

Effect of Marriage or Divorce on Wills

Terms of Reference

In 1979 the Commission was asked to examine and report upon the effect of marriage or divorce on a will including, in particular, the wills of people who subsequently lose the mental capacity to make a new will.

Background of Reference

The provisions in the *Wills Act 1970* (WA) ("the Act") in relation to marriage and divorce carried consequences that could undermine the intentions of the testator and lead to potentially unfair results. These provisions, and the general lack of testator knowledge of the law in this area, presented substantial concern, particularly in respect of the potential ability to impact on a great number of Western Australian families.

Under the Act, when a person makes a will and later marries, the marriage automatically revokes the will. There are two statutory exceptions to this rule.¹ The first exception applies where there is a declaration that the will is made in contemplation of the marriage. This exception can defeat the deliberate intention of the testator as there is some doubt whether a will expressed simply in favour of "my fiancée X" will save the will from being revoked upon the subsequent marriage of the testator to X.² Because the statutory provision is unclear and provides no guidance as to what wording will actually stop the will from being revoked, this exception has been the subject of differing judicial interpretation and practical application. The second exception relates to wills made in exercise of a power of appointment. Currently this section means that a will which both disposes of property and also exercises a power of appointment is revoked as to the disposition, but good as to the exercise of the power of appointment. However, this is unclear from the wording of the provision and has led to confusion and the intention of the testator being defeated.

The general rule of marriage revoking an earlier will can on occasions work unfairly. One example would be where a testator makes a will intended to honour family commitments and then, after having been divorced or predeceased by the spouse, subsequently marries again. If the testator dies without having made a new will the second spouse is likely to receive the bulk of the testator's estate under the intestacy rules and the first family little or nothing. A further problem is that although marriage generally revokes a prior will, divorce does not. As a major proportion of marriages end in divorce, there is the possibility that the law can therefore operate in an unfair way. An example of this is where, following a divorce, there has been a comprehensive property settlement by a testator in favour of the former spouse and a substantial time later the former spouse inherits the testator's estate under a will made during their marriage but left unrevoked.

In relation to these issues the Public Trustee expressed concern to government at the number of incapable people under his protection whose marriages were dissolved and who did not have the testamentary capacity to revoke their wills or make new ones. He also stated that, in his experience, the community in general was not aware that divorce does not revoke a former will and this sometimes caused problems when a former spouse died. Because in looking at the effect of divorce on wills, the question of revocation of wills by marriage also naturally arises the Commission was also asked to examine and report on that topic.

¹ *Wills Act 1970* (WA) s 14(1).

² A detailed discussion of this complex issue may be found in Law Reform Commission of Western Australia, *Effect of Marriage or Divorce on Wills*, Project No 76(II) (1991) ch 2.

In March 1990, the Commission issued a discussion paper which addressed the issues raised by the terms of reference and investigated the law in other jurisdictions. The paper suggested that if the general rule of revocation upon marriage were to be retained, some modification of the exception relating to wills made in contemplation of a particular marriage would be desirable. The paper discussed the extent to which extrinsic evidence should be admissible to determine whether words used in the will were an expression of contemplation of marriage, and whether it should be sufficient if the will was made in contemplation of marriage, even though that contemplation was not expressed in the will at all. In relation to divorce, the paper canvassed the arguments for and against the existing law, for example that the law should be reluctant to interfere with the express intention of testators.

Nature and Extent of Consultation

The discussion paper was widely distributed and prompted 19 submissions from a broad range of organisations including the Family Law Council, the Law Society of Western Australia, the Public Trustee and the Citizens' Advice Bureau. The Commission also received responses from several members of the public. The Commission submitted its final report in March 1991.³

Recommendations

The Commission made detailed recommendations to clarify and reform the law relating to the effect of marriage and divorce on wills. In relation to the effect of marriage on wills the Commission recommended that:

- The general rule contained in section 14(1) of the Act that the marriage of the testator revokes, by operation of law, a will made before the marriage should be retained.
- Where the will was made in contemplation of marriage, and this was not expressly stated in the will, extrinsic evidence should be admitted to establish this intention and the marriage should not then revoke the will.
- The exception contained in section 14(1) of the Act with respect to wills made in exercise of a power of appointment should be retained but it should be redrafted so that it is clearer in its presentation.

In relation to the effect of divorce on wills the Commission recommended that:

- The Act should be amended to provide a general rule of revocation in relation to the former spouse.
- Legislation should provide for a number of exceptions and qualifications to the general rule. Namely, in circumstances of contrary intention, in relation to specific debts and liabilities expressed in the will, gifts that exactly reflect contractual agreements, secret trust situations, and the existing right of a former spouse to apply under the *Inheritance (Family and Dependants Provision) Act 1972 (WA)* for a disposition recognising prior maintenance arrangements

The Commission also made a number of consequential recommendations, including that:

- The legislation should provide that for the purposes of the reform a “divorce” shall be taken to occur in the following circumstances under the *Family Law Act 1975 (Cth)*:
 - (a) when an absolute decree for dissolution is made;
 - (b) when a decree of nullity or a declaration of invalidity of marriage is made; or
 - (c) on an overseas dissolution or annulment which would be recognised by courts exercising jurisdiction.

³ Ibid.

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- Any union in the nature of a marriage which has been entered into outside Australia and is, or has at any time been, polygamous shall be deemed to be a marriage for the purpose of the reform.
- Private international law problems associated with the proposed reforms should be determined by the common law rules of private international law.
- The proposed reforms should only apply to the wills of testators who are divorced after the reform comes into operation irrespective of when the will was made.
- The Family Court of Western Australia should adopt a practice aimed at informing the parties to a divorce of the testamentary effect of a divorce.

A comprehensive summary of all the recommendations may be found in chapter five of the Commission's final report.

Legislative or Other Action Undertaken

There has been no legislative action to implement the Commission's recommendations. During 1995–1996 the Commission was consulted about the implementation of the recommended reforms and the Commission's Executive Officer and Director of Research attended a meeting with representatives of the Strategic and Specialist Services Division of the Ministry of Justice and the Office of the Public Trustee, for this purpose. Discussions with the Crown Solicitor's office continued throughout 1996–1997; however, action to implement the recommendations appears to have subsequently stalled.

Currency of Recommendations

The passage of time has not affected the relevance of the Commission's recommendations and the problems underlying the reference remain.

Action Required

Amendment to the *Wills Act 1970* (WA), specifically to s 14, would remedy many of the problems addressed in the Commission's report. It is also apparent from the Commission's research that the community remains largely ignorant of the effect of marriage and divorce on wills. In this regard, a general community education programme on the subject (including any legislative amendment) may assist in ensuring that a testator's intention is not defeated and expenditure on litigation to contest wills is reduced.

Priority – Medium–High

The Commission's recommendations are relatively uncontroversial and follow the legislative provisions in the majority of other Australian jurisdictions. For instance, the definition of "divorce" suggested by the Commission is reflected in current Commonwealth and state legislation.⁴ With respect to the exception in relation to contemplation of marriage, legislation in New South Wales, Tasmania and Victoria ensures that a subsequent marriage does not revoke a will made in contemplation of that marriage, even where the contemplation was not expressly provided for in the will.⁵ On the question of divorce, only the Northern Territory provisions currently reflect the law in Western Australia, with all other Australian jurisdictions providing the more equitable solution that divorce automatically revokes all gifts, grants and appointments that favour the former spouse, subject to certain exceptions.⁶

⁴ *Wills, Probate and Administration Act 1898* (NSW) s 15A(5), *Wills Act 1936* (SA) s 20A(3), *Wills Act 1958* (Vic) s 16A(2), *Succession Act 1981* (Qld) s 18, *Wills Act 1968* (ACT) s 20A(4), *Family Law Act 1975* (Cth). The only other state apart from Western Australia where no such provision exists is the Northern Territory.

⁵ *Wills, Probate and Administration Act 1898* (NSW) s 15(3), *Wills Act 1992* (TAS) s 19(b), *Wills Act 1958* (Vic) s 16(2)(b) & (c).

⁶ *Wills, Probate and Administration Act 1898* (NSW) s 15A(5), *Wills Act 1936* (SA) s 20A, *Wills Act 1958* (Vic) s 16A, *Succession Act 1981* (Qld) s 18, *Wills Act 1968* (ACT) s 20A.