REPORT OF THE PROPERTY LAW AND EQUITY REFORM COMMITTEE ON THE EFFECT OF DIVORCE ON TESTATE SUCCESSION

Presented to the Minister of Justice
November 1973

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INTRODUCTION

Terms of Reference

1. In your letter of 30 March 1973 to the Chairman of this Committee you asked that the Committee consider the alternative proposals -

(a) that a will should be revoked automatically by the subsequent divorce of the testator; or

(b) that where a testator is subsequently divorced and is survived by his former wife his will should be read as if his former wife had predeceased him.

Background

2. In your letter you stated that your decision to refer this matter to this Committee followed representations that you had received from a practitioner arising out of a case in which he was involved. In that case the testator has made his will during the last war leaving his whole estate to his wife. They were divorced 8 years later, and he died some 20 years after the divorce, survived by his former wife. He had not altered his will, and accordingly his whole estate (which, as it happened, was quite substantial) passed to the woman who had not been his wife for more than 20 years.

3. In the light of this case the majority of the Committee considers that some amendment to the present law would be desirable. What the majority recommends and its reasons for doing so are set out in this report. On the other hand, some members of the Committee doubt whether there is a need

to change the present law. In their view, the instances where hardship or injustice is likely to occur are so few that legislative intervention is unnecessary. Nonetheless, those members of the Committee who hold this view agree that if the law is to be amended the change should follow the lines recommended in this report. Accordingly, and for the sake of convenience, the proposals are set out in the name of the Committee as a whole.

SUMMARY OF PRESENT LAW

Testate Succession

4. The general rule is that the subsequent divorce of a testator has no effect on his will, unless, of course, the will makes express provision for that contingency. A presumption of intention on the ground of an alteration in circumstances is not enough to revoke a will : s.19 of the Wills Act 1837 (U.K.). A gift in the will to the spouse takes effect according to its tenor regardless of the intervening divorce.

5. This is so whether the spouse is named in the will or simply described as "my wife". In the latter case the primary rule is that where there is a person who fulfils the description used in the will at the date of the execution of the will, that person will take the gift; In re Coley; Hollinshead v. Coley [1903] 2 Ch. 102; Re Whorwood, Ogle v. Lord Sherborne (1887) 34 Ch.D. 446; and this rule applies notwithstanding that by a subsequent change of circumstances the description becomes inapplicable; Re Hickman, Hickman v. Hickman [1948] Ch.624.

6. The position is otherwise where the gift in the will is capable of being construed as a widowhood interest. Here, it seems that a somewhat fine distinction may have to be drawn between cases where, on a proper construction of the will, the disqualifying factor is the termination of the marriage to testator (otherwise than by the testator's death) and those where the restriction is only against subsequent remarriage. Where the gift is to W "during widowhood" W will not take the gift unless she is still the testator's wife at his death. Words such as "during widowhood" or "so long as she remains my widow" form a condition as to the beginning and ending of her interest, so that the effect of a subsequent divorce before the gift takes effect is that the former wife is disentitled to the gift : Public Trustee v. Morrison (1887) 6. N.Z.L.R. 190; In re Boddington, Boddington v. Clairat (1884) 25 Ch. D. 685.

7. Where the words used are "while she remains unmarried" it seems that the divorced wife may be entitled to take the gift if she has not remarried prior to the testator's death; Knox v. Wells (1883) 48 L.T. 655; but see In re Newcombe (deceased), Cresswell v. Newcombe [1938] N.Z.L.R. 98 where Myers C.J., at p.101, thought this question was probably still open.

Intestate Succession

8. Where a person dies intestate as to any property in New Zealand that property is to be distributed in accordance with Part III of the Administration Act 1969. Section 77(1)(a) of that Act provides for the case where "the intestate leaves a husband or wife". It seems only common sense that a divorced spouse should not be a "husband or wife" for the purposes of this provision, but there appears to be no authority directly in point either in New Zealand or England : see Halsbury's Laws of England, 3rd Ed. Vol. 16 para. 769.

9. Reference should also be made to s.12(2) of the Matrimonial Proceedings Act 1963 and s.24(2) of the Domestic Proceedings Act 1968. These provide that if, while the husband and wife are separated pursuant to a decree of separation or a separation order, one spouse dies intestate as to any property, that property shall be distributed as if the surviving spouse had predeceased the intestate.

Testamentary Freedom and Legislative Intervention

10. The general rule is that of testamentary freedom : a person by his will may leave his property to whomsoever he chooses. Only if he fails to dispose of his property (or all of it) by will does the law step in to determine who is to succeed. Nonetheless, the Legislature has made exceptions to this rule -

(a) where the testator has failed to make proper provision for a particular person : see the Law Reform (Testamentary Promises) Act 1949 and the Family Protection Act 1955; and

(b) where the testator has subsequently married : see s.18 of the Wills Act 1837.

11. There appear to be two principal grounds on which legislative intervention in the realm of testamentary dispositions may be justified:

(a) that of public policy. It is contrary to public policy to allow a testator to fail to make adequate provision for his dependants, particularly if, as a result, they are likely to become charges on the State;

in this regard s.73 of the Social Security Act 1964 is of special interest. To a lesser extent the Law Reform (Testamentary Promises) Act can also be justified on the ground of public policy. While its primary aim is doubtless to ensure that justice is done to the claimant, that it can do so may reduce the fear of being "taken for a ride" and thereby encourage more people to undertake the task of looking after those who are unable to manage for themselves. To the extent that this relieves the pressure on State social welfare agencies the Act can be said to serve the public interest;

(b) that of guarding against a person's inadvertence. A person should make a will disposing of his whole estate, but not everyone does. Accordingly, Parliament must step in and determine the distribution of his estate for him. Equally, if his marital status changes by marriage he should make a new will, but again not everyone in that position does.

THE CASE FOR REFORM

12. As stated in paragraph 3 of this report the majority of the Committee considers that the present law should be changed. The Committee's view is based upon its belief that as a general rule a divorced testator would not intend to benefit his former wife under his will - at least, not

as generously as he intended prior to the divorce. There will, of course, be exceptions, and provision should certainly be made for these. But whereas the present law must rest on the presumption that a subsequent divorce does not necessarily affect a testator's testamentary intentions unless he expressly says so (by altering or revoking his prior will), the Committee considers that this presumption should be reversed. This, it believes, would be in accord with the reality of the majority of cases.

13. Before considering what form the change should take, the Committee wishes to record its view that whatever proposals are eventually adopted they will be a poor substitute for conscious testamentary dispositions. The Committee is strongly of opinion that it is desirable for a solicitor acting in divorce proceedings to draw to his client's attention the question of revising his will in the light of the break-up of his marriage. It has no doubt that this is generally done; that there has not been a much greater manifestation of dissatisfaction with the present law probably bears testimony to this. Nevertheless, for whatever reason a divorced testator may overlook the need to reconsider his will, and the Committee now turns to consider how this contingency should be met.

PROPOSALS FOR REFORM

Revocation of the Will

14. At first sight, the proposal that a will should be automatically revoked by the subsequent divorce of the testator would appear logical. Since a will is revoked when one enters into a marriage, it may seem only sensible that it should be revoked on the termination of the

marriage. However, in the Committee's view, this argument breaks down when applied to practical cases.

15. To take one example, suppose that a testator makes a will along the following lines:

> Legacy of $1000 to godson.
> Legacy of $500 to local church.
> Residue to wife, with provision for children equally.

The marriage is subsequently dissolved by divorce. If the will is automatically revoked by the divorce, his former wife will, of course, lose her entitlement, but so too will the godson and the local church. But is it a fair assumption that, had he expected his divorce, the testator would not have intended to benefit his goodson or the church? Surely, not : such an assumption would be the wildest speculation.

16. In view of testamentary provisions such as these - by no means rare - the Committee is of opinion that to provide for the automatic revocation of a will by subsequent divorce would be going too far and could well cause more injustices than arise under the present law. It recommends accordingly.

Gift to be void

17. A second possibility would be to provide that where a testator has subsequently divorced his wife, any gift to her in the will shall be void. This would adopt the approach followed in s.15 of the Wills Act which provides that a gift to an attesting witness shall be void. However, the Committee has rejected this approach for two principal reasons.

18. First, difficulties could arise as to the ultimate destination of the subject matter of the void gift. It seems that if the gift were a life interest, the gift in remainder would simply be accelerated : Burke v. Burke (1899) 18 N.Z.L.R. 216. Thus, where a will provides for a life interest to the ex-wife, with remainder to the children the children's interest in remainder, subject to any contrary direction in the will, will fall into immediate possession. There could be no objection to this.

19. However, if the gift to the wife is an absolute one, and the will contains an alternative provision in the case of the wife predeceasing the testator, the alternative gift will not be effective, and the subject matter of the void gift will fall to be distributed as on intestacy; Aplin v. Stone (1904) 1 Ch. 543; Re Doland, Westminster Bank Limited v. Phillips (1970) Ch. 167. Thus, where the whole estate is left to the testator's wife with an alternative gift to, say, a charity, the charity will not benefit, and the whole estate will be distributable under the Administration Act. This appears consonant with neither good sense nor fairness.

20. The Committee's second reason for rejecting this approach is that it would deal only with beneficial interests given in the will. But where a gift to a particular beneficiary is void (e.g. because he witnessed the will) he may still accept appointment as executor and trustees if named as such in the will : In re Bishop (deceased) (1919) G.L.R. 26; In re Dunn (1919) N.Z.L.R. 685. In the Committee's view, there is no reason to believe that a testator is likely to consider his former spouse an appropriate executor or trustee, any more than a deserving beneficiary.

Former spouse to be deemed deceased

21. In the Committee's opinion the proposal that where a testator is subsequently divorced his will shall be read as if his former spouse had predeceased him, would avoid these difficulties. Its practical application also would seem to provide a satisfactory solution to the present problem. Referring again to the hypothetical case set out in paragraph 15 of this report the effect of this proposal would be that the godson and the church would remain entitled to their legacies, while the children would take the residue of the estate under the will instead of having to rely on the provisions of the Administration Act.

22. Admittedly, this approach itself is not free from difficulties. Suppose a testator leaves his whole estate -

> to my wife Mary, but should she predecease me then as to one half to my parents Fred and Annie, and as to the other half to my wife's parents Sam and Peggy.

If one is to assume that following his divorce the testator would no longer intend to benefit his former wife, what of her relations? Moreover, a provision along the lines above is usually made on the assumption that the testator will have received his wife's property under her will, and his intention is to give it back to her family. This would not, of course, be the case where the wife (or former wife) was only deemed to have predeceased him.

23. Perhaps the only, but nonetheless satisfactory, answer is that the Legislature can only reasonably make provision for the generality of cases. Special cases require special provisions and can only be tackled by the

testator. For its part the Committee is satisfied that a provision to the effect that where a testator is subsequently divorced his will shall be read as if his former wife had predeceased him would provide a satisfactory general rule. It recommends accordingly.

Provision for divorced spouse

24. Clearly, whatever approach is adopted provision should be made for the case where a testator, notwithstanding his forthcoming divorce, wishes to leave his wife something. If the recommendation set out in paragraph 23 of this report is adopted, the Committee recommends that the necessary statutory provision should be expressed to apply only in the absence of a contrary provision in the will.

25. The Committee should mention that it may dismiss one possible objection that could be raised on the ground of public policy. If the husband were obliged to pay maintenance to his former wife would it not seem odd that the law should provide for her exclusion from his testamentary bounty, particularly as she has no right to apply for provision to be made for her out of his estate under the Family Protection Act? One answer is that if public policy demands that the divorced wife's share in the estate be protected the Legislature ought to be able to find a better vehicle for its implementation than succession by inadvertence. The fuller answer is that a former wife's position seems to be adequately protected by sections 40 and 42 of the Matrimonial Proceedings Act 1963, which entitle her to make an application against her former husband's estate, within 12 months of his death, for permanent maintenance.

RECOMMENDATION

26. The Committee recommends that the Wills Act be amended to provide that where a testator is subsequently divorced his will shall be read in all respects as if his former wife had predeceased him, unless the will expressly provides otherwise. Appended to this report is a draft clause that could be enacted to give effect to this recommendation.

27. If this recommendation is accepted it may be that the necessary amendment should embrace separation orders and decrees, and decrees of nullity. The Committee was not asked to study these situations and it has not done so in any detail. However, given the present provisions of s.12(2) of the Matrimonial Proceedings Act 1963 and s.24(2) of the Domestic Proceedings Act 1968, there would seem to be no reason in principle why the proposed amendment should not go that far. If this further suggestion were to be accepted the words shown in square brackets in the appended clause would seem to be appropriate.

DATED at Wellington this 13th day of November 1973.

For the Committee

Charles Hutchinson

Chairman

MEMBERS

Mr C.P. Hutchinson, M.B.E., Q.C. (Chairman)
Professor G.P. Barton
Mr G. Cain
Mr J.G. Hamilton
Professor G.W. Hinde
Mr L.H. McClelland
Mr K.U. McKay
Professor P.B.A. Sim
Mr W.M. Taylor
Mr R.G.F. Barker (Secretary)

APPENDIX

Draft of Suggested Provision for Inclusion in a Wills Amendment Bill

00. Effect of divorce, etc. on wills -

(1) Where any person, by will, gives or makes to any other person any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, or makes any appointment of that other person to the office of executor, trustee, advisory trustee, or guardian, or to any other office, and any decree or order or legislative enactment for the divorce [or separation] of those persons, or the dissolution [or nullity] of their marriage is thereafter made, if the decree or [order or] legislative enactment is made in New Zealand or is (under section 82 of the Matrimonial Proceedings Act 1963) required to be recognised in all New Zealand Courts, then except as provided in subsection (2) of this section, the will shall be construed for all purposes as if that other person had predeceased the testator, unless the will expressly provides that the devise, interest, gift, or appointment shall have effect whether or not the persons are married at the testator's death.

(2) Nothing in subsection (1) of this section shall -

(a) Restrict the class of persons entitled to take under any gift, devise, bequest, or appointment to the children of the testator; or

(b) Affect any charge or direction for the payment of any debt.

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