



# **The Law Commission**

(LAW COM. No. 217)

## **FAMILY LAW THE EFFECT OF DIVORCE ON WILLS**

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by Command of Her Majesty  
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The Law Commission was set up by Section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are:

The Honourable Mr Justice Brooke, *Chairman*  
Mr Trevor M. Aldridge, QC  
Mr Jack Beatson  
Mr Richard Buxton, QC  
Professor Brenda Hoggett, QC

The Secretary of the Law Commission is Mr Michael Collon and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

# THE LAW COMMISSION

## THE EFFECT OF DIVORCE ON WILLS

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# THE LAW COMMISSION

## Item 6 of the Fourth Programme: Family Law

### THE EFFECT OF DIVORCE ON WILLS

*To the Right Honourable the Lord Mackay of Clashfern,  
Lord High Chancellor of Great Britain*

#### PART I

#### INTRODUCTION

1.1 This Report is submitted in the context of Item 6 of our Fourth Programme<sup>1</sup> as part of the Commission's examination of the law of divorce.<sup>2</sup> A draft Bill to implement our recommendations is set out in Appendix A.

#### The Consultation Paper

1.2 In November 1992 we published an informal Consultation Paper<sup>3</sup> which examined the present state of the law relating to the effect of divorce on wills<sup>4</sup> and put forward, for discussion, several possible approaches for reform. Letters were also placed in the Gazette, the New Law Journal and the Solicitors Journal which outlined the current position and invited comment on the issues. We are grateful to all those who commented on the Consultation Paper and the published letters.<sup>5</sup>

#### The Subject Matter of this Report

1.3 The basic principle of the present law is that, unless there is a contrary intention apparent from the will, a former spouse should not benefit from a will made before the marriage was dissolved or annulled, but the will is not affected in any other way. It is not the object of this project to question that basic principle and the great majority of our respondents agreed with this.<sup>6</sup> The question is, however, whether the basic principle is better provided for by a rule that gifts to the former spouse should lapse or by a provision deeming the former spouse to have pre-deceased the testator. The current law provides that any devise or bequest to the former spouse shall lapse.<sup>7</sup>

1.4 In Scotland, divorce currently has no automatic effect upon a will. The Scottish Law Commission have recently considered this.<sup>8</sup> They recommend that the testator's divorce or annulment of marriage should have the effect of revoking any testamentary provision made by one spouse in favour of the other,<sup>9</sup> and any testamentary appointment of the former spouse as trustee, executor, curator, tutor or donee of a power of appointment is also revoked,<sup>10</sup> except in so far as a contrary intention is expressed by the testator. They propose that the effect of a revocation by divorce or annulment should be that the former spouse is deemed to have failed to survive the deceased spouse.<sup>11</sup>

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<sup>1</sup> Fourth Programme of Law Reform (1989), Law Com. No. 185, Item 6.

<sup>2</sup> See Family Law — The Ground for Divorce (1990), Law Com. No. 192.

<sup>3</sup> The Effect of Divorce on Wills: A Consultation Paper.

<sup>4</sup> Our recommendations equally apply where the marriage is annulled.

<sup>5</sup> A list is contained at Appendix C.

<sup>6</sup> A small number of respondents suggested that the time had now come for divorce to revoke the whole will. We have not pursued this further, partly because it was a minority view and partly because the main sufferers from such a rule would be the other beneficiaries, for example the couple's children, and there is no particular reason to believe that the testator would have wanted this.

<sup>7</sup> Before enactment of the Administration of Justice Act 1982 the annulment or dissolution of a marriage had no effect on the will of a former spouse.

<sup>8</sup> Report on Succession (1990), Scot. Law Com. No. 124.

<sup>9</sup> *Ibid.*, recommendation 17(a)(i).

<sup>10</sup> *Ibid.*, recommendation 17(a)(ii).

<sup>11</sup> *Ibid.*, recommendation 17(b). The Northern Ireland Law Working Group in their Final Report (HMSO 1991) have proposed that gifts to a former spouse shall lapse, but where a gift lapses and the will contains a gift to some other person in the event of the spouse's death, the spouse is deemed to have pre-deceased the testator.

1.5 The law relating to the effect of divorce on wills in England and Wales was last reviewed by the Law Reform Committee in their 22nd Report.<sup>12</sup> The Committee were unable to reach agreement on the question of whether divorce should have any effect on a will. A minority of the Committee considered that the then existing law, that divorce had no automatic effect upon a will, should remain.<sup>13</sup> However, a substantial majority of the Committee agreed that a will should survive the testator's divorce except in respect of gifts to the former spouse, in which case the will should be treated as if he or she had pre-deceased the testator. No one considered that the whole will should be revoked upon divorce.

1.6 The law was amended by the Administration of Justice Act 1982, although not exactly in accordance with the Committee's recommendations. An early draft of the Bill contained a provision that deemed the former spouse to have pre-deceased the testator for all purposes, rather than for the limited purpose envisaged by the Law Reform Committee. Problems were perceived with this approach and the draft was changed to the present provision, that gifts to the former spouse shall lapse, before the Bill was introduced on 11 February 1982. Unfortunately, this approach also leads to some problems, as we shall see in Part II.<sup>14</sup>

1.7 These problems should not cause difficulties in the case of wills which have recently been professionally drawn, since a legal adviser can explain the effect of the present law and make suitable provision for it.<sup>15</sup> However, we consider that it is important that there should be wide understanding of the rules applicable to this area of the law, bearing in mind the present incidence of divorce,<sup>16</sup> the number of "home-made" wills and the risk that even if a will is professionally drawn it will not be amended in the light of later developments.

1.8 The best solution would obviously be for all testators to execute a new will upon divorce. They would then be able to dispose of their estates exactly as they wished.<sup>17</sup> We understand that solicitors advising clients on divorce already suggest executing a new will and we would hope that this is routine practice. In addition, a formal warning currently appears on the Decree Absolute which advises the parties of the effect of their divorce upon any will they might have made. However, the warning follows the wording of the statute and thus may be difficult for lay people to understand.

### **The Scheme of the Report**

1.9 In the following three parts we examine briefly the existing law and its problems, outline some different approaches to reform and explain our recommendations in detail.

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<sup>12</sup> Twenty-second Report of the Law Reform Committee (on the making and revocation of wills) (1980), Cmnd. 7902.

<sup>13</sup> The minority thought it preferable that if a testator's true intentions were to fail it should be as a result of his own inaction rather than as a result of a rule of law of which he was ignorant.

<sup>14</sup> See para. 2.5 below.

<sup>15</sup> See Consultation Paper, fn. 7.

<sup>16</sup> In 1991, there were 159,000 decrees absolute of divorce or nullity in England and Wales: see (1993) 71 *Population Trends* 11.

<sup>17</sup> Of course, it would still be open to the former spouse to apply for discretionary provision under the Inheritance (Provision for Family and Dependents) Act 1975.

## PART II

### THE PRESENT LAW

#### The Wills Act 1837

2.1 The present law is contained in section 18A of the Wills Act 1837, which is set out in Appendix B. To give effect to the principle that, unless a contrary intention is shown, a former spouse should not benefit from a will made before divorce, section 18A(1) provides that any devise or bequest to the former spouse lapses. It also provides that the will takes effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted.<sup>1</sup> If a life interest lapses by virtue of section 18A(1), section 18A(3) provides that any interest in remainder is accelerated and takes immediate effect upon the death of the testator.

2.2 The Act only applies to a testator who, whether deliberately, through inadvertence or for any other reason, fails to revoke any provision in the will which either appoints the former spouse as executor or as executor and trustee or confers a benefit upon that spouse, and does not subsequently remarry. Should the testator remarry, the earlier will is automatically revoked,<sup>2</sup> unless the testator has expressly stated that the will is not to be revoked by his subsequent marriage and names his intended spouse.<sup>3</sup>

2.3 A former spouse normally has the right to apply for discretionary provision under the Inheritance (Provision for Family and Dependants) Act 1975 if the distribution of the testator's estate is not such as to make reasonable financial provision for the former spouse. This right is expressly preserved by section 18A(2) of the Wills Act 1837.

#### Defects of the Present Law

2.4 As we have already said,<sup>4</sup> it was not our intention to call into question the basic principle of the present law, and although a few of our respondents suggested that the time had come for divorce to revoke a will completely the vast majority agreed with our approach. We, along with the majority of those who responded to our Consultation Paper, consider that the principal defect lies in the present *lapse* provision and its failure to carry out the presumed intentions of the testator. There are two principal reasons for this.

2.5 First, the present lapse provision may defeat a gift over to a third party. The case of *Re Sinclair (deceased)*<sup>5</sup> illustrates this point. The testator left his whole estate to his wife. His will provided that "if my said wife should predecease me or fail to survive me for the period (of one month) then I give . . . the whole of my estate . . . unto the Imperial Cancer Research Fund". Four years after the date of the will the marriage was dissolved by divorce. The testator died without having altered his will. He was survived by his former spouse for more than one month. It was held by the Court of Appeal that the estate fell into intestacy. The lapse of the gift to the wife did not mean that the conditions on which the Imperial Cancer Research Fund took were fulfilled since section 18A(1) could not mean "lapse as if the former spouse had predeceased the testator". This case revealed a serious defect in the provisions. There can be little doubt that the result of the section in that case was not what the testator would have wished.

2.6 Secondly, if the former spouse is a member of a class of beneficiaries under the will, the consequences may not be what the testator intended. Where the former spouse is a member of a class of beneficiaries, such as where property is left to beneficiaries "jointly", his or her share would pass as on intestacy, since "lapse" cannot be equated with "pre-decease".<sup>6</sup>

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<sup>1</sup> Wills Act 1837, s. 18A was inserted by the Administration of Justice Act 1982, s. 18(2) and amended by the Family Law Act 1986, s. 53.

<sup>2</sup> Wills Act 1837, s.18, as substituted by the Administration of Justice Act 1982.

<sup>3</sup> *Ibid.*, s. 18(3)(4).

<sup>4</sup> See para. 1.3 above.

<sup>5</sup> [1985] Ch. 446.

<sup>6</sup> See *Re Sinclair* [1985] Ch. 446. If a pre-decease provision were adopted then the former spouse's share would pass to the other beneficiaries under the class gift.

2.7 In the Consultation Paper we canvassed whether the problems could best be met by a simple pre-decease provision deeming the former spouse to have died before the testator for all purposes or by a provision along the lines originally proposed by the Law Reform Committee, deeming the former spouse to have pre-deceased the testator but only for the purposes of gifts to or appointments of that spouse. The great majority of our respondents agreed with us that the latter approach was to be preferred.

2.8 In Part III we look at the proposed reforms in some detail. However, it is convenient briefly to summarise here those areas which we consider to be in need of reform. First, and perhaps most importantly, we consider that the present "lapse" rule should be replaced by a provision that the former spouse is deemed to have pre-deceased the testator in respect of any testamentary gifts passing to him or her. This is, of course, subject to any contrary intention which may appear in the will. The date of deemed death is obviously important and this is considered further below.<sup>7</sup>

2.9 Secondly, provision should be made for the revocation of testamentary appointments. This includes both appointments as executor or trustee made by the will and testamentary guardianship.<sup>8</sup> Currently, under sections 5 and 6 of the Children Act 1989, any parent with parental responsibility and any guardian can appoint an individual to act as guardian to their children under eighteen in the event of their death. A valid appointment must be made in writing, dated and signed by the person making it.<sup>9</sup> Thus, an appointment can be made either by will or otherwise so long as it complies with the formalities.

### **Powers of Appointment**

2.10 The Wills Act 1837 contains no express provision for the effect of divorce on the testamentary grant to the former spouse of a power of appointment or of the testamentary exercise of a power of appointment in favour of a former spouse.

2.11 In relation to the exercise of a power of appointment in favour of the former spouse, the words "devise or bequest"<sup>10</sup> have been held to include the exercise of a general power<sup>11</sup> but not a special power of appointment.<sup>12</sup> Thus, if the testator has exercised a general power in favour of a former spouse this will, at present, lapse, but the exercise of a special power will not and the former spouse will continue to benefit. This we consider to be satisfactory and likely to accord with the intention of the person who conferred the original power of appointment upon the testator.

2.12 It can, however, be argued that the grant to the former spouse of a power of appointment should be ineffective in order to achieve consistency with the revocation of testamentary appointments generally. A minority of our respondents argued that since the policy of the Act was to deprive a former spouse but no one else of a benefit under the will, the power of appointment should remain effective; it was also suggested that where the former spouse is the donee of a power in relation to beneficiaries who are children of the testator and former spouse, the power should remain. However, if testators want to include such sophisticated clauses they are most likely to have sought professional advice (it is extremely unlikely that a "home-made" will would include such a provision) and to be able to seek advice as to the effect of divorce upon such an appointment. Simplicity and clarity would suggest that all such appointments should be revoked as the Scottish Law Commission have recommended.<sup>13</sup>

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<sup>7</sup> See para. 3.9 below.

<sup>8</sup> See para. 3.15 below.

<sup>9</sup> Children Act 1989, s.5(5).

<sup>10</sup> Wills Act 1837, s.18A.

<sup>11</sup> *Eccles v. Cheyne* [1856] 2 K. & J. 676.

<sup>12</sup> *Holyland v. Lewin* [1884] 26 Ch. 266.

<sup>13</sup> Report on Succession (1990), Scot. Law Com. No. 124, recommendation 17(a).

## Secret Trusts

2.13 Under the present law any devise or bequest to a former spouse but subject to a secret trust in favour of a third party is caught by the lapse provisions to the prejudice of the intended beneficiary, whilst the former spouse may take the gift if he or she is the beneficiary of a secret trust. In our Consultation Paper we proposed that the court should have power to appoint a new trustee when the former spouse is named as legatee (where the will creates a fully secret trust) or trustee (where the will creates a half-secret trust) in the will so that the intended beneficiary is able to take the gift, and that in relation to gifts to him or her under a secret trust he or she should be deemed to have pre-deceased the testator.<sup>14</sup> Respondents were asked for their experience of the incidence of secret trusts and the majority considered them to be extremely rare.

2.14 There is clearly no demand for legislation on this particular point. Taking into account the infrequency of such trusts<sup>15</sup> and the problem that to legislate for this complex area may be at the expense of clarity and understanding of the more general provisions, we have decided that this area is best left alone, at least until a more general review of the law of secret trusts can take place. We therefore recommend no change.

## Other Issues

2.15 The Consultation Paper canvassed several other issues,<sup>16</sup> which although not strictly relevant to the effect of divorce on wills, were mentioned in order to decide whether, as part of any amending legislation, further reform was necessary. Once again, consultation revealed no demand for such reform.

2.16 One such situation is where a testator contracts to dispose of his property by will to the former spouse or promises to benefit the former spouse by will. If the general rule of revocation were to apply to such gifts then the former spouse would be left to seek his or her remedy under the ordinary law of contract. We consider that this is right and that the general law of revocation should apply to such gifts. For the same reason we consider that inclusion of a clause in the will to pay debts to or relieve liabilities of the former spouse should be revoked upon divorce. We also consider that such matters will normally be dealt with when disposing of the financial aspects of divorce proceedings. We therefore recommend no change.

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<sup>14</sup> Consultation Paper, paras. 3.4–3.8 and para. 6.1(5).

<sup>15</sup> Especially in this context, since it is thought that most secret trusts were traditionally set up to benefit the testator's mistress and children born outside marriage, and generally the former spouse would be ignorant of the existence of such a trust. It is perhaps even more unlikely that he or she would be the beneficiary of such a trust.

<sup>16</sup> Consultation Paper, paras. 5.1–5.4.

## PART III

### REFORM

3.1 There are a number of principles upon which the law might be based, although the underlying object must be to seek to do what the testator himself, or herself, might have wished. Therefore, in framing our recommendations for reform we have had this consideration principally in mind.

3.2 It is equally important that any new provisions should be certain, clear and simple both to understand and to operate. If the law is simple and easy to understand, the more likely it is that testators who want to leave their property to a former spouse, or to include complicated provisions which might be affected by the divorce, will execute a new will upon divorce.

3.3 In order to protect the former spouse from either deliberately or inadvertently being deprived of any benefit under the will it is important that the court has power to make provision under the Inheritance (Provision for Family and Dependents) Act 1975 to redistribute the estate so as to make reasonable provision for the maintenance of the former spouse.<sup>1</sup> Section 18A(2) of the Wills Act 1837 expressly states that the former spouse retains the right to apply under the 1975 Act. We therefore recommend no change.

3.4 Whatever solution is adopted it is important that the legislation provides for an effective contrary intention to be expressed by testators who wish to benefit their former spouse and we *recommend* accordingly.

#### Gifts to the Former Spouse

3.5 The problems set out in Part II above indicate that the present "lapse" rule with respect to gifts to the former spouse may bring about unintended results. Accordingly, consideration was given to replacing the lapse provision with a simple pre-decease provision. This would deem the former spouse to have pre-deceased the testator for *all* purposes.<sup>2</sup> The problems relating to gifts over, and the former spouse as a member of a class of beneficiaries would not then arise,<sup>3</sup> and neither would the former spouse be able to be the donee of a special power. However, such a provision could give rise to unintended consequences where the former spouse's life forms part of a contingency upon which the testator has left a gift to a third party. For example, if the testator has left a gift to his son which is contingent upon his former spouse being alive at the date of his death, then the gift will fail because the contingency has not been satisfied. This would mean that the testator's wishes are frustrated. Some respondents considered that a professionally drafted will ought to cover the possibility of former spouse pre-deceasing the testator. However, many wills are prepared by testators who might not be aware of the effect of divorce on such a gift.

3.6 A minority of respondents argued that a court would, in such circumstances, strain against the failure of the gift, perhaps by treating the condition as one which was meant to apply only whilst the former spouse remained "alive". However, in order to give effect to the testator's wishes in such a case, it would be necessary to make an application to court so that the court could construe the meaning of the condition, which might be both costly and time-consuming. We consider that it would be better to try to make suitable provision to give effect to the testator's wishes.

3.7 An alternative to a provision which deems the spouse to have pre-deceased the testator for *all* purposes, would be a provision which deems the spouse to have pre-deceased the testator for certain purposes only. This approach has been adopted in other jurisdictions, such as New South Wales,<sup>4</sup> Queensland,<sup>5</sup> New Zealand,<sup>6</sup> various

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<sup>1</sup> The categories of applicant listed in s. 1(1) of the 1975 Act include a former spouse.

<sup>2</sup> This was the majority view of the Law Reform Committee and was contained in the early draft of the Bill but was amended to a lapse provision before the Bill was introduced on 11 February 1982.

<sup>3</sup> See paras. 2.5 and 2.6 above.

<sup>4</sup> Wills Probate and Administration Act 1989 (N.S.W.), s. 15A inserted by the Wills Probate and Administration (Amendment) Act 1989 (N.S.W.).

Canadian provinces including Ontario,<sup>7</sup> and by the American Uniform Probate Code. This was also the approach favoured by the Law Reform Committee in its 22nd Report. Under this approach, it is provided that any gift to a former spouse is revoked, and any property which would, but for this provision, have passed to the former spouse of the testator, is to pass as if the former spouse had pre-deceased the testator.<sup>8</sup> We favour an approach along these lines, because our policy is to try to give effect to the presumed intention of the testator and deprive only the former spouse of any benefit that he or she might otherwise have received. This was the option provisionally proposed in our Consultation Paper and supported by the great majority of those who responded to it.

3.8 A selective pre-decease provision would eliminate the problem of contingency gifts, as it would only affect gifts to the former spouse and no one else. We therefore *recommend* that the present lapse provision be replaced by one to the effect that any gift (which includes a general power of appointment) to the former spouse is revoked and any property which would, but for this provision, have passed to the former spouse is to pass as if the former spouse had pre-deceased the testator.<sup>9</sup> A printed warning to this effect should appear on the decree absolute.<sup>10</sup>

### **Date of Deemed Death**

3.9 There could be problems in construing the effect of certain gifts unless the date upon which the former spouse is deemed to have died is specified. These might arise where the will defines the person or persons who are to benefit from a gift over, or with an interest in remainder after the spouse's life interest, by reference to the date upon which the spouse has died, as for example in a gift "to such of our children as are living at the date of her death".<sup>11</sup>

3.10 The problem will rarely arise in practice.<sup>12</sup> Testators who make such sophisticated provisions are likely to have the benefit of legal advice, both when the will is first drafted and when they later divorce, and can make or alter their dispositions accordingly. Further, a testator who makes provision for what is to happen in the event of a gift to his spouse failing because the spouse has pre-deceased him is more likely to define the gift over by reference to the circumstances existing at his own rather than his spouse's death. The problem may be more likely to arise in relation to gifts in remainder, where the testator will necessarily have in contemplation the circumstances existing when the spouse's life interest comes to an end. Nevertheless, it was not thought necessary to deal with the question when the existing provision relating to life interests was enacted.<sup>13</sup>

3.11 If any date is to be specified, it should seek so far as is possible to give effect to what the testator is most likely to have intended. This is not easy to predict, given the wide variety of possible circumstances and dispositions, and may well differ as between a gift over and a gift in remainder. In respect of a gift over, the testator's intentions will probably be reflected by specifying the date upon which the former spouse effectively departs from his life, namely when the divorce takes place. The same may be less likely with an interest in remainder. However, we do not consider it desirable to specify a different date for different purposes. Any rule should be clear,

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<sup>5</sup> Succession Act 1981 (Qld), s.18.

<sup>6</sup> Wills Amendment Act 1977, s.2.

<sup>7</sup> Succession Law Reform Act 1977, s.17.

<sup>8</sup> This option is also favoured by the Scottish Law Commission, see para. 1.5 above.

<sup>9</sup> It might be noted that such a deemed pre-decease rule will accelerate any interest in remainder or interest contingent upon the termination of a life interest, so that the express provision in s.18A(3) of the 1837 Act would no longer be required.

<sup>10</sup> At present the Decree Absolute contains a printed warning as to the effect of divorce upon any will made by either party. Instead of this (which many lay people might fail to notice or understand) it was suggested that a booklet outlining the position in greater depth and clarity could be sent to both parties with the Decree Absolute.

<sup>11</sup> See Consultation Paper, para. 4.5(iv).

<sup>12</sup> In the Consultation Paper, at para. 4.5(iv), it was raised only in the context of a provision deeming the former spouse to have died for all purposes, including the construction of gifts which did not otherwise involve the former spouse. Such a general pre-decease provision gives rise to numerous problems of this and a similar nature and was rejected by almost all our respondents.

<sup>13</sup> Wills Act 1837, s.18A(3), see para. 2.1 above.

simple and easy for a divorced person to understand at the time when he is divorced. As at present, it should be clearly drawn to his attention when the divorce is made absolute. We do not think that it would be easy to explain in simple terms a rule which regarded the former spouse as dead from the date of decree absolute for some purposes but not for others. If the rule is simple and clear, the testator will be in a position to think about its effects upon the provisions of his existing will and to alter then if he so desires. He is also likely at that stage to have in contemplation the people whom he would wish to benefit from his estate instead of the person from whom he has just been divorced.

3.12 These considerations point to a clear rule that the spouse is deemed to have died at the date of the divorce.<sup>14</sup> This will be easy for the testator to understand and to draw to his attention on the decree. On balance, therefore, we favour making express provision to that effect and so we *recommend*.

### **Revocation of Appointments**

3.13 Separate provision for the revocation of appointments is needed. At present the will takes effect, subject to any contrary intention, as if any appointment of the former spouse as executor, or as the executor and trustee of the testator's will, were omitted.<sup>15</sup> The effect of any appointment of a substitute executor or trustee in the event of the spouse pre-deceasing the testator is not made clear. We consider, therefore, that this provision should also be replaced by a provision deeming the former spouse to have pre-deceased the testator. If such an amendment were adopted then it would be unnecessary to provide expressly for a substitutional appointment to take effect.

3.14 For the reasons already explained, we consider that the same approach should be adopted to all such appointments made in the will, whether as executor, trustee or donee of a power of appointment.<sup>16</sup> We therefore recommend that any appointment of the former spouse as an executor or as a trustee or as donee of a power of appointment shall take effect as if the former spouse had pre-deceased the testator.

### **Guardians**

3.15 In our Consultation Paper we proposed that any appointment of the former spouse as a testamentary guardian should be ineffective. Where the child concerned is the child of the testator and former spouse, the former spouse will already have parental responsibility for the child, which is not affected by the divorce, and therefore the revocation of any such appointment will not have any practical effect.

3.16 However, if the child concerned is the child of the testator but not of the former spouse, that is, where there is a relationship of child and step-parent, then although it is possible that the step-parent might have parental responsibility, there may be cases where this is not so.<sup>17</sup> If the step-parent does not already have parental responsibility it is very doubtful that the testator would want the appointment of his former spouse as guardian to remain effective after their divorce.<sup>18</sup> We therefore *recommend* that, subject to any expressed contrary intention, any appointment of the former spouse as guardian should be revoked.<sup>19</sup> Since the appointment of a guardian can be made otherwise than by will, and the effect is the same whatever method is chosen, such provision should be made by amendment to the Children Act 1989 rather than in the Wills Act 1837.

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<sup>14</sup> This was also the view of the Rt. Hon. the Lord Brightman, who was the only respondent who commented upon this point.

<sup>15</sup> Wills Act 1837, s.18(1)(a), as inserted by Administration of Justice Act 1982, s.18(2).

<sup>16</sup> See para. 2.12 above.

<sup>17</sup> The step-parent may have a residence order in his or her favour, in which case he or she would have parental responsibility: Children Act 1989, s.12(2).

<sup>18</sup> However, one respondent to our Consultation Paper did consider that any amending legislation should expressly reserve to the testator the power to appoint a guardian which would remain effective after divorce, in other words, give the testator the power to express a contrary intention.

<sup>19</sup> The Scottish Law Commission has made similar recommendations (Scot. Law Com. No. 124 (1990), recommendation 17(a)(ii)).

### **Wills in Expectation of Divorce or of Divorce and Remarriage**

3.17 Testators who are going through a divorce may wish to make a will containing provision for the other spouse which will remain effective after divorce. For example, they may wish to benefit their former spouse by leaving a gift by will, perhaps in order to compensate for the loss of pension rights which will follow the divorce. A testator may also be intending to remarry at the time of his or her divorce and may wish to include provision for the new spouse at the same time. It is in the interests of all concerned that this should be possible before the divorces takes effect.

3.18 Currently, a testator may make such provision by expressing an intention that section 18A shall not apply to his or her will.<sup>20</sup> A will may also be executed in contemplation of marriage,<sup>21</sup> provided that the intended spouse is named and the testator expressly states that the will should not be revoked by marriage.<sup>22</sup> In combination, these existing provisions allow this sensible course to be adopted.<sup>23</sup> The divorce settlement can then be concluded on the basis of that testamentary provision for the former spouse with any potential claim under the Inheritance (Provision for Family and Dependents) Act 1975 being excluded unless the testator changes the provision.

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<sup>20</sup> See para. 3.4 above.

<sup>21</sup> Wills Act 1837, s.18(3)(4).

<sup>22</sup> Otherwise a will is automatically revoked by the testator's marriage: Wills Act 1837, s.18.

<sup>23</sup> We have considered whether, for the avoidance of doubt, it should be expressly provided that such wills are not contrary to public policy. However, in the light of *Fender v. St John-Mildmay* [1938] AC 1, we consider this is unlikely to present problems, at least once divorce proceedings have begun.

## PART IV

### SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The legislative provisions for the effect of divorce and nullity on wills are clearly in need of reform.

#### Matters on Which We Recommend Change

- (a) Section 18A of the Wills Act 1837 should be amended to provide that, subject to any contrary intention, any property devised or bequeathed to the former spouse is to pass as if the former spouse had pre-deceased the testator.  
[Paragraphs 3.4, 3.8; clause 1(2)(b)]
- (b) The former spouse should be deemed to have died on the date when the marriage is dissolved or annulled.  
[Paragraph 3.2; clause 1(2)(a)(b)]
- (c) Subject to any expressed contrary intention, any provision appointing the former spouse executor or trustee or conferring a power of appointment on the former spouse should take effect as if the former spouse had pre-deceased the testator.  
[Paragraph 3.15; clause 1(2)(a)]
- (d) Section 6 of the Children Act 1989 should be amended to provide that, subject to any expressed contrary intention, any appointment of the former spouse as guardian is revoked.  
[Paragraph 3.16; clause 2]

#### Matters upon Which We have Consulted and Where We Recommend No Change

- (a) There should be no change in the existing law relating to secret trusts.  
[Paragraph 2.14]
- (b) There should be no change in the existing law to deal with contracts to dispose of property by will.  
[Paragraph 2.16]
- (c) There should be no change in the existing law to deal with testamentary clauses to pay debts owed to or relieve liabilities owed by the former spouse (the general rule of revocation, as recommended at (a) above, would apply).  
[Paragraph 2.16]
- (d) There should be no change in the provisions preserving the former spouse's right to apply under the Inheritance (Provision for Family and Dependents) Act 1975.  
[Paragraph 3.3]

(Signed) HENRY BROOKE, *Chairman*  
TREVOR M. ALDRIDGE  
JACK BEATSON  
RICHARD BUXTON  
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*  
3 August 1993

**APPENDIX A**

**Draft**

**Wills (Effect of Divorce) Bill**

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**ARRANGEMENT OF CLAUSES**

**Clause**

1. Effect of dissolution or annulment of marriage on will.
2. Effect of dissolution or annulment of marriage on appointment of guardian.
3. Short title, commencement and extent.

DRAFT  
OF A  
**B I L L**

INTITULED

An Act to make provision about the effect of the dissolution and annulment of marriages on wills and appointments of guardians. A.D. 1993.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 **1.**—(1) Section 18A of the Wills Act 1837 (effect of dissolution or annulment of marriage on will) is amended as follows. Effect of  
dissolution or  
annulment of  
marriage on will.  
1837 c. 26.  
(2) In subsection (1), for paragraphs (a) and (b) (omission of appointment of spouse as executor and lapse of devise or bequest to spouse) substitute—

- 10           “(a) provisions of the will appointing executors or trustees or conferring a power of appointment, if they appoint or confer the power on the former spouse, shall take effect as if the former spouse had died on the date on which the marriage is dissolved or annulled, and  
15           (b) any property which, or an interest in which, is devised or bequeathed to the former spouse shall pass as if the former spouse had died on that date.”.

20 (3) Subsection (3) (which makes special provision about interests in remainder and which is superseded by the amendment made by subsection (2) above) is repealed.

**2.** In section 6 of the Children Act 1989 (revocation of appointment of guardian), after subsection (3) insert— Effect of  
dissolution or  
annulment of  
marriage on  
appointment of  
guardian.  
25           “(3A) An appointment by a person under section 5(3) or (4) (including one made in an unrevoked will or codicil) is revoked if either—

- (a) a decree of a court of civil jurisdiction in England or Wales dissolves or annuls his marriage, or 1989 c. 41.

## EXPLANATORY NOTES

### Clause 1

1. This clause implements the primary recommendation in the report so as to amend the effect of dissolution or annulment of marriage on a will. The Bill leaves both the chapeau and the closing words of subsection (1) of section 18A of the Wills Act 1837 intact.

#### *Subsection (2)*

2. Paragraph (a) provides that where an executor or trustee or a donee of a power of appointment is the testator's former spouse that appointment will be determined as if the former spouse had predeceased the testator. The date of death is deemed to be the date on which the marriage is dissolved or annulled. It covers both general and special powers of appointment. A further effect of the paragraph is that any substitute may take office. Paragraph (a) implements paragraph 3.14 in the report.

3. Paragraph (b) provides that property devised or bequeathed to the former spouse shall pass as if the former spouse had died on the date of divorce. This will catch property disposed of in the exercise of a general power of appointment but not in the exercise of a special power of appointment vested in the testator. Paragraph (b) implements paragraphs 3.8 and 3.12 in the report.

#### *Subsection (3)*

4. This subsection makes it clear that specific provision about life interests and interests in remainder is superseded by the new rule.

### Clause 2

5. Unless a contrary intention is shown in the instrument of appointment, any appointment by the deceased testator of the former spouse as guardian is deemed to have been revoked at the date of the dissolution or annulment of the marriage. This clause implements paragraph 3.16 of the report.

1986 c. 55.

(b) his marriage is dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales by virtue of Part II of the Family Law Act 1986, and the person appointed is his former spouse, unless a contrary intention appears from the appointment.” 5

Short title,  
commencement  
and extent.

3.—(1) This Act may be cited as the Wills (Effect of Divorce) Act 1993.

(2) This Act comes into force on 1st January 1999 but does not affect a will or appointment made by a person who has died before that date.

(3) This Act extends to England and Wales only. 10

## **EXPLANATORY NOTES**

### **Clause 3**

- 6. The clause contains the short title, extent and commencement provisions.**

## APPENDIX B

### Section 18A of the Wills Act 1837 as inserted by the Administration of Justice Act 1982, and amended by the Family Law Act 1986.

#### 18A Effect of dissolution or annulment of marriage on wills

(1) Where, after a testator has made a will, a decree of a court of civil jurisdiction in England and Wales dissolves or annuls his marriage or his marriage is dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales by virtue of Part II of the Family Law Act 1986,—

(a) the will shall take effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted; and

(b) any devise or bequest to the former spouse shall lapse,

except in so far as a contrary intention appears by the will.

(2) Subsection (1)(b) above is without prejudice to any right of the former spouse to apply for financial provision under the Inheritance (Provision for Family and Dependents) Act 1975.

(3) Where—

(a) by the terms of a will an interest in remainder is subject to a life interest; and

(b) the life interest lapses by virtue of subsection (1)(b) above,

the interest in remainder shall be treated as if it had not been subject to the life interest and, if it was contingent upon the termination of the life interest, as if it had not been so contingent.

## APPENDIX C

### List of Respondents to Consultation Paper

#### Government Bodies

Mr P.J. Farmer, the Public Trustee  
Mr G.A. Hosker C.B. Q.C., Treasury Solicitor  
Mr W.H. McBryde, Assistant Official Solicitor

#### Judiciary and Practitioners

Anderson Longmore & Higham  
Senior District Judge Angel, Principal Registry of the Family Division  
Mrs M. Anderson, R.A. Swift & Co  
Mr J.F. Avery Jones, Speechly Bircham  
His Honour Judge Paul Baker Q.C.  
Mr D.J. Barry, David J. Barry  
Bliss Sons & Covell  
Brain & Brain  
The Right Honourable The Lord Brightman  
Mr J.H.L. Chapman, Benson Burdekin  
Miss G.E. Cockburn, Cockburns  
Mr J. Cohen, Kidd Rapinet  
Cotman & Jameson  
Mr A.P. Dawson, District Registrar  
Mr R. Eaton  
The Honourable Mr Justice Ewbank  
Farrer & Co  
Funnell & Perring  
Hammond Suddards  
Mr M.S. Hansell, Martineau Johnson  
Hayes & Storr  
Mr J.M. Heyes, Lamport Heyes & Co  
Mr S.R. Hynard, Stoneham Langton & Passmore  
Isadore Goldman  
Mrs A. Grainger, Darlington & Parkinson  
Mr G. Jacques, Mr P. Rawson  
The Honourable Mr Justice Johnson  
Mr J.B. Juby, Sparling Benham & Brough  
Howard Thomas & Petrou  
Lane & Co  
Mr S.D. Leney, Donne Mileham & Haddock  
Mr G. Lindsay, Cuff Roberts  
Linklaters & Paines  
Mr D. Lush  
Ms E.C. Millward, Gill Turner & Tucker  
Mr A.D. Morris, Merrills Ede  
The Rt. Hon. Sir Donald James Nicholls, Vice-Chancellor  
Mr R.T. Oerton

Payne Hicks Beach  
Mr A.J. Phillips, Druitts  
The Honourable Mr Justice Rattee  
Mr P.S.A. Rossdale  
Mr G.A. Schindler, Halliwell Landau  
Mr G.R. Skippen, Fison & Co  
The Right Honourable Sir Christopher Slade  
Mr C.M. Wallworth, Bird Franklin  
Mr R.M. Ward, Baxter Caulfield

**Legal Organisations**

Council of H.M. Circuit Judges  
Family Law Bar Association  
Holborn Law Society  
Institute of Legal Executives  
Law Society, Family Law Committee  
Law Society, Land Law & Succession Committee

**Organisations**

Association of Corporate Trustees  
British Bankers Association  
Building Societies Association  
Country Landowners Association  
Institute of Taxation  
Justice  
National Council of Women of Great Britain  
Society of Trust & Estate Practitioners  
United Kingdom Federation of Business & Professional Women  
Women's National Commission

**Academic Lawyers**

Professor P.M. Bromley  
Professor S.M. Cretney Q.C.  
Professor D.J. Hayton  
Mr M. Horton  
Mr R. Kerridge  
Mrs L. King  
The late Lord Lloyd of Hampstead  
Professor J. Martin  
Professor J. Masson  
Dr S. Poulter  
Mr J.H.G. Sunnucks

**Other Individuals**

Mr S.B. Edell  
Mr D. Jefferson  
Mr S.R.M. Wilson



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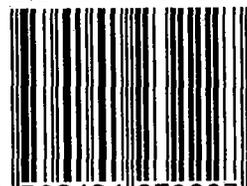
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