to or alter the will.

21. The disposition of Lorenzo Farm upon the death of the father, provided for in the agreement between father and son fails because it was not made in a will or in a codicil. The farm shall be dealt with as an item in regard to which the father died intestate.

22. *Whether the document dated 1.7.1986 is a will.*

Exhibit C (RJ) 2 made by Santiago, which he referred to as his last will meets the requirements of making a will set out in ***s: 7 of Wills Act.*** It was in writing, signed by Santiago, and two witnesses signed witnessing his signature. It is regular on the face of it. There has been no evidence suggesting that the witnesses were not present when Santiago signed the document, or that Santiago was mentally incapicated. The burden of proving a will is regarded as discharged when the person relying on the will has proved that the testator had capacity to make a will, and that the will has been duly executed in accordance with s: 7 of Wills Act. Exhibit C(RJ)2, the paper writing dated 1.7.1986, is the will of Santiago Juan.

23. Despite their defence that exhibit C(RJ) 2 is not a will, the case for the defendants concentrated mainly on the contention that, the will has

been revoked by the subsequent marriage of the testator their father Santiago, to their mother Carlota on 13.5.1993. They relied on ***Section 16 (1) of Wills Act.*** It states:

> *"16(1) A will shall be revoked by the subsequent marriage of the testor, except a will expressed to be made in contemplation of that marriage".*

So, what were the effects, if any, of the ceremony in November or December 1980, and the ceremony on 13.5.1993, on the will?

24. First the ceremony by a church mass in November or December 1980, at the house where Carlota and Santiago lived in Cayo, took place before the will was made on 1.7.1986. It was not relevant to s: 16(1) of Wills Act, unless it was proved to be a marriage, in which case, the ceremony on 13.5.1993, subsequent to the making of the will, would not be a marriage, and would not revoke the will.

25. In my view, the ceremony in November or December 1980 was not proved to be a celebration of marriage. Father Ruoff was not

available to testify about it, no document from the church issued for it, and form 8, 'marriage certificate', did not issue for it under ***s: 61 of the Marriage Act, Cap. 174, Laws of Belize***. Santiago himself in his subsequent will on 1.7.1986, did not regard the ceremony as a marriage; he referred to Carlota as his common law wife in the will. The ceremony in November or December 1980, had no effect at all on the will made six years after, and it had no effect at all on the later ceremony on 13.5.1993.

26. A point worth noting is that if the ceremony in November or December 1980, was at some point regarded as a marriage, then it was carried out on the presumption of the death of Mr. Hegar, the first husband of Carlota. He had left Belize to join the British Army, and had not been heard of for more than seven years, to be exact, for a little over forty years. The ceremony was conducted without Carlota obtaining a court order confirming the presumption of death of Hegar. Many people do that. She took the risk in the presumption based on unchecked facts.

27. It may be a wise practice to obtain a court declaration confirming that a presumption of death of a spouse has arisen from a set of facts proved, before one remarries. An application to court provides opportunity to have the information checked. It avoids the inconvenience of having to prove subsequently that, one was entitled to presume the death. Failure to prove the presumption subsequently renders the marriage *void abinitio,* not *viodable*. A void marriage has worse consequence than a voidable marriage.

28. A presumption of death arises where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years and more, and it can be proved that there are persons who would be likely to have heard from or of him, and that all due inquires have been made appropriate to the circumstances and yielded no evidence of the person being alive – see the cases of, ***Prudential Assurance Co. v Edmonds (1877) 2 App. Cas. 487 HL*** and ***Watkins v Watkins [1953] 2 All E.R. 1113,*** the case cited by learned counsel Melissa Mahler, for the claimant.

29. The ceremony on 13.5.1993, was of a valid marriage. Form 8, a copy of the Duplicate Original Marriage Register which issued for it was, "good evidence" of the marriage. That is the law in ***s: 61(4) of the Marriage Act.*** The marriage took place after the will had been made on 1.7.1986, did the subsequent marriage revoke the will under s: 16 of Wills Act?

30. My immediate view was that the subsequent marriage on 13.5.1993, of Santiago to Carlota revoked the will of Santiago made on 1.7.1986. However, upon appraisal of the entire evidence, and careful reading of the entire will, I concluded that the will was not revoked; it was made in contemplation of the marriage of Santiago to Carlota and so was exempt from revocation.

31. Whether a particular marriage was in contemplation when a will was made is, in my respectful view, a matter of the 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. With due respect, I disagree with the view in the case of, ***In re***

Coleman, Deceased [1976] Ch 1, cited by Mr. Williams, that, *"the operation of s: 177",* a similar section of the statute in England, "*is purely a matter* of *construction on which extrinsic evidence of intention or purpose was inadmissible".* For a particular marriage to be in the contemplation of the testator, he must have the intention to take the marriage into consideration when he writes the will. Sometimes what he writes or does not write because he considers obvious, can be understood in the circumstances prevailing. There are 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 – see ***Re Hynes [1950] 2 All ER 879; Higgins v Dowson [1920] A.C. 1;*** and ***Re Hodgson [1936] Ch 203.***

32. In several cases particularly similar to this case, it seems evidence of surrounding circumstances were used. I cite two of them here. In, ***Pilot v Gainfort [1931] P.103***, the testator married in 1914. The wife left him in 1921 and he never heard of her. Three years after the wife had left, he met the claimant and lived with her. Six years after in 1927, he made a will in which he stated: "I herewith bequeath and

leave to Diana Featherstone Pilot my wife, all my worldly goods". One year later in 1928, when presumption of death of his legal wife could be made, the testator married the claimant, Diana Featherstone Pilot. The court held that: *"At a time when the marriage was obviously within the contemplation of the testator, if he could validly contract it, he wrote out this [will]"*. The subsequent marriage did not revoke the will.

33. In the case of, ***In the Estate of Langston, Deceased [1953] 1 W.L.R 581,*** the testator, a widower, made a will on 4.11.1935, in which he used the words: "I give, devise and bequeath unto my fiancée Maida Edith Beck…" Two months later, on 7.1.1936, he married her. It was held that he had in contemplation the marriage to her, so his will was not revoked by the marriage.

34 I acknowledge that it may not be sufficient to simply state that a will is, "made in contemplation of marriage", because that could mean, in contemplation of marriage of the testator to someone not yet identified; any marriage in the future. The words must show that a

particular marriage is in contemplation – see ***Sallis and Another v Jones [1936] P. 43,*** also cited by Mr. Williams.

35. 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 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.

36. 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.

37. A summary of my decisions on the several issues in this claim are the following:

37.1 The paper writing dated 1.7.1986, made by Santiago Juan is his will. The court pronounces in solemn form for the will.

37.2 The will was made by Santiago Juan in contemplation of his marriage subsequently to Carlota Galvez de Juan, which marriage took place on 13.5.1993; the will was not revoked by the subsequent marriage of Santiago to Carlota on 13.5.1993.

37.3 Probate of the said will is granted to Rodolfo Juan; and Trinidad Santiago Juan who may renounce the grant to him if he wishes.

37.4 The Agreement Between Father and Son dated, 10.7.1997, made between Santiago Juan and Rodolfo Juan, is not enforceable to the extent that it devised Lorenzo Farm to Rodolfo on the death of Santiago. The farm becomes an item in regard to which Santiago died intestate. Letters of administration in regard to the farm may be applied for in accordance with the Rules.

37.5 Judgment is entered for the claimant to the extent outlined above. The claim is dismissed to the extent that it is denied by this judgment.

37.6 Judgment is entered for the defendant on the counterclaim to the extent that Lorenzo Farm will be regarded as an item in regard to which Santiago Juan died intestate, otherwise the counterclaim is dismissed.

37.7 Costs of parties will be costs in the administration of the estate.

37. Pronounced this Tuesday the 12th day of November 2009
At the Supreme Court
Belize City

Sam L. Awich
Judge
Supreme Court