WILLS MADE IN CONTEMPLATION OF MARRIAGE

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Introduction

Before the Wills Act 1837 came into effect, the will of a testator could be revoked by a change in circumstances. Thus, marriage revoked the will of a woman[1] and while marriage, by itself, did not revoke the will of a man, it was revoked by the subsequent birth of a child.[2] These circumstances were considered to produce such a total change in the testator's situation as to lead to a presumption that he could not intend a disposition of property previously made to continue unchanged.[3]

The Wills Act did not entirely abolish the rule that a will could be revoked by a change in circumstances. Although section 19 provided that "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances", section 18 provided that "Every will made by a man or woman shall be revoked by his or her marriage . . ."

Both the old rule and section 18 were based on the view that a testator did not intend his will to come into effect after a total change in his family situation. However, the old rule contained an element of flexibility that was missing from section 18.

Under the old rule, marriage and the birth of a child did not absolutely produce revocation. These circumstances merely raised a presumption that could be rebutted by clear evidence of a contrary intention on the part of the testator. The best possible evidence was a provision in the will itself for the future wife and child which unequivocally showed that the testator contemplated the possibility of his being both a husband and a father.[4] It seems that evidence had to be derived from the will. In *Marston* v *Roe*,[5] Tindall C. J., in delivering the judgment of the Court, said:[6]

> [W]e all concur in the opinion that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of the intention of the party himself, and consequently that no such evidence [of the testator's intention that his will should not be revoked] is admissible.

Under section 18 of the Wills Act, there is no basis for avoiding the rule that marriage revokes a will. Thomas Jarman in the first edition of his *Treatise on Wills* commented that "the new rule, though it may some-

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1 *Forse and Hembling's Case* (1588) 4 Co. Rep. 60b; 76 E.R. 1022.
2 *Christopher* v *Christopher* (1771) Dick. 445; 21 E.R. 343.
3 Ibid.; *Spraage* v *Stone* (1773) Amb. 721; 27 E.R. 467.
4 *Kenebel* v *Scrafton* (1802) 2 East 530; 102 E.R. 472.
5 (1838) 8 Ad. & E. 14; 112 E.R. 742.
6 Ibid., 55.

times produce inconvenience, has at least the merit of simplicity, and will relieve this branch of testamentary law from the many perplexing distinctions which grew out of the pre-existing doctrine."[7]

Apparently, the inconvenience must have outweighed the merit of simplicity because in 1925 section 177 of the Law of Property Act 1925 (U.K.) came into effect providing that "a will expressed to be made in contemplation of marriage shall . . . not be revoked by the solemnisation of the marriage contemplated." Similar provisions were also enacted in other jurisdictions where a will was revoked by marriage.[8]

The obvious[9] question which springs to mind is — "What constitutes an expression that a will is made in contemplation of marriage?" The courts have been unable to agree on an answer. Their views have ranged between two extremes: first, that the necessary expression is only constituted by a clear statement in the will that it is made in contemplation of marriage to a named person, and, secondly, that it is sufficient if there is a reference in the will to the intended spouse which indicates that marriage is contemplated — e.g. a disposition to "my fiancée" or "my future wife". Both these views were clearly propounded in the law reports in 1953: in the New Zealand case of *Burton* v *McGregor*[10] and the English case of *In the Estate of Langston, deceased.*[11] Six weeks separated the cases which were decided in ignorance of each other.

The New Zealand Decisions

In *Burton* v *McGregor,* the testator gave his whole estate "unto my fiancée Valerie Richards". Adams J. held that the will was not expressed to be made in contemplation of marriage. It was not enough for a will to have been made in contemplation of marriage. Contemplation must be expressed in the will.[12] Accordingly, Adams J. held that extrinsic evidence, while it might be admissible for the purpose of identifying the testator's fiancée and showing that she was in fact the testator's fiancée, was not admissible for the purpose of ascertaining the testator's intention and showing that the will was made in contemplation of marriage.[13]

As it was not possible to admit extrinsic evidence to ascertain the testator's intention, it was necessary to look at the words of the will itself to see if they contained an expression of contemplation of marriage. Adams J. held that they did not. The words in question were "my fiancée". What is a fiancée? "The word is no more than a description such as is commonly applied to donees under wills."[14] A description of a present status — no more.

This was enough to decide the case. However, Adams J. fortified his conclusion with a comment on the meaning of the words "made in contemplation of marriage". He considered that they meant that "the will

7 Jarman, *A Treatise on Wills* (1st ed. 1843), 114.
8 See, e.g., Wills Amendment Act 1885 (N.Z.), s.13; Wills Probate and Administration Act 1898 (N.S.W.), s.15; Wills Act 1958 (Vic.), s.16.
9 Perhaps only obvious since 1953 when the question became the basis of litigation.
10 [1953] N.Z.L.R. 487.
11 [1953] P.100.
12 [1953] N.Z.L.R. 487, 491-492.
13 Ibid., 491.
14 Ibid., 492.
15 **Idem.**

was made in contemplation of the marriage in the sense that the testator contemplated and intended that the will should remain in operation notwithstanding the marriage."[15] It follows that if the words of the will are consistent with a possible intention that the will should not operate after the marriage, the will is not one made in contemplation of marriage within the meaning of the section.

This comment, which was not necessary to the decision, was expressly approved by Mahon J. in the New Zealand case of *Public Trustee* v *Crawley.*[16] Nevertheless, it seems to import an additional requirement which is not apparent from the words of the section. As Megarry J. said in *Re Coleman, deceased:*[17]

> With all due respect, the requirement of the statute seems to me to be single and not double: one must not confuse the conditions for the section to operate with the result when it does not operate, or read into the statute words which are not there. All that the statute requires is that the will should be "expressed to be made in contemplation" of the marriage in fact celebrated.

Burton v *McGregor* was followed by Mahon J. in *Public Trustee* v *Crawley.* Here again, the testator gave all his property to "my fiancée". Two interesting points arise from the case. First, Mahon J. had an opportunity to consider the English case of *Re Langston* where on similar facts an opposite conclusion was reached to that reached in *Burton* v *McGregor.* Despite various academic opinions, to which His Honour referred,[18] that *Re Langston* should be followed in preference to *Burton* v *McGregor,* Mahon J. came to the conclusion that *Burton* v *McGregor* correctly represented the law.[19] The two cases could not be reconciled. In *Burton* v *McGregor* the words "my fiancée" were regarded as a reference to an existing status. In *Re Langston,* they were regarded as a reference to a future status (the fiancée of today is the spouse of tomorrow). But, in Mahon J.'s opinion, this only meant that the testator had expressed a contemplation of marriage: not that he had expressed that the will was made in contemplation of marriage.[20]

The second point of interest is that Mahon J., in pinpointing the weakness of *Re Langston,* anticipated the problem which would soon be faced by Megarry J. in *Re Coleman.* His Honour pointed out[21] that, in the few decided cases on the question, the testator left all of his estate or the bulk of it to his intended spouse. Thus, it was an easy step to infer that the use of such words as "my fiancée" postulated a will expressed to be made in contemplation of marriage. But, what if the testator left only a small part of his estate to his intended spouse? It would be improbable that the testator intended the will to operate after the marriage. Mahon J. thought that the use of such words as "my fiancée" in a will should not have the effect of saving it from revocation — not even where the fiancée is the sole beneficiary.

One might expect the situation contemplated by Mahon J., of the intended spouse being left less than the bulk of the estate, to be unusual. However, shortly after the decision in *Public Trustee* v *Crawley,* Me-

16 [1973] 1 N.Z.L.R. 695.
17 [1976] Ch.1, 10.
18 [1973] 1 N.Z.L.R. 695, 699.
19 Idem.
20 Idem.
21 Ibid., 700.

garry J. was confronted with *Re Coleman* where the spouse, who had been referred to in the will as "my fiancée", received less than the lion's share under the will and accordingly claimed, not that the will was expressed to be made in contemplation of marriage, but that it was not. Megarry J., as we will see, supported the spouse's claim but for different reasons from those expressed by Mahon J. in *Public Trustee* v *Crawley.* More recently, in the New Zealand case of *Re Whale, deceased,*[22] the spouse of a testator who had been left only half of her husband's estate found herself in conflict with her mother-in-law who had been left the other half and who claimed that the will had been made in contemplation of marriage. Wild C. J. followed *Burton* v *McGregor* and *Public Trustee* v *Crawley* and held that the will had been revoked by marriage.[23]

Re Knight and Re Langston

In *Re Knight*[24] a disposition by a testator of all his estate "to E.L.B. my future wife" was held to be a sufficient expression of contemplation of marriage to satisfy section 177 of the Law of Property Act 1925 (U.K.). This case was followed by Davies J. in *Re Langston* where the testator gave all of his estate "unto my fiancée Maida Edith Beck". His Honour thought that the proper test to be applied was: "Did the testator express the fact that he was contemplating marriage to a particular person?"[25]

In *Burton* v *McGregor,* Adams J. regarded the reference to the testator's fiancée as a description of an existing status in the same way as one would regard a reference to "my mother" or "my friend". In *Re Knight* and *Re Langston,* references to "my future wife" and "my fiancée" were regarded as something more. It seems that in those cases it was thought that there is inherent in such words a contemplation of marriage and that the expression of them is an expression of contemplation of marriage. The problem is that the words can be used in either way. How does one discover which way the words were used by the testator? A further problem is that even if the words are construed as an expression of contemplation of marriage, they may not satisfy the requirement that the will must be expressed to have been made in contemplation of marriage.

Re Coleman

In *Re Coleman,* Megarry J. accepted the proposition that the word "fiancée" not only describes an existing state of affairs but also contemplates a change in that state of affairs. This is not to say that a reference in a will to "my fiancée" necessarily means that the will is expressed to be in contemplation of marriage. It is the will *as a whole* which must be expressed to have been made in contemplation of marriage. As he said:[26]

> In my judgement, "a will" means the whole will, and not merely parts of it, even if they are substantial; and the will that is "made" is of necessity the whole will. It may indeed be that merely trivial parts can be ignored, so that "a will" can be read as being "the whole of a will, or substantially the whole of a will": but I cannot regard "any substantial part of a will" as

22 [1977] 2 N.Z.L.R. 1.
23 Regrettably, Wild C. J. made no reference in his judgment to *Re Coleman.*
24 (1944), not reported but mentioned in *In the Estate of Langston, deceased* [1953] P.100.
25 [1953] P.100, 102.
26 [1976] Ch.1, 9.

being "a will". In my view, the question to ask is, "Was the will as a whole expressed to be made in contemplation of the particular marriage that has been celebrated?"

Megarry J. was thus able to hold that the will before him was not expressed to have been made in contemplation of marriage. Although it contained some provisions that were expressed to have been made in contemplation of marriage, it contained others that could not be said to be trivial in respect of which no such contemplation was expressed. These provisions were substantial dispositions in favour of persons other than the testator's fiancée.

In this way, Megarry J. was able to solve the problem envisaged by Mahon J. in *Public Trustee* v *Crawley* without accepting the rationale of that case. At the same time he rejected the view, for which *Re Langston* is said to be an authority, that a reference in the will to the intended spouse is, by itself, a sufficient expression of contemplation.

Megarry J.'s question—"Was the will as a whole expressed to be made in contemplation of the particular marriage that has been celebrated?" — invites the further question — "What will show that the will as a whole is expressed to be made in contemplation of marriage?"

The most obvious evidence of this would be a clear statement that the will is made in contemplation of marriage to a particular person. If there is no such statement, the test will be satisfied if there is a reference to the intended spouse as such, together with an indication that each beneficial disposition was made with the marriage in mind. It appears that, with allowances made for trivial dispositions, this indication would be found in a gift of the entire estate to the fiancée or, possibly, gifts of the entire estate to the fiancée and children of the contemplated marriage. Megarry J. did not think that a substantial gift to the fiancée would be sufficient. "[E]ven if that part is substantial, I do not see how it can be said that it is the will which is expressed to be made in that contemplation."[27]

Megarry J. did not consider the case of a gift to a child of the testator and his fiancée. Such a gift may be a stronger indication of intention than a gift to the testator's fiancée. A reference to a fiancée may be a description of either a present or future status but a reference to a child, even in this day and age, would probably show an intention that the will is to take effect after the marriage.[28] It may even satisfy the New Zealand approach because it would show that the testator contemplated and intended that the will should remain in operation notwithstanding the marriage.

Another indication that the will as a whole is expressed to be made in contemplation of marriage, might be words in the will which, without expressly saying that it is made in contemplation of marriage, in some way link the will with the marriage. In the Victorian case of *Re Chase, deceased*[29] Herring C. J. held that a will in which the testator gave two-thirds of his estate to "my fiancée at present travelling to Australia on board the s.s. *Stratheden* due in Fremantle on the 8th June 1948" contained language sufficient to justify the conclusion that it was made in contemplation of marriage. Whether or not the language would have

27 Idem.

28 This may not be such a strong indication since legislation such as The Family Law Reform Act 1969 (U.K.) and Status of Children Act 1969 (N.Z.) eroded the legal distinctions between legitimate and illegitimate children.

29 [1951] V.L.R. 477.

satisfied Megarry J.'s test is uncertain. Megarry J. referred to *Re Chase* in his judgment but did not express his own opinion on the case.[30]

The final issue considered by Megarry J. was the admissibility of extrinsic evidence. He agreed with the view of Adams J. in *Burton* v *McGregor* that extrinsic evidence is not admissible for the purpose of ascertaining the testator's intention and showing that the will was made in contemplation of marriage. Megarry J. said[31] that "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." This is not to say that extrinsic evidence is never admissible. It is clearly admissible for certain factual purposes such as identifying the spouse or proving the marriage. In the New South Wales case of *In the will of Foss*[32] Helsham J. admitted extrinsic evidence of the surrounding circumstances when the will was made and of the fact and date of the marriage. While conceding that it was not permissible to admit extrinsic evidence of a testator's intention in order to show that the will was made in contemplation of marriage, he considered that, if there is some expression in the will referable to a contemplated marriage, then the problem becomes one of construction of the language used by the testator in respect of which extrinsic evidence is admissible. This distinction may seem to be more verbal than real, but nevertheless, it is one which has long been recognised by the courts.[33]

Cases Where the Intended Spouse is Described as an Existing Spouse

In *In the will of Foss* the testator left all his estate to "my wife (Mrs P. Foss)". In the circumstances, the description of "my wife" instead of "my future wife" may have more strongly indicated that the will was expressed to have been made in contemplation of marriage. The testator was to be married within a short time of making his will and before marriage he lived apart from his future wife. It is thus probable that the words "my wife" in his will were a reference not to an existing status but to a future status, i.e. a status to be held at the time he expected the will to take effect.

This may be contrasted with the situation where a testator uses the words "my wife" to describe the person with whom he is living and whom he does not marry within a short time of making his will. Here it is probable that the testator is describing his future wife in the way he regards her when he makes his will. Thus it cannot be said that the will is expressed to be made in contemplation of marriage. In his own mind, the testator is already "married".

The cases on this point are inconsistent[34] and most of them fail to recognise the distinction between the two situations. It seems that the only way to ascertain which situation applies is to admit extrinsic evidence. Although this was done in *In the will of Foss,* it remains to be seen if the approach taken by Helsham J. in that case will be followed.

30 However, he did comment ([1976] Ch.1, 7) that in *Burton* v *McGregor,* Adams J. both distinguished and dissented from the decision in *Re Chase.*

31 [1976] Ch.1, 11.

32 [1973] 1 N.S.W.L.R. 180. See also *Keong* v *Keong* [1973] Qd.R. 516 (S.C.), 522 (C.A.).

33 See, e.g., *Charter* v *Charter* (1874) L.R. 7 H.L. 364.

34 Compare *Pilot* v *Gainfort* [1931] P.103; *Re Taylor, deceased* [1949] V.L.R. 201; and *In the Estate of Gray, deceased* (1963) 107 Sol. Jo. 156.

The General Contemplation Cases

In *Sallis* v *Jones*[35] the testator, in the last sentence of his will, declared 'that this will is made in contemplation of marriage." Bennett J. held that the will was revoked by the subsequent marriage of the testator. He said[36] that section 177 of the Law of Property Act 1925 (U.K.) "has no operation unless there is found in the will something more than a declaration containing a reference to marriage generally." Similarly, in the Victorian case of *Re Hamilton*[37] Lowe J. held that a clause beginning "That should I marry prior to my death" did not satisfy the equivalent provision to section 177. Both these cases were referred to with approval in *Re Coleman* by Megarry J. who commented[38] that in these cases "the will merely expressed a contemplation of marriage in general, so that the will could not be said to have been made 'in contemplation of a marriage' within the section. 'Marriage' and 'a marriage' are two different concepts; and this is emphasised by the concluding words of the section, 'the solemnisation of the marriage contemplated'."

Effect of Failure to Solemnise the Contemplated Marriage

In this situation, the testator's will is expressed to be made in contemplation of a particular marriage but the testator dies before the marriage takes place. Does the will still take effect or it is conditional on the marriage being solemnised?[39]

Failure to marry may be such a circumstance as to produce a total change in the testator's situation which would lead to a presumption that he could not have intended his will to come into effect, especially if the engagement was broken before his death. However, as we have already observed, section 19 of the Wills Act provides: "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." While this is subject to other statutory provisions, the only relevant provision seems to be section 177 of the Law of Property Act 1925 (U.K.) (and its equivalents), the wording of which suggests that its sole purpose is to ensure that if a will is expressed to be made in contemplation of marriage it shall not be revoked by the solemnisation of the marriage contemplated. The section does not contain a basis for revocation — only for continuance. It follows that any provision inserted in a will pursuant to the section would have the effect only of enabling the will to continue after marriage. If a testator wishes his will to be conditional on his marriage taking place, he must insert a specific provision to that effect.[40]

35 [1936] P.43.

36 Ibid., 46.

37 [1941] V.L.R. 60.

38 [1976] Ch.1, 5.

39 In *Re Natusch, Pettit* v *Natusch* [1963] N.Z.L.R. 273 McGregor J. held that a testator's will expressed to be made in contemplation of marriage was not conditional on the marriage and accordingly, although the marriage did not take place, the will took effect. See also *Ormiston's Executor* v *Laws* 1966 S.C. 47.

40 Except in Western Australia where the Wills Act 1970, s.14(2) provides: "A will expressed to be made in contemplation of the marriage of the testator is void if the marriage is not solemnised, unless the will provides to the contrary."

Conclusion

Of the three main approaches taken by the courts, *Re Coleman* and the New Zealand decisions have the most to commend them because they direct attention to the meaning of the words both in the statute and the will. The defect of *Re Langston* is that it concentrates on a mere description, which, if seen in the wider context of the whole will, may have alternative meanings.

Between *Re Coleman* and the New Zealand decisions there is little to choose. Both approaches are eminently reasonable. The fact that they differ reflects only on the imprecise wording of the statutory provisions.

The best way to measure their value is to compare their different effects. In most situations, the same result will ensue. Thus, if a will contains an express statement that it is made in contemplation of marriage, then, by the application of both approaches, it will not be revoked by the marriage. If a will refers to the testator's fiancée without disposing of the whole of the estate in her favour, then, by the application of both approaches, it probably will be revoked by the marriage. In other situations which are yet to come before the courts, for example, where the will refers to a child of the testator and his intended spouse, it is possible that, again, both approaches will reach the same conclusion. Only in the situation where a will refers to the testator's fiancée and she is his sole beneficiary, is it certain that there would be a difference. The *Coleman* approach would hold that the will is not revoked by the marriage and the New Zealand approach would hold that it is revoked. But even so, if there is an intestacy, the spouse would be either the sole beneficiary or, if she has children, the main beneficiary. Furthermore, whichever approach is taken — whether there be a testacy or an intestacy — if adequate provision is not made for members of the testator's family, there is a basis for redistribution under the Family Protection legislation.

The real problem does not lie in selecting an approach to the interpretation of the legislation or in the imprecise legislation itself. It lies in the inability of laymen to cope with legal technicalities. It is a fact that many laymen draft their own wills, and are neither aware of the legal technicalities nor the steps to be taken to comply with them. Perhaps the only solution is to scrap the legal technicalities and revert to a rule which "though it may sometimes produce inconvenience, has at least the merit of simplicity."[41] Such a solution may be worse than the problem.

41 Jarman, supra n.7.