SHOULD I AMEND MY WILL AFTER DIVORCE?

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The Wills Act stipulates that, should the testator die within three months after he is divorced, his ex-spouse will not inherit in terms of his will, unless a contrary intention is apparent; this allows a divorced person a little transitional time to deal with the trauma of the divorce. On the other hand, should the testator die more than three months after he is divorced without changing the will which he made before the divorce, his ex-spouse will inherit in terms of that will, if the will made provision for this. It is therefore important for you to ensure that your will correctly expresses whether or not an ex-spouse should benefit in any way from your estate.

Some practical examples:

1. A married testator draws his will leaving everything "to my wife". He later divorces his wife and marries his second wife, with whom he lives happily until his death some forty years later - without having changed his original will.

Who inherits under his will? His first wife now well cared for by her second husband, or his widow?

The first wife will inherit the estate. A will speaks from the date of its execution and not from the date of the testator's death.

I prefer to define a "spouse" in the wills I draw as "the person to whom the testator is married at the date of his death". There is the cynical but realistic possibility to be taken into account that you and your spouse may be involved in divorce proceedings at the time of your death. To cater for that possibility, you may wish to provide for your spouse to be disinherited should there be unresolved but current divorce proceedings pending at the time of your death.

2. Another example, based on an actual case where the testator was born in the United Kingdom in 1905 and married A in 1924 producing two children. The testator separated from A in 1945, emigrated to South Africa and lived with woman, B producing six children born before the testator obtained a divorce from A in 1968. The testator married B and thereafter, executed a joint will, which provided that:

"Our joint estate, or the estate of the survivor of us, shall devolve upon our children, or their issue by representation per stirpes."

The High Court was called upon to decide if the words "our children" meant the testator and B's six children or if they included A's two children.

Our law is against the disinheriting of children, and thus presumes that a testator intends to disinherit his children only if there is a clear expression of this intention in the will.

The court was of the view that, as the words "our children" were not clear and after examining evidence of the surrounding facts and circumstances, concluded that the expression "our children" was a reference to the six children born of the union between the testator and B and did not include the two children born of his first marriage.

The problem could have been avoided if the draftsman of the will had defined precisely what the words "our children" intended. I suggest that your will contain such a definition, whatever your past marital history may be.