LAW REFORM COMMISSION OF SASKATCHEWAN

DISCUSSION PAPER ON REVOCATION OF WILLS

October, 2004

Introduction

A will is a formal "declaration of a person's mind or wishes as to the disposition of his property" after death[1]. It is revocable by its maker at any time, but so long as it has not been repudiated, the general policy of the law is to respect the intentions of the person who has made it. Its maker may revoke it by execution of a new will, a declaration of revocation, or even by destroying it. Otherwise, the law generally assumes that the will continues to represent the wishes of its maker, and will give it legal effect.Clause (a) of section 16 of *The Saskatchewan Wills Act, 1996* provides for revocation by operation of law in the circumstances discussed in this report. Otherwise, the *Act* explicitly provides that "no will or any part of a will" is revoked in any other manner.[2] The general rule promotes certainty: It ensures those who make wills that the formal expression of their wishes set out in the document are binding and final so long as the will conforms to law.

In most common law jurisdictions, a validly made will is revoked by operation of law in only two circumstances, marriage and divorce or nullification of marriage. Saskatchewan extends these exceptions to include long-term cohabitation and termination of long-term cohabitation as equivalents to marriage and divorce.[3] These exceptions have been justified by the proposition

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1 *Black's Law Dictionary* (4th ed.) , 1968

2 Section 16 of *The Saskatchewan Wills Act, 1996* codifies the common law. The maker of a will may revoke it:

> (b) by another will executed in accordance with this Act;
> (c) by some writing declaring an intention to revoke the will or part of the will and executed in accordance with this Act; or
> (d) by burning, tearing or otherwise destroying the will or part of the will by the testator, or by some person in his or her presence and by his or her direction, with the intention of revoking it.

3 Marriage: see section 17; Divorce: see section 19. Under section 17, a will is revoked on marriage or when " the testator has cohabited in a spousal relationship continuously for two years."Under section 19, a will is revoked on divorce, when the marriage is found to be void or declared a nullity", or " the testator and his or her spouse, who are not legally married, have ceased to cohabit in a spousal relationship for at least 24 months." These sections are set out in

that marriage and divorce are "profound changes" in the circumstances of the maker of a will. As the Alberta Law Reform Institute has argued, "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"[4].

Marriage and divorce are not the only changes in circumstances which may make a will less appropriate when its maker dies than when it was made. But except in the special cases referred to in the *Act*, a change in circumstances is not enough to invalidate a will. *The Wills Act, 1996* is explicit. Section 18 provides that, except in the cases of marriage and divorce, "a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances". The general policy of the law is to assume that the makers of wills can determine for themselves when circumstances require a new will, and will not presume to make that decision for them.

Not surprisingly, both of the exceptions to the general rule have been questioned. Nor are they part of the law in all jurisdictions. In the United States, some states do not recognize one or both of the exceptions. In Canada, wills are not revoked on marriage in Quebec, and divorce does not revoke wills in Quebec, Nova Scotia, New Brunswick, and Newfoundland.

Until recently, law reform agencies that have examined the issue have expressed some concern that the exceptions erode the general principle that the law respects the intention of testators, but have been quick to concede that the exceptions serve identifiable social policy goals. Both exceptions have been justified as protections against inadvertent failure to reconsider a will made before divorce or marriage. Revocation on marriage has been justified as a protection for the spouse and children of the marriage, who will receive nothing under the old will. However, questions have been asked about the effectiveness of revocation as a means of achieving this policy goal. The social context in which the exceptions operate is changing. Divorce and remarriage are more frequent than when the exceptions were established, and changes in matrimonial property law have altered the practical impact of the rules. It has been pointed out that a testator may deliberately leave a will in place after marriage or divorce, believing it remains appropriate, and unaware that it has been revoked by operation of law. In at least some such cases, critics suggest that revocation provides less protection for the testator's family, particularly children from a previous marriage, than the will would have.

The Commission's attention was directed to the revocation rules during consultations with members of the Saskatchewan branch of the Canadian Bar Association. Several lawyers who attended consultation sessions were concerned about a recent Saskatchewan decision that suggests that the rule revoking a will on marriage can have unintended consequences many people would regard as unfair.[5] Similar concerns were recently expressed by the Manitoba Law Reform Commission, though the Commission's final report on will and succession concluded

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full below. In this report "marriage" and "divorce" will, as a matter of convenience, include formation and termination of all spousal relationships.

[4] Alberta Law Reform Institute, *Effect of Divorce on Wills,* Report no. 72, 1994

[5] *Re Ratzlaff Estate*, discussed below.

that the rule still does more good than harm[6]. The rule revoking wills on divorce has attracted less criticism, but in a recent discussion paper, the Nova Scotia Law Reform Commission recommended against adopting the rule in that province.[7]

There is no doubt that the revocation rules can have unintended consequences, and that changing social realities make those consequences more likely than in the past. But the purposes the rules have served in the past remain important, and still provide protection for spouses and children in many cases.

At the core of the problem is the increasingly common reality of second marriages. The revocation rules prefer the testator's second family to the first. If a will was designed to protect the children of a first marriage, revoking it on divorce or remarriage may undermine the testator's effort to provide for them. Whether this result is a socially acceptable allocation of the estate between the first and second families depends in large part on the impact of other legislation, including *The Family Property Act* and *The Dependants' Relief Act.* While there is no simple answer to the issues raised by the changing context in which the revocation rules operate, it is clear that they need to be reexamined. When they were adopted, second marriages were an exception, and much of the family legislation that now protects spouses and children had not been enacted.

Because of the varied fact situations to which the revocation rules must apply, their impact is also varied. Whether they are acceptable is not a simple black and white matter. In the Commission's opinion, the core issue is whether they are appropriate as *default rules*. It is always possible for the maker of a will to avoid the rules: An old will can be reaffirmed after marriage or divorce, and in any event, neither rule operates when the will clearly expresses a contrary intention. As the Alberta Law Reform Institute observed in its discussion of revocation on divorce, the issue is who bears the onus to take action, the testator who wishes to retain the substance of a will made before marriage or divorce, or the testator who is content that the old will should be revoked. Under the present law, it is the former who is compelled to take positive steps to preserve the arrangements made before marriage or divorce.

This discussion paper is intended to provide the legal and factual background for reconsideration of the revocation rules. The choice between retention and abolition involves legal questions, but is ultimately a matter of social policy. For that reason, the Commission has prepared this paper as the first step in a public consultation process. We welcome the responses of interested members of the public and legal profession.

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6 Manitoba Law Reform Commission, *Wills and Succession Legislation*, 2003

7 Nova Scotia Law Reform Commission, *Reform of the Nova Scotia Wills Act*, 2003

Revocation on marriage

1. The statutory rule: Origin and history

The Wills Act, 1996[8] provides that an ordinary will is revoked on the marriage of the testator who made the will, unless the will was made "in contemplation of the marriage":

> **Revocation by marriage or cohabitation**
>
> 17(1) A will is revoked when:
> (a) the testator marries; or
> (b) the testator has cohabited in a spousal relationship continuously for two years.
>
> (2) Subsection (1) does not apply where:
> (a) there is a declaration in the will that it is made in contemplation of the marriage or cohabitation in a spousal relationship; 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 or she died intestate.
>
> (3) Clause (1)(a) does not apply where the testator marries a person with whom he or she is cohabiting and has cohabited in a spousal relationship continuously for two years.

The revocation rule has been part of the law of wills in most common law jurisdictions since it was adopted in the English *Wills Act, 1837*[9]. Until recently, the policy of the rule was widely accepted without question. While it has been justified as a protection for spouses and children of the marriage, it appears that the rule was originally adopted for different purposes.

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[8] S.S. 1996, c.W-14.1. Section 15 of the former *Wills Act*, R.S.S. 1978, c. W-14, was identical in substance, except that it applied only to legally married testators.

[9] 1 Vict., c. 26, s.18.

Prior to the *Wills Act, 1837*, it was the law of England that remarriage revoked the will of a woman. A man's will was not revoked by marriage, but only on the subsequent birth of a child. A woman's will was automatically revoked by marriage because at the common law a married woman lost testamentary capacity. Thus, if the will she made before marriage were allowed to stand, she would be unable to change it after marriage. Marriage did not, of course, affect the capacity of a man to make a will. Nevertheless, it was thought appropriate to revoke a man's will when a new heir was born to him.[10]*Principles of Succession* (2nd), 1953.

At common law, a married woman's property was controlled by her husband during marriage. If she had children, they inherited any estate or inheritance she brought into marriage, but subject to the husband's right of curtesy, a life interest in all her realty.[11] Thus husbands obtained only limited economic advantage from the revocation rule. A married woman was entitled to dower, a life interest in a portion of her husband's real property. Thus a wife had some protection even if a will made before marriage was still valid when her husband died.

The *Wills Act, 1837* made revocation upon marriage the rule for both men and women.[12] It appears that the principal motive for the reform was simplification of the law by making the rule uniform. Concern for the well-being of married women was very much a secondary consideration.[13] However, the change in the rule did benefit women whose husbands died before making a new will or the birth of a child. Nevertheless, the most important protection for widows continued to be dower rights.

The 1837 legislation made no exception for wills made in contemplation of marriage. In 1897, Ontario amended its *Wills Act*[14] to create such an exception. The first Saskatchewan *Wills Act*[15] adopted the Ontario model. The rationale for the change is straightforward. If a will made in contemplation of marriage is revoked, it defeats the testator's intentions formulated with the

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[10] Thomas Atkinson, *Handbook of the Law of Wills and Other*

[11] This regime was abolished by the *Married Women's Property Act, 1882*.

[12] The exception in regard to a will "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 or she died intestate" in the Saskatchewan Act was also contained, in very similar language, in the 1837 Act. It appears to have preserved the common law. The rationale for the exception is obvious: It relates to powers of appointment that are only incidentally contained in wills, and which do not affect the disposition of the testator's estate.

[13] L. McKay, "The Contemporary Validity of Section 18 of the Wills Act, 1837", 1975-77, 8 *Victorian University of Wellington Law Review*, 246.

[14] *An Act to amend The Wills Act of Ontario*, S.O. 1897, c.20. This reform was not adopted in England until the adoption of the *Law of Property Act*, 1925, 15 & 16 Geo. 5, s. 177.

[15] S.S. 1907, c. 15 (R.S.S. 1909, c. 44, s.17). Minor revisions were made to the section in the *Wills Act*, 1931, S.S. 1931, c.34, s.14, and the *Wills Act*, 1965, R.S.S. 1965, c. 127, s. 17, prior to being put in its present form in *The Wills Act, 1996.*

consequences of marriage in mind.[16]

2. The policy of the rule

Modern defenders of the revocation rule justify it on the ground that a will made before marriage will not usually make any bequest to the future spouse and children of the marriage. If a will remains in place after marriage, it effectively disinherits the spouse and children by depriving them of the share of the estate they would receive under *The Intestate Succession Act, 1996* if there was no will.[17] While a will made after marriage could also disinherit the testator's spouse and children, automatic revocation of a will made prior to marriage ensures that the decision to disinherit is deliberate and considered.[18] This justification for the rule has been adopted by many commentators and law reform agencies. The English Law Reform Committee endorsed the policy of revocation in 1980[19], as did the British Columbia Law Reform Commission in 1981.[20] The Manitoba Law Reform Commission's more recent report on *Wills and Succession Legislation* dealt only briefly with revocation. The Commission observed that matrimonial property and intestate succession legislation may now have the effect of "arguably frustrating the original purpose" of the rule. However, the Commission concluded that "automatic revocation of a will by marriage should continue to be the law in Manitoba".[21]

The argument that changes in legislation and society have undermined the value of the rule does not suggest that it no longer provides any significant protection for many spouses and children. Rather, it is suggested that contemporary realities increase the likelihood that the rule will fail to serve it purpose, and even defeat it, in a significant number of cases. In addition, other legislation now provides protections for spouses and children, arguably making the revocation rule less essential.
Under *The Dependant's Relief Act, 1996*[22], a spouse and infant children are entitled to "reasonable maintenance" out of an estate, and thus cannot be entirely disinherited by will. Perhaps more importantly, *The Family Property Act, 1997*[23] applies on the death of a spouse. Under this legislation, the surviving spouse is entitled to a share of family property, even if legal title to it is in the deceased spouse's name. This share is not affected by the deceased spouses' will. However, in themselves these changes in legislation would not be a strong reason for re-examining the rule. There would be no reason to remove the protection the rule continues to provide unless it can be shown that the rule is not only less essential , but also a source of more

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16 See comments in Bailey, *The Law of Wills*, 1967, p. 99.

17 S.S. 1996, c. I-13.1

18 See BCLRC, *The making and revocation of wills*, p. 72.

19 Law Reform Committee, *The making and revocation of wills,* Report no. 22, 1980.

20 Law Reform Commission of British Columbia, *The making and revocation of wills,* Report no. 52, 1981.

21 Law Reform Commission of Manitoba, *Wills and Succession Legislation,* Report no. 108, March 2003.

22 S.S. 1996, c. D-25.01

23 S.S. 1997, c. F-6.3.

problems than in the past. Critics suggest that changed circumstances now make the impact of the rule on the children of the testator, particularly the children of a previous marriage, unfair in a significant number of cases. Thus they argue that on balance, the rule now does more harm than good. This point of view will be examined below.

When a will made before marriage is revoked, the surviving spouse is entitled to a preferential share under *The Intestate Succession Act*, and to a share of the estate under the *The Family Property Act.* The testator's children are also entitled to a share of the estate under the *Intestate Succession Act*, but in many cases, there may be little left in the estate after the surviving spouse's share is taken under *The Intestate Succession Act*. If there are no children from a previous marriage, this result is not particularly troublesome. In practice, most testators leave the bulk of their estate to their spouses, content that the spouse will benefit the children of the marriage. But if a testator had a will in place before marriage designed to ensure that the children of a previous marriage are protected, this will may seem to remain adequate after remarriage. The testator may see no need in the circumstances to consult a lawyer. The fact that the will was automatically revoked on marriage may not be discovered until after the testator's death.

In Saskatchewan, these issues were focussed by *Re Ratzlaff Estate*.[24] Edward Ratzlaff, a retiree, made a will shortly before marrying in 2000. He left most of his substantial estate to his adult children from a previous marriage, but also made a bequest to his future wife. Ratzlaff consulted a solicitor, who advised him and prepared the will. He considered entering a pre-nuptial agreement with his future wife to limit the application of *The Family Property Act* to his estate, but was advised that property he owned at the time of marriage, other than the matrimonial home, would not be divisible under the Act. On that basis, he was satisfied that the will was adequate to ensure that his children would be the principal beneficiaries of the property he had acquired before his remarriage. Ratzlaff was married two months after making the will. He and his wife were killed in an automobile accident less than a year later.

Ratzlaff's will provided that

> If at the time of my death I am legally married then, in such case, I specifically bequeath to my wife the sum of $10,000.00 for each year or a portion thereof that we have cohabited together as man and wife . . .".

The issue before the courts was whether this clause in the will amounted to "a declaration in the will that it is made in contemplation of the marriage" as required under section 17 of *The Wills Act, 1996* to protect the will from revocation. The Saskatchewan Court of Queen's Bench found that the clause was not a "declaration" within the meaning of the Act, and thus held the will had been revoked by marriage. Some of the concern in the legal profession generated by this decision was mitigated when the Court of Appeal reversed the Queen's Bench decision, holding that the language used in the will, taken together with extrinsic evidence that Ratzlaff had made definite plans to marry when he made the will, was sufficient to prevent revocation.

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[24] (2002), 212 DLR (4th) 258 (Sask. C.A.), reversing the Q.B. decision in 2001. Leave to appeal to the S.C.C. denied, Jan. 9, 2003.

The issue in *Re Ratzlaff Estate* was confined to the question of whether the will was made in contemplation of marriage. It did not, therefore, address the more fundamental question of whether revocation of a will on marriage is still sound. In a case very much like Ratzlaff, but involving a will that made no reference to future marriage, the courts would have had no alternative but to hold that the will was revoked. Thus concern about the effect of section 17 of *The Wills Act, 1996* remains.

Most people would probably agree that revocation would have done more harm than good in the *Ratzlaff* case. However, it must be stressed that this outcome was dictated by the facts of the case. If, for example, Mr. Ratzlaff had been a younger man, and children had been born to his second wife, an intestacy might have more fairly distributed property between the children of the first and second marriages. In such a case, a strong argument could be made that the law should require a person who had made a will before marriage to re-examine the arrangements he or she has made. This, in a nutshell, is the policy issue at the core of the debate about the revocation rule.

3. The impact of other legislation

Assessment of the practical consequences of the revocation rule must carefully consider the interaction between the rule and other legislation. The most important change in the relevant law in the last 25 years was adoption of matrimonial property legislation in all provinces of Canada. The Saskatchewan legislation was adopted in 1979,[25] a few years earlier than most provinces.

The Family Property Act is a comprehensive code for the distribution of family property upon application by a spouse, during marriage, or upon death of the other spouse. The Act provides explicitly that:

> 30(1) An application for a family property order may be made or continued by a surviving spouse after the death of the other spouse or may be continued by the personal representative of the deceased spouse.

Thus, whether a will made before marriage is revoked or not, the surviving spouse can make application for division of property under *The Family Property Act.*

The right of a spouse to a share of family property is based on the contribution made by both spouses to the acquisition and maintenance of the property. Regardless of the legal title, both spouses have a claim under the *Act* to a share of family property. A will, or distribution of property on intestacy, can only distribute the share of family property the deceased spouse is entitled to under the *Act.* Thus, in effect, a claim under *The Family Property Act* is in addition to any other entitlement to the property by will or under intestacy legislation:

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[25] *The Matrimonial Property Act*, S.S. 1979, c.M-6.1. See now *The Family Property Act*, S.S. 1997, c. F-6.3.

30(3) Where the deceased spouse died intestate, no court, in making a distribution of family property pursuant to an application made or continued by a surviving spouse or continued by the personal representative of a deceased spouse, shall consider the amount payable to a spouse pursuant to *The Intestate Succession Act, 1996*, and no order made pursuant to this Act affects the rights of the surviving spouse on intestacy.

31 Where an application is continued or commenced pursuant to section 30:

(a) this Act applies, with any necessary modification, with respect to the estate of the deceased spouse; and

(b) the property of the deceased spouse, whether or not it has vested in the personal representative, is family property that is subject to this Act.

37(1) Nothing in this Act affects the right of a surviving spouse to make an application pursuant to *The Dependants' Relief Act, 1996*.

The portion of the property to which the deceased spouse had legal title that will be available for distribution depends on the circumstances of each case. In all but exceptional circumstances, the surviving spouse is entitled to a half interest in the family home:

22(1) Where a family home is the subject of an application for an order pursuant to subsection 21(1), the court, having regard to any tax liability, encumbrance or other debt or liability pertaining to the family home, shall distribute the family home or its value equally between the spouses, except where the court is satisfied that it would be:

(a) unfair and inequitable to do so, having regard only to any extraordinary circumstance; or

(b) unfair and inequitable to the spouse who has custody of the children.

Under section 21 of the Act, the general rule is that, except as otherwise provided by a valid interspousal contract under section 38, other family property shall be equally divided, "subject to any exceptions, exemptions and equitable considerations mentioned in this Act". An important exception applies to property brought into marriage by a spouse:

23(1) Subject to subsection (4), the fair market value, at the commencement of the spousal relationship, of family property, other than a family home or household goods, is exempt from distribution pursuant to this Part where that property is:

(a) acquired before the commencement of the spousal relationship by a spouse by gift from a third party, unless it can be shown that the gift was conferred with the intention of benefitting both spouses;

(b) acquired before the commencement of the spousal relationship by a spouse by inheritance, unless it can be shown that the inheritance was conferred with the intention of benefitting both spouses; or

(c) owned by a spouse before the commencement of the spousal relationship.

Two other statutes are also relevant. *The Intestate Succession Act, 1996* governs distribution of property when there is no will. Section 6 provides that:

6(1) Where an intestate died on or after June 22, 1990 leaving a spouse and issue and the net value of the estate does not exceed $100,000, the estate goes to the spouse.

(2) Where the net value exceeds $100,000, the spouse is entitled to $100,000 and has a charge on the estate for that amount, with legal interest from the date of the intestate's death.

(3) Of the residue of the estate, after payment of the $100,000 and interest:

(a) where the intestate dies leaving a spouse and one child, one-half goes to the spouse; and

(b) where the intestate dies leaving a spouse and children, one-third goes to the spouse.

(4) Where a child of an intestate died leaving issue and that issue is alive at the date of the intestate's death, the spouse takes the same share of the estate as if the child had been living at that date.

Under *The Dependant's Relief Act, 1996,* if a testator makes inadequate provision for a spouse or dependent children[26] , the court may order maintenance out the testator's estate:

3. Where a person dies leaving a dependant or dependants, any dependant or person acting on behalf of a dependant may apply to the court for an order to provide reasonable maintenance for the dependant.

This claim is in addition to any claim that could be made under *The Family Property Act.*

Where there has been a long marriage, most of the deceased's estate is usually available for distribution under *The Family Property Act*, and the surviving spouse will usually be entitled to

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[26] Under the Act, "dependant" means:

(a) the wife or husband of a deceased;
(b) a child of a deceased who is under the age of 18 years at the time of the deceased's death;
(c) a child of a deceased who is 18 years or older at the time of the deceased's death and who alleges or on whose behalf it is alleged that:
(i) by reason of mental or physical disability, he or she is unable to earn a livelihood; or
(ii) by reason of need or other circumstances, he or she ought to receive a greater share of the deceased's estate than he or she is entitled to without an order; or
(d) a person with whom a deceased cohabited as spouses:
(i) continuously for a period of not less than two years; or
(ii) in a relationship of some permanence, if they are the parents of a child;

half the property acquired during marriage whether there is a will or not. This is in addition to any bequest made to the spouse by will. If there is no will, the surviving spouse will also be entitled to the preferential share of the estate under *The Intestate Succession Act, 1996.* Children of the marriage are entitled to a share under the will or, if there is no will, *The Intestate Succession Act, 1996*. Revocation of a will made before marriage will create an intestacy. Thus, in many cases, the revocation rule has minimal impact, but provides some additional protection for spouses and children.

There are likely few cases in which a will made before marriage has not been changed during the course of a long marriage. Revocation in these anomalous circumstances will increase the surviving spouse's claim on the estate by the amount of the spouse's share under *The Intestate Succession Act, 1996*. The effect of revocation on the interests of children of the marriage is usually less significant in practice. While a prenuptial will is unlikely to have made bequests to the children, the combined claim of the spouse under *The Family Property Act* and *The Intestate Succession Act, 1996* will often leave little for the children on an intestacy.
The situation when the testator marries late in life is somewhat different. In this case, most of the property brought into marriage by each spouse will be exempt from distribution under *The Family Property Act*, though the surviving spouse will usually be entitled to at least a half interest in the family home. A will made after a second marriage late in life is often intended to prefer the children of a previous marriage over the new spouse and this is often the expectation of the new spouse. A will made before the marriage will likely make the children of the previous marriage the principal beneficiaries. Revoking such a will increases the spouse's share. Since the spouse's share under *The Intestate Succession Act, 1996* takes precedence, the effect of revocation on children of a previous marriage could be substantial. Note also that even if there is no claim to family property, the spouse still has a claim to maintenance under *The Dependants' Relief Act, 1996.*

4. Policy issues: Should the revocation rule be kept?

The discussion above makes it clear that the effect of the revocation rule was quite different when it was adopted in 1837 than it is today. What is unclear is whether changing social norms make the effect of the rule in practice significantly different today than it was twenty five years ago when the English Law Reform Committee expressed the opinion that "social and legislative changes . . . have not created a need to amend" the rule. The question is whether the rule now has more potential for harm than good.

Situations in which doubts have been raised that the rule does more good than harm have to do with fact situations like those in *Re Ratzlaff Estate*, involving second marriages of middle aged or older couples, in which one of the testator's primary concerns is to protect a portion of the estate for adult children of a previous marriage. The testator is legally entitled to make only a modest bequest, or none at all, to the surviving spouse. The surviving spouse will still be entitled to a share of family property under the *Family Property Act*, and in cases of need, under the *Dependant's Relief Act*. But since property brought into marriage is ordinarily exempt from distribution, a substantial part of the estate will be available for distribution to the testator's

children. If, however, the deceased spouse made a will before the second marriage benefiting his or her children, it will be invalidated under the present law.

None of this matters, of course, unless the testator has failed to make a new will. An important consideration is whether such a failure is likely. The deceased spouse may have been believed that the spousal share under the *Family Property Act* amounts to reasonable provision for the surviving spouse, and thus see no need for a new will. But in fact, because the will is invalidated, the surviving spouse takes a share of the property under the *Intestate Succession Act* in addition to the share he or she is entitled to under the *Family Property Act*. The spouse's share under the *Intestate Succession Act* will likely be larger in many cases than the deceased spouse would have left by will if one had been made after marriage, and larger than the surviving spouse expected to receive. Particularly if the estate is small enough that the spouse's preferential share under the *Act* is a significant part of the estate, the combined effect of the *Intestate Succession Act* and the *Family Property Act* may leave little or nothing for the children. Thus, in cases of this sort, revocation may deprive the children of the previous marriage of the share of the estate they were intended to receive, and which the testator had a legal right to bequeath.

The best course of action for a testator entering a second marriage would be to enter into an interspousal contract with the new spouse and execute a new will after marriage. But the testator may well believe that an existing will is adequate for his or her purposes. In the result, legal advice before marriage may not seem necessary, and the testator may not discover the fact that *The Wills Act, 1996* automatically revokes the existing will. While the English Law Reform Committee was correct that lawyers are aware of the revocation rule, we are far from certain that lay people are. The Nova Scotia Law Reform Commission found, as the result of an informal survey, that "not many Nova Scotians are aware of the provision which revokes a will in the event of marriage". This is almost certainly the case in Saskatchewan as well. The Nova Scotia Commission suggested that issuers of marriage licences should provide a standard notice to newlyweds explaining the effect of marriage on wills. But whether this would be an effective way to bring the law to the attention of the public is open to question.

It must of course be recognized that not all second marriages, even late in life, will fall into the pattern outlined above. In some cases, for example, the surviving spouse may need and expect to receive more to maintain a home and established life style than the *Family Property Act* alone will provide. But the cases in which the revocation doctrine most clearly does more good than harm involve younger couples and first marriages. If a younger person has made a will before marriage that is not revoked, his or her spouse and children will usually receive nothing under it. Their claims would be limited to those that could be made under *The Family Property Act* and *The Dependants' Relief Act.* Similarly, if the testator brought considerable assets into marriage, and the couple acquired few assets during marriage, the surviving spouse would receive little under *The Family Property Act.* In such a case, the surviving spouse would be much better off if the will was revoked, so that the spousal share under *The Intestate Succession Act* could be claimed. In this case, there is perhaps considerable merit in British Columbia Law Reform Commission's suggestion that a testator should not be allowed to disinherit a spouse and children except when he or she has made a deliberate decision to do so by a will made after marriage.

Clearly, it is difficult to expect a single rule to apply equally fairly in all cases. It is for this

reason that the Commission believes the issue is primarily one of determining the appropriate default rule. Under the law as it now stands, revocation on marriage is the default. A will made prior to marriage will automatically be invalidated unless it is re-confirmed after marriage by incorporating it in a new will. If the revocation rule was abolished, wills made before marriage would remain in effect unless the testator revoked it or made a new will. The question is which approach will best serve to protect the interests of testators and their families.

The discussion above suggests that two sets of factors must be taken into consideration in identifying the appropriate default rule.

1. The impact of the rule in the context of contemporary social realities and existing legislation. Are other protections for spouses and children of testators now adequate to make the revocation rule unnecessary? Does the increasing frequency of second marriages make application of the revocation rule as much a problem as a solution, or does the rule continue to do more good than harm?

2. The expectations of people who make wills. The revocation rule encourages people to think about the implications of their new legal status and to make necessary changes in their wills. But are the rules well known to the public? Is there a significant danger that a will the maker regards as appropriate will be left in place after divorce or marriage in the belief that it is still valid, or should the public be expected to be aware of rules such as this?

The Commission welcomes comment on these questions.

Revocation on divorce

1. The statutory rule

Section 19 of the Saskatchewan *Wills Act, 1996* provides that divorce revokes certain provisions of wills:

Effect of divorce, etc.

> 19(1) This section applies where, after the making of the will and before the death of the testator:
>
> (a) the marriage of the testator is terminated by a divorce;
>
> (b) the marriage of the testator is found to be void or declared a nullity by a court in a proceeding to which the testator is a party; or
>
> (c) the testator and his or her spouse, who are not legally married, have ceased to cohabit in a spousal relationship for at least 24 months.
>
> (2) In the circumstances mentioned in subsection (1), unless a contrary intention appears in the will, the following are revoked and the will is to be construed as if the spouse had predeceased the testator:
>
> (a) a devise or bequest of a beneficial interest in property to the spouse;
>
> (b) the appointment of the spouse as executor or trustee;
>
> (c) a general or special power of appointment conferred on the spouse.
>
> (3) In this section, "spouse" includes the person purported or thought by the testator to be his or her spouse.

Note that divorce does not revoke the entire will. Only bequests made to the former spouse and appointment of the spouse as executor of the will are revoked. When the former spouse was named executor by the will, the court will appoint an administrator of the estate in his or her place.[27] Although some jurisdictions that have adopted revocation provisions invalidate the entire will on divorce, most have enacted partial revocation on similar terms to the Saskatchewan *Act.*

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[27] Note also that the section both revokes bequests to the spouse, and provides that the will takes effect as though the former spouse had predeceased the testator. In most cases, the effect of either is the same. However, both the Alberta Institute's report, *Effect of Divorce on Wills,* and the Manitoba Commission's report, *Wills and Succession Legislation*, suggest that this formula is confusing. In particular, in the case of a bequest to a spouse with a gift over in case of her death, it is unclear whether the gift over can take effect after divorce. This provision is based on the Uniform Law Conference *Uniform Wills Act.*

Law reform agencies have almost uniformly rejected revocation of the entire will.[28] If the entire will were revoked, bequests to the testator's children as well as to his or her spouse would be defeated. Partial revocation ensures that the only person whose interests are adversely affected by revocation is the former spouse.

The rule revoking wills on divorce is of considerably more modern origin than the rule revoking wills on marriage. As the Alberta Institute noted in its report, *Effect of Divorce on Wills*:

> 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 [when divorce legislation was adopted in England] a total of 184 divorces were obtained by this method.

It was only after reform of divorce law in the 1960's made divorce easier to obtain, with a consequent increase in the divorce rate, that the question of revocation on divorce was considered in the Commonwealth. Some American states, with a longer familiarity with liberal divorce laws, have long had revocation rules, and in 1969, the National Conference of Commissioners on Uniform State Laws *Uniform Probate Code* recommended a revocation rule[29]. The rule was first proposed and adopted in the Commonwealth by New Zealand in 1973.[30] This initiative was copied in Australia and England. In Canada, the rule was first recommended by the Ontario Law Reform Commission in 1977.[31] Most provinces adopted the model proposed by the Uniform Law Conference of Canada in 1978. [32]

The rule was not controversial when it was adopted. Provinces which did not follow the ULC lead appear to have done so more out of inertia than conviction. On the other hand, adoption of the rule appears to have been as much an exercise in promoting uniformity of laws as a response to a demonstrated need. While the rule remains largely noncontroversial, there is some evidence that its utility is now less certain than it seemed to be in 1978. The Alberta Institute recommended adoption of the rule in 1994, but without the unanimous support of the Commissioners. In 2003, the Nova Scotia Law Reform Commission considered adoption of the rule in that province, but concluded that "the Commission does not consider the reasons for such a change to be sufficiently compelling to justify suggesting that the Act be changed [to provide for revocation on divorce]".

There are arguments for and against the rule. It should not be retained without reconsidering its

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[28] Revocation of the entire will was recommended by the Law Reform Commission of Tasmania, *Report on Reform in the Law of Wills*, 1983. See the criticism in the Alberta Law Reform Institute, *Effect of Divorce on Wills*, 1994.

[29] NCCUSL, *Uniform Probate Code*, 1969, section 2-508

[30] *Report of the Property Law and Equity Reform Committee on the Effect of Divorce on Testate Succession*, 1973

[31] Ontario Law Reform Commission, *Report on the Impact of Divorce on Existing Wills*, (1977)

[32] ULCC , "Wills: Impact of Divorce on Existing Wills" in *Proceedings*, 1978

practical effect as the institution of marriage continues to evolve. As with the rule revoking wills on marriage, it is timely to consider the practical effects of the rule revoking certain provisions of wills on divorce, to determine the impact of evolving views on marriage and divorce.

2. Policy issues: Should the revocation rule be abolished?

There is little doubt that most divorced couples no longer wish to make their former spouses beneficiaries under their wills.[33] It can be argued, then, that a default rule revoking bequests to former spouses is sensible. The revocation rule does not prevent the maker of a will from benefiting a former spouse. It merely places, as the Alberta Institute noted, the onus on an individual who decides to do so to take the positive step of confirming the intention by making a new will after divorce.

But the rule has been criticized because it undermines the principle that the expressed intentions of the maker of a will should not be displaced by anything other than an equally formal declaration of change of intention. The Alberta Institute set out the argument thus:

> 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 . . . . 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?

It is unlikely that this somewhat sterile dispute over contending “principles” can be resolved by logic or legal argument alone. To identify a solution, it is necessary to consider the practical effect of the revocation rule.

The potential importance of the rule is illustrated by a case from Alberta, decided before the revocation rule was adopted in that province. In *Re Brechin*[34], the testator’s wife divorced him and remarried after he had become mentally incompetent. He thus lacked capacity to revoke the will he had made in her favour. The court held that his will remained valid, and his entire estate went to his former wife.

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[33] The Alberta Institute examined wills in three judicial centres in Alberta. They found that only 5 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.

[34] (1973) 38 D.L.R. (3d) 305 (Alta. S.C., T.D.).

Although *Re Brechin* is unusual, it is perhaps only an extreme example of a broader category of cases. Supporters of the revocation rule argue that it would be only in very rare circumstances that failure to make a new will after divorce was the result of a deliberate intention to leave bequests to a former spouse in place. The testator might have died before making a new will. The trauma of the divorce may have deflected attention away from the need to rewrite the will. The Nova Scotia Law Reform Commission observed that "given the turmoil that can surround a divorce, having a will revoked may not be foremost in people's minds. There could be a tendency to forget about a will". The Alberta Institute suggested that "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 Institute concluded that the principle that a will should always be taken as the definitive expression of the testator's intention is a dubious assumption when applied to a will made prior to divorce: "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".

However, some of the assumptions made in this argument are open to question. In the first place, some testators may wish to benefit a former spouse, particularly if to do so will provide a better home for children of the marriage. Although such an intention is hardly commonplace, changing attitudes toward marriage and divorce may make the practice more common. Thus, it can be argued that the decision to revoke or keep a will made prior to divorce should be left to individual testators. One respondent to the Alberta Institute's request for comment on the revocation issue expressed the opinion that:

> My 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.

The principal reason given by the Nova Scotia Commission for recommending against adoption of the revocation rule was the observation that:

> In some situations, divorced spouses might still wish to provide for a former spouse in a will. These people might also consider it intrusive and inconvenient for legislation to automatically revoke a will upon divorce.

It may also be questioned whether inadvertent failure to change a will after divorce is a problem meriting modification of the general rule that leaves revocation to the maker of the will. It was suggested above that the rule revoking a will on marriage may have unintended consequences because few people are aware of the rule. Legal advice on such matters is rarely obtained by couples contemplating marriage. Divorce, and consequent property division, on the other hand, almost always involve legal advice and representation. In addition, divorcing spouses who do not want to benefit one another are strongly motivated to give thought to the need to change their wills.

Request for comment

It would be all too easy for both lawyers and lay people to classify the law governing revocation of wills as a paradigm example of technical "lawyer's law". But while the issues raised by the revocation rules do involve some technical matters, they are fundamentally matters of social policy. The arguments on both sides of these issues have merit. They can be resolved only by those who will be affected by the policy choices that are made. Anyone who has made, or may make, a will may be affected by the revocation rules. The Commission believes that the law should reflect the expectations and opinions of the public.

The Commission hopes that this discussion paper will provide the background for informed public comment on what we believe are important issues.