

TAX

The effect of divorce and remarriage on a Will: SA and UK perspective

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by Rachel Winterbach, Candidate Attorney
reviewed by Doelie Lessing, Director

This article compares the legal position that applies in the UK when a testator executed a will prior to a divorce and a subsequent remarriage, to the South African situation.

The impact of divorce on a will

In South Africa the formalities and administration of wills are regulated by the Wills Act 7 of 1953, but this Act does not contain any provisions which regulate the effect of marriage on a will. It does, however, regulate the effect of divorce or annulment of a marriage on a will. In this regard it states that if a person dies within three months after a divorce or annulment and that person executed a will before the date of the divorce or annulment, the will must be implemented as if the testator's ex-spouse had died before the date of the divorce or annulment, unless the will indicates clearly that the testator intended to benefit the ex-spouse notwithstanding the divorce or annulment.

Therefore, in South Africa a will is not automatically void or invalid as a result of a divorce, but unless expressly stated to the contrary, if a testator executed a will before the date of divorce and dies within 3 months of the divorce, the former spouse of the testator will not inherit in terms of the will and will be regarded as having pre-deceased the testator. On the other hand, where a testator dies after three months have passed from the date of divorce and the will was executed before that date, the previous spouse of the testator would inherit in accordance with the terms of the will.

The position in the UK is similar in terms of section 18A of the Wills Act of 1837 which states that where a testator has made a will and thereafter his marriage is dissolved, unless the contrary intention appears from the will, any bequest to the former spouse shall pass as if the former spouse had died on the date that the divorce or annulment was finalised.

The impact of remarriage on a will

The question which then arises, where a testator remarries, is as to what the position would be where a will is executed before the date of divorce and makes a bequest to, for instance, my "wife" or "husband", and is at no point thereafter amended or updated, and:

- the testator then remarries and dies within 3 months of the date of the dissolution of the first marriage; or
- the testator remarries and then dies, but after the 3 month period has lapsed.

In the UK these questions do not arise as, in terms of section 18 of the Wills Act of 1837, when a testator marries any existing will is automatically revoked and is no longer valid unless expressly stated to the contrary therein. Therefore, should a testator not finalise a new will, the testator will die intestate and the new spouse of the testator would usually inherit. Where a testator is divorced, therefore, from that period onwards the will of the testator will be read as if the previous spouse had predeceased the testator and that previous spouse will not inherit, and if the testator remarries, the will of the testator will in any event automatically be revoked and the new spouse would usually inherit in terms of the law of intestate succession.

In South Africa, however, the general position is that where a testator remarries, the will of the testator is not automatically revoked and will remain valid. Therefore, in the first instance posed above, where a testator is divorced and then remarries and dies both within 3 months of the date of dissolution of the first marriage, the previous spouse will be treated as having predeceased the testator, and it therefore *prima facie* appears that neither the previous, nor the new spouse would inherit from the testator. In the second instance, where the testator is divorced and then remarries and dies both after the 3 month period has lapsed, but without ever amending his will, it appears *prima facie* that the previous spouse would inherit. It has been submitted that, and which submission is consistent with the above interpretation, where a testator is married at the time of execution of his will and makes a bequest to his "wife" but then divorces and remarries, there is a strong presumption that the courts will interpret the testator to have intended to benefit the person to whom he was married at the time of the execution of the will.

In both instances it could be argued that the testator intended the new spouse to inherit, however, such argument would need to be proven in accordance with the ordinary principles applicable to the interpretation of wills, the default position being to ascertain the intention of the testator from the language used in the will, and which would result in the abovementioned positions. Extrinsic evidence will be admitted where, as in the present context, the words of the will are equally applicable to two persons, in which instance direct declarations of intention by the testator before, at the time of or after the execution of the will, will be admitted, however, only to the extent that all other aids and evidence has failed to provide an answer.



Doelie Lessing

Head of Tax | Head of Private Wealth

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