SOUTH AUSTRALIA

FORTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE EFFECT OF DIVORCE UPON WILLS

1977

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE JACOBS, *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

D. W. BOLLEN, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Adelaide, South Australia 5000.

FORTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE EFFECT OF DIVORCE UPON WILLS

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us for consideration the question of whether any reform is required in the existing law so as to deal adequately with the impact of a divorce upon a will made by either of the spouses to the marriage prior to the divorce.

In considering the reference we have been assisted by consideration of a report of the Property Law and Equity Reform Committee of New Zealand, a report of the Ontario Law Reform Commission on the present subject and a report in more general terms by the Law Reform Commission of Manitoba and also by consideration of two articles on the subject in (1967) 40 *Southern California Law Review* 708 *and in* 1972 *Utah Law Review page* 177.

The law as it stands at present is that a will is revoked in one of four ways:—either (*a*) by express revocation in a subsequent testamentary instrument, (*b*) by destruction animo revocandi, (*c*) by subsequent marriage pursuant to the provisions of section 20 of the Wills Act, 1936, or (*d*) by the making of a subsequent will or codicil from which the intention to revoke the prior will can be deduced.

With regard to gifts in a will, it is provided by section 21 of the Wills Act, 1936, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. By section 23 it is enacted that no will is revoked or held to be invalid nor is the construction thereof altered by reason of any subsequent change of domicil of the person making the same. Conformably with this view of the law, the general rule is that the divorce of the testator or testatrix from his or her spouse does not operate to revoke a will by reason of the express words of section 21 and secondly that where in a will there is a reference to the wife or husband of the testator or testatrix, that reference means the wife or husband at the time when the will was made unless some contrary intention appears from the construction of the will itself.

The law is set out in *In re Devling deceased; Vroland* v. *Devling* [1955] *V.L.R.* 238. In that case a testator by his will left his whole estate "to my wife". Some three years after the making of the will his wife divorced him and in the year following the divorce, the testator died. O'Bryan J. held, in conformity with authority, that the testator having a wife alive at the date of the will, the words "my wife" were to be taken to refer to the circumstances existing at the date of the will and not those existing at the testator's death. Accordingly, where a donee in a will was described as the "wife" of a person and that person was married at the date of the will, then in the absence of a context to the contrary the person answering the description of "wife" at the date of the will was prima facie entitled to take. He further held

that there should not be implied in the gift to her any condition that she should continue at the date of the testator's death to answer the description "my wife".

Equally an application to omit from the will the words "my wife" or any similar application would fail because a Court may not omit from the probate of a will any words appearing therein where the omission would cause other words of the will to produce a result different from that which was within the knowledge and approval of the testator: see the judgment of the High Court of Australia in *Osborne* v. *Smith* (1960) 34 *A.L.J.R. page* 368.

Of course if a testator confirms his will by a later codicil made when he is aware of the divorce proceedings then the preceding gift must be good: *In re Revling deceased* (*supra*) *at page* 239. Nothing in this report is intended to alter that position. Equally where a contrary intention is disclosed by the will so that the later wife is as a matter of construction entitled, there is again no intention to alter the present law by any reform suggested in this report. On this point see the judgment of Gavan Duffy J. in *In re Harpers Trustees Executors and Agency Co. Ltd.* v. *Harper* 1940 *A.L.R.* 178.

Although the problem referred to us does not seem to have arisen in any reported case in South Australia so far as our researches go, the reason may lie in the fact that the law as it now stands is well settled and that nobody has thought it worthwhile to challenge the result of the law in Court. It is a problem however which is much more likely to occur in the future than it has in the past. The rate of divorce of existing marriages in Australia has regrettably increased very greatly in the last few years. It seems unlikely that this position will be reversed. The breakdown of Christian faith, the acceptance by a large proportion of the population of a materalistic way of life, the successive amendments to the law under which the grounds for the granting of a decree of divorce have become easier and easier, and the emphasis these days on peoples[2] so called rights, unaffected by correlative duties, all conspire to ensure a large and increasing number of divorces. The most recent statistics available suggest that something of the order of one marriage in five in Australia today is terminated by divorce. However the very rapid increase in divorces in the recent past may not reflect itself in testamentary causes jurisdiction for some years to come. Like the Committees in Ontario and New Zealand, we see the difficulties which any amendment to the law must produce, and indeed we have spelt them out rather more in this report than in their reports because of this characteristic, but we still feel that for property to be given by will to a person from whom the testator or testatrix is divorced, if the will or testamentary instrument was executed before the divorce, will almost always frustrate the actual desires of the deceased in relation to his or her property. Accordingly we think that an amendment of the law is warranted.

The problem which we are now considering might be thought also to arise in relation to deeds of family settlement and trust settlements generally, but as those matters are not within the remit to us we have not considered them in this report.

Before turning to the various amendments which have been suggested we should deal first with the question of constitutional power, a problem which affects all subjects of legislation in this area—see for example the judgments in the Full Court of this State in *Tansell* v. *Tansell* (unreported, judgment delivered 15th September, 1977). Sackville

and Howard in their article "*The Constitutional Power of the Commonwealth to Regulate Family Relationships*" (1970) 4 *F. L. Rev.* 30 *at* 64 suggest that this is a problem which could be brought within the ambit of Commonwealth power. We would ourselves take leave to doubt whether the subsequent decision of the High Court of Australia in *Russell* v. *Russell* (1976) 9 *A.L.R.* 103 supports that contention, but however that may be, the fact is that the Commonwealth has not legislated in this field and the States still therefore retain power to do so, whether that power is one which is not given to the Commonwealth at all or is one which the Commonwealth, if it has power, has not legislated to take up. Accordingly we proceed to consider the reference. However in order to prevent any question arising under section 109 of the Commonwealth Constitution, we think that it might be wise that a provision be placed in the new legislation stating that nothing in the legislation is intended to alter the effect or incidence of any orders made by a competent court under the Family Law Act, 1975, of the Commonwealth Parliament nor is it intended to apply to any testamentary gift which is expressed to be in satisfaction of the testator's liability for maintenance under any order made under the Family Law Act.

We should state in this regard that where we speak of divorce we speak of a final decree of dissolution of marriage or a decree of nullity of marriage. We would not consider either a consensual separation or a separation by order of the Court to be sufficient to attract the provisions which we think should be inserted in the law, nor do we think that a decree nisi for dissolution of marriage should suffice, notwithstanding the considerations adverted to by the House of Lords in *Fender* v. *St. John-Mildmay* 1938 *A.C.* 1. We think that the provisions hereinafter recommended should apply whether the marriage was dissolved or annulled in Australia or elsewhere.

There are several possible solutions to the problem. The first would be to repeal section 21 of the Wills Act so that a will could be revoked on the ground of an alteration in circumstances. This apparently is the law in a number of the States of the United States of America. We however think, as do those who have considered the problem before us, that such an amendment would be too wide ranging in its consequences to be adopted here and would cause at least as many problems as it might solve. Indeed the whole thrust of will legislation today is to remove uncertainties from the drawing of wills and the administration of estates and anything which tends to increase those uncertainties should be rejected.

The second is to amend section 20 of the Act dealing with revocation of wills to provide that every will made by a testator or testatrix shall be revoked by his or her marriage or divorce, and then continue as in the present section. Again this solution has appealed to some States in the United States of America. Once more the suggested amendment is going against the tide of testamentary law in that section 20 was amended in 1969 to provide for the making of wills specifically expressed to be made in contemplation of marriage and for their validity notwithstanding the subsequent marriage. It has, in the experience of those of us who have practised in this jurisdiction, proved difficult to educate the ordinary man and woman to the knowledge that, if they marry, any will which they have previously made is automatically revoked, and it would seem only to compound those difficulties to add a further ground of automatic revocation. Further, as Ontario has noted, it would be quite unjust to beneficiaries other than the spouse who are included in the will made preceding

divorce, and indeed the will preceding divorce might have been made after a long separation and with every intention of excluding the estranged spouse.

The next suggestion is to give a Judge a power to modify the will or in a proper case to declare the will revoked by the divorce. Again the experience which some of us have had in testator's family maintenance cases does not dispose us to think that this is a very good solution. The procedure has proved difficult enough in testator's family maintenance, putting oneself in the armchair of the deceased. It is not infrequently a euphemism for the Judge making the sort of will which he thinks the testator's moral duty required him to make, irrespective of whatever good reasons the testator might have had for weighing the competing claims on his bounty quite carefully and indeed dispassionately and with much greater background knowledge than a Judge is ever able to attain in coming to a fair and just disposition of his assets by will. Further, it might well be argued that a judicial discretion of this kind might well fall foul, in some cases at least, of the width of the jurisdiction conferred by section 33 of the Family Law Act.

The fourth alternative is that of deeming the divorced spouse to have died before the testator. This is the solution recommended in New Zealand, Ontario and Manitoba. The difficulties we see with this solution have been to some extent considered in the other reports, such as substitutional provisions in a well drawn will to provide for the case where a beneficiary predeceases the testator, a secret trust imposed upon the divorced spouse to provide for an unnamed beneficiary, a matter which we shall deal with later in this report, the problem of substitutional gifts upon death generally, the problem of devises to a named beneficiary but given *pur autre vie* and the other life is the life of the divorced spouse. It would also raise other problems such as problems under the modern rule of perpetuities where the divorced spouse is the measuring life or one of the measuring lives for the operation of the rule. Equally it would raise all sorts of problems with regard to automatic acceleration of dependent or subsequent gifts and the constructions of wills on such an acceleration happening. Again where a life interest is given to a divorced spouse that life interest may itself be charged with gifts to other people to be paid out of the life interest, a matter we shall also return to later. Accordingly we do not feel able to recommend this as the preferred solution.

The other method of reform which is referred to but which did not find favour in other reports, is that of revocation of gifts or benefits contained in the will in favour of the ex-spouse. We think that if the suggestions which we make in this report are implemented, and if it is provided that the revocation of any such gift to the ex-spouse does not defeat any gift which is charged on the gift to the ex-spouse but such a gift is deemed to be charged on the residue of the estate, and that if the will itself provides for a substitutionary gift to take effect then that substitutionary gift shall take immediate effect, then there should not be many other real problems. This solution also avoids one very real problem in the other preferred solution, which deems the divorced spouse to have died before the testator, namely that the divorced spouse may be either sole executrix or the sole executrix able or willing to prove the will. In such a case the deeming of the ex-spouse to have died before the testator might interfere considerably with the due administration of the estate of the deceased particularly if there was a business or some other asset in the estate which required an immediate grant to enable the estate or the asset in the estate to go on functioning as before

the date of death of the testator. We therefore recommend that when a will is made giving benefits to a spouse who is afterwards divorced from the testator or testatrix, the will should in general be construed as if the gift to the former spouse had been revoked on the day of the date of the decree absolute of dissolution of marriage or of the decree of nullity of marriage. We say "in general" because we have already referred to two general exceptions. They are first that if a testator by his will shows clearly that notwithstanding the impending divorce he proposes making testamentary provisions for his or her divorced spouse that will be unaffected by these proposals. The second is that where the testator by his will shows clearly that he is making provision for an actual or anticipated order for maintenance that provision should be unaffected by these recommendations.

It may then be easiest to divide the recommendations which follow into two classes:—those in which we recommend that the alteration is to have no effect on the preceding law, and those where we think that because of the alteration which will be made certain specific provisions ought to follow. The ones where we think the present law should be stated to continue as it is are as follows:—

1. Where a codicil made subsequently to the divorce effects a constructive republication of the testator's will and the testator does not by his codicil take any steps to delete or modify the gifts given to the divorced spouse, the constructive republication by codicil should enure to the benefit of the divorced spouse: see for a similar problem *In re Jackson; Jackson* v. *Duncan* (1964) 82 *W.N. N.S.W. Pt. I page* 62.

2. Nothing in the proposed amendment is to alter the existing law relating to secret trusts. The present law is as stated in *Theobald on Wills, the* 12*th Edition, page* 252—

> "Where a gift is made in absolute terms but the testator, before or after the date of his will, communicates to the legatees his intention that they are to hold the gift in trust, and they either accept the trust or acquiesce in it by silence, evidence of the trust is admissible; and if the evidence establishes the trust, effect will be given to it if it is valid, if it is not, the property will go to the residuary legatees or next of kin, as the case may be.
>
> The principle applies where the testator is induced to make a will; where he is induced to leave an existing will unrevoked; where he is induced to not make a will; where he is induced to revoke his will."

3. Nothing in this reform should alter the operation of any contract made between the divorced spouses binding on the relevant testator to dispose of his or her property in a certain way. We need not here set out the law on it. It can be found in *Williams on Wills, the* 4*th Edition, pages* 8-13. It is sufficient to say that no such contractual will or contractual provision contained in a will should be avoided by the proposed amendment.

4. Nothing in this reform is to interfere with the operation of the law relating to executors *de son tort.*

5. Nothing in this alteration is to interfere with any statutory rights the divorced spouse may have to testator's family maintenance.

6. Nothing in this amendment is to affect any power of appointment exercisable by the divorced spouse if exercisable—specially in relation to the whole or any part of the estate of the testator.

7. Nothing in this amendment is to operate so as to make any class of beneficiaries under the will close earlier than it would have done if the gift had not been struck out. If this were not enacted, problems such as arose in *Wyndham* v. *Darby* [1896] 17 *L.R. N.S.W.* (*Cases in Equity*) 272 could easily arise.

We turn now to the amendments which ought to be made to give proper effect to the suggested alteration in the law:—

1. Where the will leaves the whole or part of the estate in aliquot parts among several beneficiaries of whom the divorced spouse was one, the property or estate shall be divided according to the proportions of the remaining shares and as if there had been no reference to the divorced spouse. This provision shall operate not only as to the original disposition but also as to accruer and cross-accruer clauses so as to obviate any questions of the kind which arose in *In re Green* 1928 *S.A.S.R.* 473.

2. Nothing in these provisions shall apply to any provision of a will whereby the divorced spouse's life is used as the or a measuring life for the purposes of the operation of the modern rule against perpetuities; neither shall it affect the operation of any substitutionary gifts given by will.

3. Where there are alternative gifts given by the will and one alternative, or the only alternative as the case may be, is a gift in favour of the divorced spouse, the will shall operate and be construed as if that alternative had not been expressed in the will.

4. Where the result of the striking out of a gift to divorced spouse causes the property comprised in the gift to be otherwise undisposed of by the will, the property shall fall into residue.

5. Nothing in this reform should cause a lapse in relation to a will or in relation to any powers created by will. The law relating to this subject is well set out in *Williams* (*op. cit.*) at pages 259-261 and we need not discuss it in detail here. It needs to be laid down that no lapse is to occur by reason of the statutory striking out of the gift to the ex-spouse which would not have occurred if that gift had been left in the will.

6. Where the right of property given to the divorced spouse is a life estate or a leasehold estate the subsequent interest or interests shall be accelerated as though no such gift for life or for years had been made, except in cases where there is a dependent gift to another person charged on the life or leasehold estate in which case the charge will attach to the estate so accelerated.

7. If the existence of the life of or any other circumstances relating to the divorced spouse is referred to in the will, the will should for this purpose, but not for the conferring of any benefit on the divorced spouse be construed as if the statutory deletion had not taken place.

We are conscious that we have in making this recommendation departed from that of the other law reform committees who have considered this question, but we would point out that the solution we have proposed is the solution also adopted in Pennsylvania and in Hawaii.

We have the honour to be

HOWARD ZELLING
S. J. JACOBS
L. J. KING
D. W. BOLLEN
J. F. KEELER
K. T. GRIFFIN

Law Reform Committee of South Australia

6th December, 1977.

3.78 J3867

D. J. WOOLMAN, Government Printer, South Australia