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EFFECT OF DIVORCE ON WILLS

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ALBERTA LAW REFORM INSTITUTE

The Alberta Law Reform Institute was established on January 1, 1968, by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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The Institute is grateful to its Counsel Mr. Richard Bowes for his carriage of this project. It has been researched and written with his usual thoroughness and clarity, and accomplished at a time when he was also responsible for several major projects. The recommendations are those of the Institute but they owe much to the clear and helpful way in which the issues were presented to the Board.

The issues we deal with involve important practical matters for individuals and their advisers. We are grateful to those who responded to our Issues Paper and who helped shape our views.

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SUMMARY

In Alberta, divorce has no effect on a will made during marriage. If a person has made a will that leaves everything to their spouse, the will is not automatically revoked or otherwise affected by a subsequent divorce. If the person who made the will dies without changing their will or remarrying, everything would go to their former spouse, in accordance with the pre-divorce will.

In many Canadian and foreign jurisdictions the result would be different. Although the details vary from jurisdiction to jurisdiction, the relevant legislation generally says that divorce automatically revokes gifts in a will to a former spouse, unless it clearly appears from the will that the gift was intended to survive the divorce. After discussing arguments for and against such a rule, this report recommends that the same rule should be adopted in Alberta by an appropriate amendment to the *Wills Act*. The report also make recommendations about several technical issues that would arise if our main recommendation were adopted.

REFERENCES AND ABBREVIATIONS

LAW REFORM REPORTS

ABBREVIATED REFERENCE	FULL REFERENCE
B.C. Succession Report	Law Reform Commission of British Columbia, *Report on Statutory Succession Rights* (1983)
B.C. Revocation Report	Law Reform Commission of British Columbia, *Report on The Making and Revocation of Wills* (1981)
English Committee Report	Law Reform Committee, *Twenty-second Report (The Making and Revocation of Wills)* Cmnd. 7902 (1980)
English Commission Report	The Law Commission, *Family Law: The Effect of Divorce on Wills* Cm 2322 (1993)
Manitoba Report	Manitoba Law Reform Commission, *Report on Family Law; Part I, The Support Obligation; Part II, Property Disposition* (1976)
N.S.W. Report	New South Wales Law Reform Commission, Community Law Reform Program, Eighth Report, *Wills — Execution and Revocation* (1986)
New Zealand Report	*Report of the Property Law and Equity Reform Committee on the Effect of Divorce on Testate Succession* (1973)
Ontario Report	Ontario Law Reform Commission, *Report on the Impact of Divorce on Existing Wills* (1977)
Queensland Report	Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Succession* (1978)
Scottish Report	Scottish Law Commission, *Report on Succession* (1990)
South Australian Report	Law Reform Committee of South Australia, *Forty-fourth Report to the Attorney-General — Relating to the Effect of Divorce Upon Wills* (1977)
Tasmanian Report	Law Reform Commission of Tasmania, Report No. 35, *Report on Reform in the Law of Wills* (1983)
ULCC Report	"Wills: Impact of Divorce on Existing Wills" in Uniform Law Conference of Canada, *Proceedings of the Sixtieth Annual Meeting* (1978), Appendix S.

ABBREVIATED REFERENCE	FULL REFERENCE
Western Australian Report	The Law Reform Commission of Western Australia, *Report on the Effect of Marriage or Divorce on Wills* (1991)

CANADIAN LEGISLATION

The following enactments provide for automatic revocation of spousal gifts and appointments upon marriage dissolution.

Province	Legislation
British Columbia	*Wills Act* R.S.B.C 1979, c. 434, s. 16
Manitoba	*The Wills Act* C.C.S.M., c. W70, s. 18(2)
Ontario	*Succession Law Reform Act* R.S.O. 1990, c. S26, s. 17(2)
Prince Edward Island	*Probate Act* R.S.P.E.I., c. P21, s. 69
Saskatchewan	*Wills Act* R.S.S. 1978, c. W14, s. 16(2), as am. S.S. 1980-81, c. 97, s. 3

A. PROJECT HISTORY AND SCOPE

In Alberta divorce has no effect on a will made before the divorce. If a person gets divorced some time after making a will that leaves their entire estate to their spouse, the will remains in full effect notwithstanding the divorce. If the testator[1] then dies without having revoked or changed the will and without having remarried,[2] the entire estate would go to the former spouse in accordance with the pre-divorce will.

In November 1993 the Alberta Department of Justice asked the Institute to consider whether Alberta's law regarding the effect of divorce on wills should be changed. More specifically, we were asked to consider whether the Wills Act should be amended so that divorce would automatically revoke any gift to a spouse in a will made during the marriage unless the testator has expressed a contrary intention. Such an amendment would bring Alberta's law into line with that of many other Canadian provinces.

After receiving the Department of Justice's request, the Institute prepared and circulated an issues paper on the effect of divorce on wills. We arranged for the paper to be distributed at meetings of the Canadian Bar Association's "Wills and Estates" and "Family Law" sections in Edmonton and Calgary during February of 1994. We also sent copies of the issues paper to presidents of local bar associations in other centres across the province with a request that they bring the paper to the attention of members of their local bar who might have a particular interest in the subject. We received a total of nine written responses to the issues paper.[3] These responses were considered by the Institute's Board in deciding upon the recommendations that appear later in this report.

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1 A person who has made a will is called a "testator".

2 The testator's remarriage will take care of the problem because in Alberta (and elsewhere) marriage revokes any will that is not expressed to have been made in contemplation of marriage: see below, p. 4.

3 Two of the letters represented the views of more than one individual. One of these "joint" letters argued that the existing law is satisfactory and should not be changed; the other argued the opposite.

The scope of this project is confined to the narrow issue raised by the Department of Justice's request: the effect of divorce on wills. Thus, we have not considered what effect, if any, divorce should have on beneficiary designations that can be made outside of a will (we will refer to such designations as "instrument designations") for life insurance policies, pension plans, retirement savings plans and so on. We recognize that the effect of divorce (or marriage) on such instrument designations is a matter of considerable importance; the value of benefits whose destination is determined by instrument designations can easily dwarf the value of the estate that passes under a testator's will. Nevertheless, for a number of reasons, we have decided not to examine the effect of divorce on instrument designations in this report.

It is desirable for the circumstances in which testamentary instruments (including instrument designations) are revoked by operation of law to be as consistent as possible from one province to the next. Although Alberta's current law regarding the effect of divorce on **wills** is out of line with that of many other Canadian jurisdictions, Alberta's current law regarding the effect of divorce on **instrument designations** (it has no effect) is consistent with that of other Canadian jurisdictions. There are certainly practical arguments for making the revocation rules consistent for wills and beneficiary designations, but there are also practical reasons for keeping the revocation rules applicable to beneficiary designations consistent from one province to the next. We think that any changes to the law regarding the revocation of instrument designations should be coordinated with other provinces.

Another reason why we do not consider the effect of divorce on instrument designations here is that there is a broader issue of how far the rules applicable to benefits payable under instrument designations should be integrated with the rules applicable to succession generally. For example, should benefits payable under beneficiary designations relating to RRSPs, RRIFs or insurance policies be subject to family relief claims?[4] We think it would be more appropriate to deal with the effect of divorce (and marriage) on instrument designations as part of an examination of this broader issue.

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[4] This, incidentally, is the approach taken to a spouse's "elective share" under the American *Uniform Probate Code*: see L.W. Waggoner, *The Revised Uniform Probate Code* (1994) 133:5 Trusts & Estates 18 at 24-26. The Code's "elective share" provisions serve a similar purpose to the family relief provisions found in Canadian legislation.

B. THE CURRENT LAW IN ALBERTA AND ELSEWHERE

We mentioned at the beginning of this report that in Alberta divorce does not affect an existing will. We will spend a few moments considering how the law came to be as it is now in Alberta and elsewhere. For this purpose, we should begin with the English Wills Act, 1837, which is the ancestor of Alberta's Wills Act.[5]

Before 1837 certain changes in a testator's circumstances were considered to revoke the testator's will (or a part of the will). For instance, a woman's will was revoked by marriage, while a man's will was revoked not by marriage itself, but by marriage followed by the birth of a child. In certain cases, the rationale offered for the legal rule focused on the presumed intentions of the testator:

> Marriage and the birth of a child conjointly, however, revoked a man's will, whether of real or personal estate; these circumstances producing 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.[6]

Section 19 of the Wills Act, 1837 set out a general rule that wills are not revoked by presumption of an intention to revoke them because of a change in circumstances. This rule is currently found in section 18 of Alberta's Wills Act, which reads:

> 18 A will is not revoked by presumption of an intention to change it on account of a change of circumstances.

Thus, the general rule is that a will can only be revoked by a deliberate act of the testator that complies with the formalities for revocation.[7] To this

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5 R.S.A. 1980, c. W-11.

6 T. Jarman, *A Treatise on Wills*, vol. 1, 4th ed. by S. Vincent (London: Henry Sweet, 1881), at 122-23.

7 The formalities for revocation are set out in section 16 of Alberta's Wills Act.

general rule section 18 of the Wills Act, 1837 created one major exception: a will would be revoked by the testator's subsequent marriage. This exception is presently embodied in section 17 of Alberta's Wills Act:

> 17 A will is revoked by the marriage of the testator except when
>
> (a) there is a declaration in the will that it is made in contemplation of the marriage,[8] or
>
> (b) the will is made in exercise of a power of appointment of real or personal property that would not in default of the appointment pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if he died intestate.

The Wills Act, 1837 said nothing about the effect of divorce, and it is a safe bet that the issue was not even considered. At the time, the only way to obtain a divorce was through an act of Parliament, and between 1715 and 1852 a total of 184 divorces were obtained by this method.[9] Given a divorce rate of a little over one per year, it probably did not appear urgent in 1837 to make provision for the effect of divorce on wills. By the 1970s marriages ended in divorce rather more frequently than they did in 1837, but the law remained the same in all jurisdictions whose succession legislation could be traced back to the Wills Act, 1837. The legal position was clear enough, so the issue of the effect of divorce on wills did not receive a lot of judicial attention over the years. Of the few reported cases, we will mention two that illustrate the courts' strict adherence to the general rule that wills are not revoked by changes in circumstances other than those specifically mentioned in the Wills Act.

In *Re Brechin*[10] the deceased testator (Malcom) had made a will in 1950 that left his entire estate to "my beloved wife, Agnes". This will was unchanged at the time Malcom was admitted to Alberta Hospital as a mentally incompetent person in 1968. Presumably (although the point is not

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8 This exception was not in the English *Wills Act* of 1837.

9 English Committee Report at 19.

10 (1973) 38 D.L.R. (3d) 305 (Alta. S.C., T.D.).

discussed), from this point until he died Malcom lacked testamentary capacity, and, therefore, lacked the ability to revoke or change his will by voluntary act. In 1971 Agnes divorced Malcom and then remarried. Malcom died in 1972. The only issue considered by the court was whether the gift to Agnes had lapsed because she no longer fit her description in the will as Malcom's "wife" (beloved or otherwise). In accordance with established principles, the court held that it was irrelevant that Agnes was no longer Malcom's wife when he died. So Malcom's entire estate went to Agnes, notwithstanding their divorce.

The testator (Philip) in *Goldfield v. Koslovsky*[11] had made certain bequests to his wife (Barbara) in a will made several years before their divorce. Shortly before they were divorced, Philip and Barbara signed a settlement agreement in which they each agreed not to make any claim against the other's estate under certain statutes and in which Barbara agreed that the payments and other provisions of the agreement constituted a full and final settlement of her rights against Philip. Philip (a lawyer) died about nine years after the divorce without having revoked or changed his will. It was argued that the terms of the pre-divorce settlement agreement prevented Barbara from taking under the will. The court, however, pointed out that nothing in the agreement prevented Philip making a testamentary gift to Barbara or prevented her from accepting such a gift. The judge declined to "speculate as to the reason why the testator did not make a new will." Thus, the bequests to Barbara were effective.

Results such as those in *Brechin* and *Koslovsky*, which occurred periodically in Commonwealth jurisdictions, were not viewed with universal satisfaction. In 1973 New Zealand's Property Law and Equity Reform Committee recommended "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".[12] Law reform agencies in at least a dozen Commonwealth jurisdictions have considered the effect of divorce on wills since the New Zealand Commission issued its 1973 report. The Law Reform Commission of Tasmania recommended that divorce should revoke an

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11 [1976] 2 W.W.R. 553 (Man. Q.B.).

12 New Zealand Report at 11.

existing will in its entirety.[13] All of the other law reform agencies agreed that divorce should have some effect on a pre-divorce will but did not think that the effect should be as drastic as that proposed by the Tasmanian Report. The other agencies all concluded that divorce should automatically "revoke"[14] certain provisions of a person's will. The provisions to be revoked fall into two broad categories:

1. provisions that make a gift to the former spouse; and

2. provisions appointing the former spouse as an executor or trustee, giving the spouse a power of appointment, or otherwise giving the former spouse some sort of role in the administration or disposition of the testator's estate.

For convenience, we will refer to such provisions as "spousal gifts", and "spousal appointments", respectively.

The selective revocation approach was adopted by the Uniform Law Conference of Canada ("ULCC") in 1978. At that time the ULCC added the following two subsections to section 17 of the Uniform Wills Act:

> (2) Where in a will
>
> (a) a devise or bequest of a beneficial interest in property is made to a spouse;
>
> (b) a spouse is appointed executor or trustee; or
>
> (c) a general or special power of appointment is conferred upon a spouse,
>
> and after the making of the will and before the death of the testator, the marriage of the testator is terminated by a decree

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13 Tasmanian Report at 14, 17.

14 Technically, there are circumstances where it could make a difference whether one says that a particular provision is **revoked**, or whether one says that the provision is applied as if the former spouse had predeceased the testator. We will come back to this point later in this report, but for the time being it will be convenient to speak in terms of revocation of the relevant provisions. The technical point is discussed below at pp 21-23.

> absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, then, unless a contrary intention appears in the will, the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.
>
> (3) In subsection (2) "spouse" includes the person purported or thought by the testator to be his spouse.[15]

In the rest of this report we refer to these two subsections collectively as the "**uniform section**".

Most jurisdictions in which a law reform agency recommended that divorce should revoke spousal gifts and spousal appointments have amended their succession legislation accordingly. British Columbia, Saskatchewan, Manitoba, Ontario and Prince Edward Island have all done so, as have New Zealand, England and most Australian states.[16]

In the United States, the effect of divorce on wills varies somewhat from state to state. Some states have never enacted a provision similar to section 18 of the Wills Act, 1837 (which prevents courts from finding a will to have been revoked on the basis of presumed intention). In some (but not all) of these states, courts have held that divorce combined with a property settlement is a change of circumstances that effects a complete or partial revocation of a will.[17] Other states have passed statutes that provide for partial or complete revocation of wills.[18]

In 1969 the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Bar Association adopted the Uniform

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15 ULCC Report at 35, 269-282. The Uniform Wills Act was originally adopted by the Conference of Commissioners on Uniformity of Legislation in Canada (as the ULCC was formerly called) in 1929.

16 The relevant Canadian enactments are identified in the "References and Abbreviations" section at the beginning of this report.

17 C.A. Mace, *Revocation of Will Provisions by Divorce* (1983) 48 Missouri L. Rev. 576 at 578, note 15.

18 *Ibid.*

Probate Code ("UPC"). Section 2-508 of the 1969 UPC provided that divorce revokes spousal gifts and spousal appointments unless the will expressly provides otherwise. The UPC provided for the revival of such provisions if the testator remarried the former spouse. The NCCUSL adopted a substantially revised version of Article II of the UPC in 1990.[19] The effect of divorce is now dealt with in UPC section 2-804. The most significant change from the former section 2-508 is that the provision now applies to a wide range of revocable dispositions or appointments, not just to wills. Divorce would also sever joint tenancies and revoke dispositions in favour of the former spouses relatives (i.e., the testator's former "in-laws").

C. ISSUES AND RECOMMENDATIONS

We have concluded that the Wills Act should be amended so that divorce automatically revokes certain provisions of an existing will, unless the testator has expressed a contrary intention. In reaching this conclusion, like other law reform agencies before us, we have considered a number of issues, which are summarized briefly below.

1. Should divorce have any automatic effect on a will, or should the law continue to be that a will is unaffected by divorce?

2. Should divorce effect a complete revocation of an existing will, or should it only affect certain provisions of such a will?

3. If divorce only affects certain provisions of a will, what provisions should it affect, and exactly how should it affect them?

4. Should the automatic effect of divorce on a will give way to a contrary intention, and how must such an intention be expressed in order to be effective?

5. Should any events falling short of divorce (such as separation or a division of property) have any effect on a will?

6. To what extent, if at all, should the amendments to the Wills Act have retrospective effect?

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[19] Waggoner, *supra* note 4.

1. Should Divorce have any Effect on an Existing Will?

All law reform agencies that have considered the effect of divorce on wills in the last 20 years or so have recommended that divorce should (at least) revoke spousal gifts. However, their reports acknowledge that there are reasonable arguments that divorce should have no effect on an existing will. In at least one instance, a minority of the members of the law reform agency thought that divorce should not affect an existing will,[20] a view that is shared by a minority of the members of our own Board. Before summarizing the main points that have been made on either side of the issue, we should observe that the dispute seems to be over the best means of achieving an agreed end. That is, everyone seems to agree that the primary objective of any rule should be to make it as likely as possible that divorced testators' estates will be distributed in accordance with their final testamentary intentions.[21] But views diverge on whether this objective is better served by a "divorce has no effect" rule or a "divorce revokes spousal gifts" rule.

a. Argument that divorce should not affect a will

One may concede that most persons who get divorced probably do not want to leave any property to their former spouse without conceding that divorce should automatically revoke spousal gifts in an existing will. Whenever a person makes a will there is a chance that circumstances will change so that the provisions of the will no longer reflect the testator's intentions. When this occurs, there is a simple and inexpensive solution; the testator can revise the will or make a new will to take account of the new circumstances. Divorce is just one of many possible changes in circumstances that might lead an observer to conclude that the provisions of an old will probably do not reflect a deceased testator's final testamentary intentions, and that the failure to change the will must have been due to an

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20 English Committee Report, at 21-22.

21 Of course, there are situations where considerations of public policy may require that testators' property be distributed in a manner that is known to be contrary to the testator's duly expressed intentions. The Family Relief Act, which allows a court to intervene in favour of family members for whom a testator is not considered to have made adequate provision, illustrates this point. But in this report we are concerned with the problem of discovering what a divorced testator's final testamentary intentions were, not with overriding those intentions in the interests of public policy.

oversight. But the long-established and sensible policy of the law is to give effect only to testators' duly expressed testamentary intentions and to refrain from speculating about the testator's unexpressed intentions. Why should divorce affect a will when other significant changes in circumstances do not? Indeed, people are less likely to overlook the need to change a will upon divorce (assuming they want to do so) than to overlook the need to change their will to take account of other changes of circumstances. This is because most people obtain legal advice during the process of getting a divorce, and lawyers should advise their clients of the need to reconsider their wills.

A significant proportion of people who get divorced may deliberately decide not to change an existing will that leaves property to their former spouse:

> [M]y impression is that most people make a "conscious" decision to not make a new Will, [or] revoke or change their pre-divorce Will. When there are young children, it still makes a great deal of sense to leave the testator's estate to the ex-spouse who then, presumably would be caring for the children. In addition there are a surprising number of people who really have no one else to whom they would rather leave their estate.[22]

Although many people who get divorced will have no desire to leave any portion of their estate to their former spouse, they can easily change their existing will to make sure that does not happen.

b. Argument that divorce should revoke spousal gifts

In general, it is reasonable to assume that if a duly executed will has not been expressly changed or revoked by the testator, the will represents the best available evidence of the testator's final testamentary intentions. However, this is a dubious assumption if applied after a divorce to a spousal gift in a will made during marriage. It is dubious because the fact is that most people who get divorced do not want to leave any of their estate to their former spouse.

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[22] Letter from Mr. Douglas G. Moe dated March 1, 1994. Ms. Angela C. Kerr made a similar point in a letter dated March 7, 1994.

It is true that testators can always change or revoke their wills, and, ideally, all testators who get divorced would make their intentions clear by making a new will. However, it is unrealistic to conclude that a divorced testator's failure to change or revoke a will that contains a spousal gift reflects the testator's actual intentions. It is more likely that the failure to change the will was inadvertent. Perhaps the testator thought that spousal gifts in a will are automatically revoked by divorce,[23] or perhaps the testator simply forgot about the will and its dispositions in the turbulent period surrounding the divorce. Admittedly, if the testator receives legal advice in the course of the divorce, as most testators do, the lawyer should alert the testator to the need to reconsider the provisions of any will made during the marriage. But not every person receives legal advice during the course of a divorce and even where they do there can be no guarantee that their lawyer will raise this point. Moreover, the combination of the press of events, financial considerations, inertia and procrastination may lead to changes to the will being put on the back burner:

> . . . the majority of clients who obtain separation and divorces would likely intend not to benefit their spouse under any will. But as in most divorces, cost is a major factor. Although the cost of preparing a new will for a client is not significant, taken together with all of the other costs, wills are often "left for a later time" when the client is in a better financial position. Usually that later time never happens until it's too late.[24]

Another possibility is that testators might take steps that they think are effective to cut their spouse out of their will, but which are not in fact effective to do so. One of the lawyers who responded to our issues paper reported that a client had just been in to make a new will, more than ten years after getting divorced. The client had taken it upon himself to cross out references to his former wife in his old will. He probably would have been surprised to learn that if he had been run over by a bus on his way to his lawyer's office, the spousal gifts in the old will would have remained in force, even though he had crossed them out.

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[23] Someone who was unfamiliar with the law of wills might be excused for thinking that a gift to "my wife, Wilma", or "my husband, Harold", automatically lapses if they are no longer married to Wilma or Harold.

[24] Letter from Lonny L. Balbi dated March 1, 1994.

c. Points of contention

There seem to be two main points of contention between those who favour divorce having no effect on an existing will and those who favour divorce revoking spousal gifts. The first concerns the likelihood that a person who gets divorced will want to leave any property to their former spouse. Those who favour automatic revocation of gifts to a former spouse contend that divorced persons rarely have any desire to leave property to their former spouse; those who favour the existing approach argue that this happens fairly frequently. The second point of contention is over how likely it is that people whose pre-divorce will no longer reflects their intentions will inadvertently fail to change their will. Supporters of automatic revocation argue that the probability of this occurring is fairly high; those who are against automatic revocation argue that the probability is low.

d. Who bears the onus of action?

Ideally, when testators whose wills make a spousal gift get divorced, they will take steps that make it absolutely clear whether they intend to cut their former spouse out of the will or whether they intend to confirm the spousal gift, notwithstanding the divorce. It is uncontroversial that the legal rules should give effect to the clearly expressed intentions of the testator, whether the intention be to cut the former spouse out of, or to leave the former spouse in, the will. But it is necessary to have a rule that says what happens where testators do not clearly express their intentions about the status of a spousal gift in a pre-divorce will. This "default rule" must specify one of two outcomes: either the spousal gift is left in place or it is revoked by the divorce. Another way of putting it is that the default rule must place the **onus of action** — the burden of taking specific steps to make their intentions clear — on one group of testators or the other: those who would cut their former spouse out of the will ("**cut-outs**"), or those who would leave the spousal gift in the will, notwithstanding the divorce ("**leave-ins**"). The present default rule that spousal gifts survive divorce unless the testator expressly provides otherwise puts the onus of action on cut-outs; the opposite rule would put the onus on leave-ins.

We should emphasize that we do not think that the question of whether to put the onus of action on cut-outs or leave-ins raises profound philosophical or moral issues, or that putting the onus on leave-ins is to

substitute the state's judgment for that of the individual testator. What we are looking for is a default rule that will make it as likely as possible that divorced testators' estates will be distributed in accordance with their final testamentary intentions. The issue is whether this is more likely to be achieved by putting the onus of actions on cut-outs or leave-ins.

It would not really matter which group of testators had the onus of action if one could safely assume that all members of this group would make their intentions clear. Deciding upon the default rule would simply be a question of deciding which group of testators must bear the minor inconvenience of expressing their intentions. Everyone's estates would end up being distributed in accordance with their final testamentary intentions. The issue is more difficult if it is anticipated that a significant number of testators who have the onus of action will fail to express their intentions, because the estates of such testators will not end up being distributed in accordance with their final testamentary intentions.

How likely is it that a testator who bears the onus of action will fail to take whatever steps are required to discharge this onus? As noted earlier, different views have been expressed about this. One view is that testators who want to cut their former spouse out of their will are unlikely to inadvertently fail to do so, but other commentators have expressed the opposite view. For our part, we are persuaded that a significant minority of whichever group of testators has the onus of action will fail — through inadvertence, procrastination, or whatever — to express their intentions. We also assume that the proportion of cut-outs who would fail to express their intentions would be about the same as the proportion of leave-ins who would fail to do so. That is, if 25% of cut-outs would fail to express their intentions if they had the onus of action, we assume that 25% of leave-ins would also fail to express their intentions if they had the onus. We make this assumption because we cannot think of any reason why members of one group would be any more or any less likely to fail to express their intentions than members of the other group.

Having made the foregoing assumptions, it seems appropriate to put the onus of action on whichever group of testators — cut-outs or leave-ins — appears to be smaller. Assuming that the members of either group are equally likely to fail to discharge the onus of action, putting it on the smaller group will minimize the frequency with which the default result is

contrary to testators' actual testamentary intentions.[25] This brings us to the issue of whether more testators would choose to cut their former spouse out of their will upon getting divorced than would choose to leave a spousal gift in the will.

Most of the lawyers who responded to our issues paper thought that the majority of divorced testators would intend to cut their former spouse out of the will. This also appears to be the view of most members of the law reform agencies that have considered the effect of divorce on wills. On the other hand, as mentioned earlier, some of our respondents thought that a substantial proportion of divorced testators would decide not to revoke gifts in favour of their former spouse. Respondents in the latter category suggested that there is a tendency to underestimate the number of divorced persons who want to make some provision for their former spouse in a will.

To draw conclusions about the relative proportions of leave-ins and cut-outs, it would be useful to have direct evidence of the proportion of testators who choose to leave property to a former spouse in their will. Fortunately, we have data that shed some light on this issue. In the summer of 1993 the Institute examined close to one thousand Surrogate Court files in the Judicial Districts of Edmonton, Calgary and Vegreville in connection with another project.[26] Some of the data obtained through this research are relevant to the issue under consideration here.

97 of the files we examined related to persons who were divorced at the time of death.[27] Of these 97 persons, 77 died testate (that is, with a

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25 For example, suppose we knew that 80% of testators are leave-ins, that 20% are cut-outs and that 25% of testators (in either category) will fail to express their intentions if they have the onus of action. Now suppose that we picked a group of 100 deceased, divorced testators at random. If the onus of action is placed on leave-ins, one could predict that 25% of the 80 leave-ins would have failed to express their intentions, so that the gift to their spouse would be revoked even though they intended it to survive the divorce. Therefore, the rule would be expected to produce the wrong result in 20 cases out of 100. Since only 20% of divorce testators are cut-outs, putting the onus of action on that group would produce the wrong result in only 5 cases out of 100.

26 The researchers examined all files opened in each judicial district during a certain period, so our sample would seem to be reasonably representative of all estates for which files are opened in the surrogate court.

27 This does not include persons who remarried after their (last) divorce. The Wills Act's "marriage revokes previous wills" rule ensures that any will that survived a person's divorce would be revoked by that person's subsequent remarriage.

valid will). Five of the 77 divorced testators left property to their former spouse in their will. Two of these five wills were made after the divorce and two were made before; the timing of the fifth will in relation to the divorce could not be determined from the information in the file. The two testators who left property to their former spouse in a post-divorce will obviously intended to leave property to their former spouse notwithstanding the divorce. Nothing in the files indicates whether the other three testators actually intended to leave property to their former spouse, or whether they inadvertently failed to change a pre-divorce will. However, it is clear that at least 72 of 77 divorced testators in the sample chose not to leave any property to their former spouse. This supports the view that the great majority of divorced persons ultimately choose not to leave property to their former spouse. In other words, cut-outs greatly outnumber leave-ins.

Our conclusion is that it is appropriate to put the onus of action on leave-ins rather than cut-outs, because the former constitute a much smaller group. If members of the two groups are equally likely to fail to express their intentions, placing the onus of action on leave-ins will in the long run produce fewer "wrong outcomes" than the rule placing the onus of action on cut-outs. For this reason, we believe that the case has been made out that divorce should automatically revoke dispositions in an existing will in favour of the former spouse unless a contrary intention is expressed by the testator.[28]

2. Complete or Partial Revocation

We mentioned earlier that the Law Reform Commission of Tasmania recommended that divorce should revoke any will made during marriage.[29]

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[28] The survey results also shed light on the question of how frequently the problem we are dealing with arises. Out of just under 1000 estate files we examined, we found two or three cases where a pre-divorce will left property to a former spouse. According to the Alberta Attorney General, *Annual Report 1991-1992*, there were just under 6000 applications for "probate administration" (which we take to mean probate or administration) in the province during the year covered by the report. This suggests that in a given year in Alberta, there might be somewhere in the neighbourhood of a dozen or a couple of dozen applications for probate or administration where a pre-divorce wills leaves property to a former spouse.

[29] This recommendation was acted upon by the Tasmanian legislature in the Wills Amendment Act 1985.

One of our respondents favoured this approach,[30] and other law reform agencies noted that there was some support for this approach amongst those whom they consulted. An analogy has been made to marriage, which in most jurisdictions revokes a will in its entirety. It has been argued that the effect of divorce on a will should be the same as the effect of marriage because they represent equally profound changes in a testator's circumstances. In either case, a will made before the event is unlikely to have contemplated, and is likely to be entirely inappropriate for, the testator's new circumstances.

Most of our respondents and most law reform agencies believe that revoking the entire will upon divorce goes beyond what is necessary to address the changes in circumstances brought on by divorce. We agree. It is true that both marriage and divorce represent significant changes in a person's circumstances, but the analogy does not extend much beyond that. The argument for automatic revocation of the entire will on marriage starts from the premise that people who get married generally want — and perhaps have a moral duty — to provide for their new spouse and for any children of the marriage in the event of their own death. Furthermore, unless it was actually made in contemplation of the marriage, a will made before marriage is unlikely to provide for the new spouse or any children of the marriage. If a newly married person who has previously made a will neglects to make a new will, the most practical solution may be to revoke the pre-marriage will, which (presumably) does not provide for the testator's new family. Once the pre-marriage will is revoked, the intestate succession legislation will provide for the deceased's family. It would be difficult[31] to leave the old will basically intact but modify it by legislative fiat so that it makes provision for the new spouse and family.

Unlike marriage, divorce does not create a presumption that there is a new person in the divorced person's life who has probably been left out of a pre-divorce will. More likely, the pre-divorce will benefits a person, the former spouse, whom the testator no longer wishes to benefit. This problem can be addressed without revoking the whole will by selectively revoking provisions that seem to assume the continuing existence of the marriage

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30 Letter from Mr. Alex K.H. Rose dated March 3, 1994.

31 But not impossible: see UPC section 2-301.

relationship. Of course, this raises the question of how such provisions are to be identified.

3. Provisions Affected by Divorce

a. Practical considerations

There are a couple of different ways by which the Wills Act might attempt to implement the principle that divorce should automatically revoke provisions of a will that seem to assume the continuation of the marriage relationship. One approach would be to imbed the principle in the act and then rely upon the courts to apply the principle on a case by case basis. A provision based on this approach might look something like this:

> If the testator's will was made while the testator was married to a person from whom the testator is divorced at the time of death, any provision of the will that appears to the court to be premised on the continuation of the marriage relationship is deemed to be revoked.

A provision along these lines would give the courts considerable flexibility in dealing with pre-divorce wills. It might well be more likely than a more rigid legislative provision to give effect to the divorced testator's final intentions in any given case. But it would also promote litigation. Although it is not always clear exactly how a deceased testator wished to distribute their estate, it is clear that very few testators want the bulk of their estate to be distributed to lawyers for the purpose of conducting litigation regarding their wills. Since that would be the likely result of a provision such as the one set out above, we think the Wills Act should instead make it clear what provisions of an existing will are affected by divorce.

The next issue is how clever one should attempt to be in identifying provisions of a will that are affected by divorce. To what extent should the legislation be designed to accommodate unusual or complicated provisions and circumstances? On this point, we agree with what was said by the first Commonwealth law reform agency to consider the effect of divorce on wills:

> 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.[32]

The objective of the default rule should be to achieve a reasonable result in most cases where testators have neglected to make their intentions absolutely clear. The objective should not be to create a default legislative rule that is a perfect substitute for divorced testators' making their intentions clear; such an objective is simply not achievable.

It is easy to imagine situations where a simple default rule such as the uniform section will not account for the subtleties of an unusually complicated will. However, in framing a default rule, the likelihood of such situations arising should be taken into account. In this regard, testators who go to the trouble and expense of getting a lawyer to draw up unusually complicated wills are more likely, as a group, to keep their wills up to date than are testators who execute simple wills with basic provisions. Thus, it seems much more likely that the default rule will have to deal with wills that say "my entire estate to my husband" than with wills that contain elaborate class gifts, contingent remainders and so on.[33]

b. Spousal gifts

Spousal gifts are the provisions of a pre-divorce will that are most obviously going to assume a continuing marriage relationship. Therefore, we believe that divorce should revoke spousal gifts.

c. Gifts to former spouses relatives

It is not uncommon for wills to contain a provision to the effect that if the testator's spouse predeceases the testator and the testator dies without any surviving "issue" (descendants), gifts that would otherwise have gone to the spouse or issue are instead divided between relatives of the testator and relatives of the deceased spouse (i.e. the testator's "in-laws"). Arguably, after a divorce most testators would have no more desire to leave property to

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[32] New Zealand Report at 9-10.

[33] In our survey of Surrogate Court files, as many as three wills would have been affected by the default rule. None of the three contained complicated provisions that would not be adequately addressed by a simple default rule along the lines of the uniform section.

their former in-laws than to their former spouse. As noted earlier, section 2-804 of the American UPC (as revised in 1990) revokes gifts to a former spouse's relatives. The relevant definition reads as follows:

> "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity [marriage] and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.[34]

There is something to be said for the approach taken by the UPC. A testamentary gift to a spouse's relatives may well be premised on the continuation of the marriage until the time of death. On the other hand, while divorce is pretty good direct evidence that you have had a falling out with your former spouse, it does not provide direct evidence that you have had a falling out with anyone else, including your spouse's relations.[35] Another consideration is one we have already mentioned in other contexts, that the default rule should be designed to deal with the generality of cases. We suspect that actual instances of unintended testamentary gifts to former in-laws would arise too rarely to justify the added complexity of a provision designed to revoke such gifts.

d. Spousal appointments

As noted previously, the uniform section says that divorce revokes the following sorts of spousal appointments in a will:

- appointment of the former spouse as executor or trustee;

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[34] Section 2-804(a)(5). The Comment on section 2-804 refers to several reported cases where the effect of deeming the former spouse to have predeceased the testator was to trigger a gift over to the testator's former in-laws.

[35] This point is made in the ULCC Report at 275. UPC section 2-804 seems to be directed primarily at gifts over to people who take **because** they are related to the former spouse. But it would also revoke gifts to anyone who **happens** to be related to the former spouse. Thus, section 2-804 would revoke a specific bequest "to my good friend, Sam", if Sam happens to be a cousin of the testator's former spouse.

- grant of a general or special power of appointment to the former spouse.[36]

In our issues paper we pointed out that in certain situations the argument for automatic revocation based on the testator's presumed intention might be weaker for such spousal appointments than it is for spousal gifts. The issues paper used the following hypothetical example to illustrate the point:

> Frank and Cindy, who have three young children, make identical wills that leave part of the testator's estate to the other spouse and direct that the balance of the estate is to be held on trust for their children. Each will appoints the other spouse and the XYZ Trust Company as the trustees of the children's trust. A couple of years later Frank and Cindy go through a relatively amicable divorce, and agree to joint custody of the children. Frank dies unexpectedly a year after the divorce without having remarried or revoked or altered his pre-divorce will.

In the circumstances, the divorce seems less likely to have changed Frank's view that Cindy would be a suitable trustee for their children's trust than to have changed his intention to leave her part of his estate. So in this case the argument for revoking Cindy's appointment as a trustee is not as strong as the argument for revoking the gift to her. We did not suggest in the issues paper, nor do we now suggest, that this is a sufficient reason not to extend automatic revocation to spousal appointments as well as spousal gifts. Instead, we suggested that situations such as this should be kept in mind in deciding what evidence courts should be able to consider in deciding whether the presumption of revocation has been rebutted in any given case. The possibility of such situations arising provides some support for allowing courts to consider external evidence of a testator's intentions in deciding whether any particular provision of a pre-divorce will should be revoked. We will return to this point in section C.4, below. For the time being, it suffices to say that we think the default rule should be that divorce revokes the spousal appointments identified in the uniform section.

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[36] This is consistent with the approach recommended by the various law reform agencies that have considered the issue.

e. Other provisions and circumstances?

Some law reform agencies have attempted to fine tune their recommendations so as to deal with certain situations that might not be addressed by a "no frills" provision such as the uniform section. Thus, recommendations have been crafted to deal with, amongst other complications, secret trusts,[37] and remarriage of the testator and former spouse to each other.[38] Again, however, we agree with the law reform agencies who argue that such situations arise too rarely to justify special provisions intended to deal with them.[39]

f. The precise effect of divorce

Up to this point we have been talking about divorce "revoking" certain provisions of a will, but we must now consider exactly what effect divorce should have on the provisions it affects. After describing the types of provisions to which it applies the uniform section describes the effect of divorce in the following terms:

> the devise, bequest, appointment or power is revoked and the will shall be construed as if the spouse had predeceased the testator.

This description of the effect of divorce is ambiguous in two respects. The first ambiguity arises because the statement that "the will shall be construed as if the spouse had predeceased the testator" suggests that the entire will is construed in this fashion. This might affect gifts to persons other than the former spouse. For example, suppose that a pre-divorce will makes a bequest to the testator's (former) spouse, and provides that the income from certain property is to be paid to X during the life of the testator's (former) spouse, and that the property is to be transferred to Y upon the spouse's death. Suppose that the former spouse survives the testator. The bequest to the former spouse triggers the operation of the uniform section. The spousal gift itself is revoked, but if the whole will is

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37 See e.g. Western Australian Report at 60-62.

38 UPC section 2-804(e).

39 See e.g. N.S.W. Report at 134-35 and English Commission Report at 5 (both regarding secret trusts) and the ULCC Report at 275-76 (remarriage).

construed as if the former spouse predeceased the testator, the gifts to X and Y would also be affected: the gift to Y would take effect immediately and X's life estate would vanish. This is not the result that was intended by the drafters of the uniform section. What was really intended was that the **relevant provisions**, not the whole will, would be construed as if the former spouse had predeceased the testator. This should be made clear in any amendment to Alberta's Wills Act.

The second ambiguity arises because the effect of revoking a spousal gift is not necessarily the same as construing the relevant provision as if the spouse had predeceased the testator.[40] We gave a couple of examples of this in our issues paper, which we will summarize here. The first example supposes a gift "to my husband, but if he predeceases me to the XYZ Charity". If this provision is applied as if the former husband had predeceased the testator, the property goes to the XYZ Charity immediately. If the gift is simply revoked, it is arguable that the alternative gift to the XYZ Charity fails as well, and the property would go to the residual beneficiary. The second example supposes that the testator's will directs that the income from certain property is to be paid to the testator's wife during her life, and that the property is to be transferred to the testator's nephew upon the wife's death. The residue of the estate is left to the XYZ charity. If the relevant provision is applied as if the former wife predeceased the testator, the property is transferred to the nephew as soon as the testator dies. But if the gift to the former spouse is treated as having been revoked, it seems that the will has not specifically disposed of the income from the property during the former wife's life, so the income forms part of the residue to which the XYZ charity is entitled. The nephew would have to wait until the death of the former wife to get the property.

Most law reform agencies have favoured the approach of applying the relevant provision as if the former spouse had predeceased the testator, rather than saying that the provision is revoked. This approach creates fewer uncertainties and minimizes the effect of the statutory intervention on gifts to persons other than the former spouse. The report prepared for the ULCC considered this point and favoured the "as if the spouse had predeceased the testator" approach over the "revocation" approach.[41]

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40 This point is made in the B.C. Revocation Report at 70.

41 ULCC Report at 272.

Therefore, when the uniform section says that the spousal gift or appointment is revoked and the will is construed as if the spouse had predeceased the testator, the drafters almost certainly intended that the only effect of "revocation" would be that the relevant provisions are applied as if the spouse had predeceased the testator. To avoid any possible confusion, we think that any amendment to the Alberta act should avoid any reference to revocation, and simply say that the relevant provisions are applied as if the former spouse had predeceased the testator. For convenience, however, we will continue to refer to "revocation" of spousal gifts and spousal appointments except where it is important to emphasize the distinction between revoking a provision and applying the provision as if the former spouse had predeceased the testator.

4. Exceptions to the Default Rule

a. Contrary intention

We consider it to be uncontroversial that the default "revocation" rule should not apply where the testator has clearly indicated that a spousal gift or spousal appointment in a pre-divorce will should be unaffected by the divorce. The more difficult issue is whether such a contrary intention must appear in the testamentary instrument itself, or whether it should be possible for the court to consider external evidence of a contrary intention, where none appears from the will itself. The uniform section's default rule applies "unless a contrary intention appears in the will". This is the usual approach, but the New South Wales Report recommended that spousal gifts and spousal appointments not be revoked if the court is satisfied by any evidence, including extrinsic evidence, that the testator did not at the time of termination of the marriage intend to revoke the gift or appointment.[42]

Our issues paper set out and invited comment on the two different approaches to ascertaining a contrary intention on the part of the testator. We suggested that in any given case, allowing the court to consider extrinsic evidence of the testator's intention would be more likely to produce a result that reflects the testator's actual intentions than would a rule that restricts the court to considering whether the will itself indicates a contrary

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[42] N.S.W. Report at 133. This recommendation is implemented by section 15A of the Wills Probate and Administration Act, 1898. The New South Wales approach was considered and rejected in the Western Australian Report, at 53-56.

intention. We also suggested that allowing the court to consider extrinsic evidence of intention would be a useful method of dealing with certain spousal appointments. We have suggested that many testators might be less inclined to revoke certain spousal appointments — such as an appointment of their former spouse as a trustee of a trust for their children — than to revoke spousal gifts. A court that was allowed to consider extrinsic evidence of a testator's intention might conclude that a testator probably intended a spousal appointment to survive the divorce, even though the testator probably did not intend a spousal gift to survive. In the issues paper we suggested that the main drawback of allowing the court to consider extrinsic evidence of a contrary intention is that this would make the outcome of any given case less predictable and, therefore, would make litigation more likely.

Most commentators on the issues paper who addressed this point favoured the approach of only allowing the default revocation rule to be overcome by an intention expressed in the will. Their responses stressed that allowing the court to consider extrinsic evidence of the testator's intention would create uncertainty and promote litigation. However, there was some support for allowing the court to consider extrinsic evidence of the testator's intentions because of the greater flexibility of this approach. One commentator who thought that the courts should be able to consider extrinsic evidence of the testator's intention acknowledged that this approach could make litigation more likely. He suggested that this might be addressed by safeguards such as "requiring corroboration of the spouse's claim, and giving the power to the court to award costs against the unsuccessful claimant, perhaps on a solicitor and client basis to discourage frivolous claims".[43]

We continue to believe that the "extrinsic evidence" approach has something to be said for it. If our objective were to devise a method that would give the court the best theoretical chance of giving effect to the testator's final testamentary intentions in every case, we would recommend this approach. It can hardly be doubted that a court that may consider all relevant evidence of a testator's intentions is more likely to arrive at the correct conclusion regarding those intentions than a court that is prevented by artificial rules from considering all the relevant evidence. On the other hand, we suspect that in most cases, when all was said and done the same

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[43] Letter from Mr. Phil Renaud dated March 4, 1994.

conclusion would be reached whether or not the court could consider extrinsic evidence of the testator's intention. Moreover, allowing the courts to consider extrinsic evidence of divorced testators' intention would make the outcome of any given case less predictable and would, therefore, make litigation more likely.

It does not hurt to reiterate the point we made earlier, that very few testators want a big chunk of their estate to be distributed to lawyers for the purpose of conducting litigating regarding their wills. Over the course of time, allowing the courts to consider extrinsic evidence of divorced testators' intentions regarding spousal gifts and appointments would occasionally produce better results than would be produced by the more rigid rule. However, we suspect that the most consistent effect of the more flexible rule would be to transfer a larger proportion of divorced testators' wealth to lawyers than would be the case if the default revocation rule could only be overcome by a contrary intention that appears in the will. Therefore, we agree with the majority of law reform agencies and legislators in other jurisdictions who have concluded that the contrary intention must appear from the will itself.

b. Mutual or contractual wills

Our issues paper did not discuss whether special provision needs to be made for mutual wills or contracts to make a will in favour of one's spouse. A few law reform agencies have discussed this issue, and it was also raised by one of the commentators on the issues paper.[44] We think that no special provision needs to be made for mutual wills, but that it would be prudent to make it clear that the default revocation rule does not interfere with the rights of a former spouse under a contract with the testator.

A mutual will arises when two people (typically a husband and wife) enter into an agreement (express or implied) to make wills in which each leaves property to the other and under which it is agreed that the survivor will dispose of their estate in a particular way. Either party can revoke the agreement by notifying the other party of their intention to do so. Indeed, either party can revoke or change their will without notifying the other; however, if one of the parties dies **and** the survivor accepts benefits under

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44 *Ibid.*

the deceased's will, the survivor is then bound to dispose of their estate in accordance with the agreement. The proposed default rule would not directly affect any of these characteristics of mutual wills. What it would do, however, is ensure that neither of the former spouses would take under the other's will (unless a contrary intention was expressed in the will).

Two people can enter into a binding contract under which one of them agrees to make a will that leaves certain property to the other. If the party who has agreed to make the will fails to do so (or does so and later replaces the complying will with a non-complying will) the other party would have a claim for damages or specific performance against the estate based on the testator's breach of contract.[45] As pointed out by one of our commentators, spouses could enter into a separation agreement that requires one of them to leave certain property to the other, intending the agreement to remain in effect after the divorce.[46] Suppose that a husband (H) has agreed as part of a divorce settlement to leave certain property to his wife (W) in his will. H makes a will to that effect prior to the divorce, but there is nothing in the will itself that indicates that the spousal gift is intended to survive the divorce. In the absence of such an indication in the will, the proposed default rule would require the provision containing the spousal gift to be applied as if W had predeceased H, which is obviously not consistent with the terms of the agreement. Since the disposition brought about by the default rule is inconsistent with the terms of the settlement agreement, W should have a contractual remedy against H's estate for damages or specific performance of the agreement.

We think this result would follow even if the amended Wills Act were silent on the point. However, out of an abundance of caution we suggest that the amended act should expressly state that the default rule does not prevent the former spouse from relying upon or enforcing the terms of any agreement to which the testator is a party. This would negate any possible argument that the default rule is intended to override the provisions of such an agreement.

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[45] This is illustrated by *Phillips v. Spooner*, [1981] 1 W.W.R. 79 (Sask. C.A.). The point regarding specific performance comes out more clearly in the decision at first instance: [1979] W.W.R. 473 at 479.

[46] Letter from Phil Renaud dated March 4, 1994, and see *Phillips v. Spooner*, *ibid.*

5. What Events Connected with Marriage Breakdown Should Affect a Will?

We have been referring to "divorce" as the event that should have a certain effect on a will made before the divorce. We have been using this as a shorthand way of referring to any event that officially terminates a marriage. The triggering events are described by the uniform section like this:

> . . . the marriage of the testator is terminated by a decree absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party . . .

Most law reform agencies and legislatures seem to have concluded that nothing short of final termination of marriage should affect an existing will.[47] On the other hand, section 16 of British Columbia's Wills Act gives judicial separation the same effect as divorce. In a report issued after section 16 was enacted, the Law Reform Commission of British Columbia recommended that revocation should be triggered where "a property division has been made by the testator in favour of the other spouse, or the other spouse becomes entitled to an interest in family assets under the Family Relations Act".[48] This recommendation has not been acted upon by the British Columbia legislature.

Our issues paper invited comment on whether any event falling short of final termination of marriage should trigger revocation of spousal gifts and appointments. None of our respondents expressed support for such an approach. We agree that formal termination of a marriage should be the only event that triggers revocation of spousal gifts or appointments. The further back from final termination one moves the triggering event, the less certain one can be that revocation of spousal gifts and appoints will be in accordance with the testator's actual intentions. Moreover, if something other than a precisely defined, formal event such as a decree absolute of

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[47] We say "seem" to have concluded because most reports do not even discuss the possibility that events falling short of official termination of the marriage might have any effect on the will. The Ontario Law Reform Commission did address the issue, and concluded that only final dissolution of a marriage should trigger the default rule: Ontario Report at 10.

[48] B.C. Succession Report at 111.

divorce formal could serve as a trigger, it might not always be readily apparent whether the triggering event has actually occurred.

6. Should the Amendment Operate Retrospectively?

Some jurisdictions that have amended their wills legislation in the manner we are suggesting here have not made it clear to what extent, if at all, the new default rule operates retrospectively. An amendment that was purely prospective would only affect wills made after the amendment came into force. A fully retrospective amendment, for which we think there is no justification, would apply to wills even if the testator had died before the amendment came into force. The real question is whether the new divorce provision of the Wills Act should apply in either or both of the following situations:

1. the will was made before the amendment came into force, but the divorce occurs afterwards;

2. the divorce occurred before the amendment came into force but the testator dies afterwards.

For the reasons set out below, we believe the new divorce provision should apply in the first situation, but not the second.

We think the amendment should apply to wills that have been made before, if the testator gets divorced after, the amendment comes into effect. The date of the divorce seems more relevant than the date the will is made because the amendment deals with the effect of divorce on existing wills, not with the making of wills. It is at the time of getting divorced that a testator is likely to receive legal advice about and consider the effect of divorce on an existing will. Testators who are about to get divorced and who know that divorce revokes spousal gifts and appointments in an existing will can take appropriate steps to preserve such gifts if they wish to do so.[49]

The more difficult question is whether the amendment should apply where the divorce occurs before, but the testator dies after, the amendment

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[49] The Western Australian Report at 71 makes essentially the same argument.

comes into effect. The Ontario Law Reform Commission argued that the new provision should apply in such situations:

> We consider that the reforms we have proposed in this Report are so desirable that we would recommend that they apply to all wills of persons dying after any legislation implementing the reforms comes into force. We take [this] position . . . for a number of reasons. Firstly, this is consistent with the fundamental principle . . . that the law in effect at the date of death of the testator should govern. Secondly, if we have made out a case for reforming the law and if our basic premise, that testators should be deemed to prefer the invalidation rather than the retention of testamentary benefits conferred upon a former spouse, is sound, then there is no convincing policy reasons for not making the statute retrospective in its operation. . . . the amending statute should contain an express provision clarifying the legislative intention on this point. To make the legislation prospective only would be, in effect, to postpone reform for a generation or more, and there are no justifiable grounds for doing so.[50]

As a matter of fact, Ontario's amending statute did not contain the express provision recommended by the Commission. Nevertheless, the relevant provision has been held to apply to a will where the testator was divorced before the provision came into force.[51]

The Ontario Report argued that there was no convincing policy reason not to make the amendment fully retrospective. The Western Australian Report, on the other hand, concluded that the new provision should only apply where divorce occurs after the provision comes into force.[52] In our issues paper we observed that there may well be a

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50 Ontario Report at 10.

51 *Page Estate v. Sachs* (1990), 72 O.R. (2d) 409. But the opposite conclusion was reached by the British Columbia Court of Appeal regarding that province's legislation: *Re Matejka* (1984), 8 D.L.R. (4th) 481.

52 Western Australian Report at 68-71. The Report notes that both the Queensland and New South Wales Commissions favoured the approach recommended by the Ontario Commission. The Commission's recommendation was followed in Queensland but not in New South Wales: the latter's "divorce" provision applies only where the divorce occurs after the provision came into force.

substantial number of divorced persons in Alberta who have intentionally left their pre-divorce wills unrevoked and unaltered. Some of these persons might not learn of the retrospective change in the law and therefore would not take the necessary steps to preserve the intended effect of their will. We noted that this problem might be reduced by ensuring that the new provision of the Wills Act is well publicized when it is enacted.

One of the commentators on the issues paper thought that the new provision should be fully retrospective, because there must be very few divorced testators in Alberta who have intentionally left spousal gifts or appointments in their wills.[53] But other commentators who addressed this issue thought that the new provision should apply only where the divorce occurs after the provision comes into force. One of them made the following point:

> I have given advice to previous divorce clients that their Wills are NOT revoked by divorce, [and] I am certain that many other lawyers have too! If these people left their Wills "as is", intending to benefit their former spouses, why should their Wills be "revoked" now by operation of law?[54]

We agree with the commentators who argue that the new provision should only apply where the divorce occurs after the provision comes into force. It is true that this means that people who were divorced before the new provision comes into effect and who accidentally failed to change their will would not be assisted by the amendment. But we think this result is preferable to the alternative of retroactively upsetting the wills of people who, relying on the law as it was at the time of their divorce, decided not to revoke a spousal gift or appointment in their will.

7. Recommendations

We have already indicated that we think the Wills Act should be amended by enacting, with minor technical variations, the uniform section adopted by the Uniform Law Conference of Canada. The following are our specific recommendations.

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53 Letter from Douglas A. Ast dated February 16, 1994.

54 Letter from Angela C. Kerr dated March 7, 1994.

RECOMMENDATION 1 **Effect of divorce on an existing will**

Where, after the making of a testator's will and before the testator's death, the marriage of the testator is formally terminated, any provision of the will that

(a) gives a beneficial interest in property to the former spouse,

(b) appoints the former spouse as executor or trustee, or

(c) gives the former spouse a general or special power of appointment

should be construed as if the former spouse had predeceased the testator, unless it appears from the will that the testator intended the provision to be construed in the same manner that it would have been if the marriage had not been terminated.

RECOMMENDATION 2 **Amend Wills Act**

Recommendation 1 should be implemented by adding a new provision ("the new section") to the Wills Act based on section 17(2),(3) of the Uniform Wills Act.

RECOMMENDATION 3 **Contractual rights not prejudiced**

The new section should state that it is not to be construed so as to prejudice any rights that the testator's former spouse would otherwise have under a contract with the testator.

RECOMMENDATION 4 **Amendment not retroactive**

The new section should apply only where the testator's marriage is terminated after the section comes into force.

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November 1994

APPENDIX A

SUGGESTED WORDING FOR WILLS ACT AMENDMENT

The following is the suggested wording of a section that would be added to the Wills Act to implement the recommendations in this report. The wording is based on but is not identical to the wording of section 17(2),(3) of the Uniform Wills Act.

17.1 *Effect of divorce*

(1) Where after the making of a testator's will and before the testator's death the marriage of the testator is terminated by a decree absolute of divorce or his marriage is found to be void or declared a nullity by a court in a proceeding to which he is a party, any provision of the will that

(a) gives a beneficial interest in property to the former spouse,

(b) appoints the former spouse as executor or trustee, or

(c) gives the former spouse a general or special power of appointment

shall be construed as if the former spouse had predeceased the testator, unless it appears from the will that the testator intended the provision to be construed in the same manner that it would have been if the marriage had not been terminated.

(2) In subsection (1) "spouse" includes the person purported or thought by the testator to be his spouse.

(3) Subsection (1) shall be construed so as not to prejudice any rights that the testator's former spouse may have under a contract with the testator.

(4) Subsection (1) applies only where the testator's marriage is terminated after this section comes into force.

APPENDIX B

COMMENTATORS

The Institute thanks the following individuals, who provided written comments on the issues paper circulated in early 1994.

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