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TRUSTS AND ESTATES ALERT

IN THIS **ISSUE**

2B OR NOT 2B: WILL YOUR EX-SPOUSE INHERIT FROM YOUR ESTATE?

Sometimes it takes a sensational story in a newspaper, as opposed to oft-repeated legal advice, to drive home the importance of regularly updating your Will. Such an article appeared in the Sunday Times on 29 January 2017, entitled *Gone to the Dogs*. Conveying some sympathy for the deceased's ex-wife, the article sets out the facts of how she "lost" her inheritance to the SPCA or, quite literally, to the dogs. Her misfortune came about as a result of the application of the rather obscure s2B of the Wills Act, No 7 of 1953 (Act).

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Looking to change what she perceived to be an outdated law, the ex-wife instituted action against the executor to prevent the inheritance going to the SPCA.

In essence, s2B states that if a testator dies within three months of becoming divorced, his ex-spouse will be deemed to have predeceased him. Thus the ex-spouse will be excluded from inheriting to the extent that the ex-spouse is appointed as a beneficiary in the relevant Will unless it appears from the will that the deceased wanted to benefit his ex-spouse.

The facts of the unusual case were as follows: A husband and wife executed a joint Will some 13 years before the husband's death. In terms of the Will, they appointed each other as the sole beneficiary of their respective estates. They further stated that upon the death of both or the last-dying of them, the benefit would devolve upon the husband's father. If, however, the husband's father should die before them, the benefit would devolve upon the SPCA. The thinking behind this last choice was that they had no children and they loved animals.

The husband and wife subsequently got divorced and the ex-husband died shortly after the divorce. At the time of his death, his father had already passed away and thus could not inherit. Due to the application of s2B (discussed below) the benefit devolved upon the SPCA. The ex-wife felt aggrieved by this turn of events given that she was married to the deceased for 28 years, had settled her divorce on unfavourable terms and claimed to have made substantial contributions to the property the deceased owned. She blamed s2B of the Act for her woes because if not for the section's operation, she would have been the beneficiary of her ex-husband's estate. In this assertion, she was correct: had section 2B not been in operation, she would have inherited. Looking to change what she perceived to be an outdated law, the ex-wife instituted action against the executor to prevent the inheritance going to the SPCA. The High Court dashed her hopes, ruling against her.

I would go as far as saying that in blocking the ex-wife from inheriting, the section achieved the very purpose for which it was legislated.

The ambit and purpose of s2B

Section 2B of the Act became law in September 1992. Despite being short and despite its salutary intention, the section has the potential to cause a testator that does not take heed of its application, serious and mostly unintended consequences.

As a general rule in our law, unlike some other jurisdictions, the change of status of a testator, such as getting married, getting divorced or having children does not automatically result in the revocation of an existing Will.

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Colloquially, the section affords a recently divorced testator a grace period of three months, within which to get his affairs in order, review his Will and if necessary amend it on account of his changed status.

A further fundamental principle in the law of succession is that a beneficiary must be alive to inherit and if not, the benefit will devolve upon the named substitute. In the absence of a direct substitute, the inheritance will fall into the residue and the residue beneficiaries will inherit instead. If there should not be a residue beneficiary, the inheritance will devolve in terms of the laws of intestate succession.

So by deeming the ex-spouse predeceased, s2B ensures that the ex-spouse does not inherit even though they are named as a beneficiary while the rest of the Will stays intact. Colloquially, the section affords a recently divorced testator a grace period of three months, within which to get his affairs in order, review his Will and if necessary amend it on account of his changed status. In other words, a testator has three months to consider whether he wishes his now ex-spouse to still be a beneficiary in his Will.

The reasoning for the incorporation of s2B

Section 2B was introduced because it is generally accepted that while it is typical for a testator to leave a portion or the whole of their estate to a surviving spouse, it is generally not the intention of most testators to be equally generous after divorce. Bluntly put, there often is not much love lost at that point.

To some extent, planners can regulate the financial outcome of divorce by entering into an appropriate marriage regime. It is also common for divorce parties to settle their claims and the distribution of the property of the marriage.

Lastly it is accepted that for whatever reason testators are slack and tardy in effecting changes to their Will and require a grace period within which to do so.

For the above reasons the relevant provision creates a three-month default position whereby the ex-spouse (if they still happen to benefit in terms of a Will) is deemed (regarded) to have died on the date of divorce and consequently will not inherit.

The potential and undesired consequences of s2B

The provision's relief is limited to three months and will not afford any relief if the person dies after the three month period. In my view and experience, this assumption that a testator will address the matter in three months after his divorce is incorrect as many a testator will not have changed their Will within three months. In such circumstances, the provision's aim fails to protect most testators.

In the absence of a clear expressed intention to the contrary in the Will, the default disqualification operates whether the testator wanted to disinherit his ex-spouse or not. Understandably, if a testator is happily married at the time of drafting their Will, they are not inclined nor open to consider the consequences of a divorce and, more often than not, advisers do not prompt such testators to cater for the possibility that their marriage may someday end.

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To extend the metaphor of the newspaper article: if you want to prevent the wrong person getting their paws on your estate then you best ensure that you regularly review your Will and estate plan.

While the s2B provision may have the effect of preventing an ex-spouse from inheriting if the testator dies within three months of divorce, the remaining terms of the Will may lead to a most unwanted situation. For example, consider the scenario where the minor children of a deceased (from the marriage of this disqualified spouse) are not named as substitute beneficiaries – on the basis that the spouse would have cared for them – resulting in the entire estate devolving on some other party or institution who may be distant or no longer relevant.

As common as the incident of divorce is so too is the occurrence of a second marriage and the possibility of children from this subsequent marriage. If a testator dies and no provision has been made for such very different circumstances, it may lead to an ex-spouse, who had received her share of the estate on divorce, inheriting further unintended benefits and causing potential prejudice and hardship to a subsequent spouse and children.

The position with regard to life partners is such that the definition of "spouse" has not been extended to incorporate such relationships, and they have neither the benefit nor pitfalls - such as they are - of s2B.

Conclusion

Regrettably, many divorced testators do not get round to reviewing their Will in the requisite three months so the intended relief (limited and flawed as it may be) is lost to them and they die with a Will that does not provide for their current circumstances nor one that fulfils their sometimes obvious intentions.

The ramifications of a Will that has not taken cognisance of a recent divorce can be so serious that testators should not leave devolution of their estate to chance or to the s2B default position. An out of date Will can easily lead to an untenable and patently unfair outcome if not harsh.

Practitioners are often asked, how often should I amend my Will? While there is no "one size-fits-all" answer, I cannot state too strongly that if your marital status changes you should seriously re-look at your estate planning documents, such as your Will, nominations for policies and the impact on any trust deeds.

To extend the metaphor of the newspaper article: if you want to prevent the wrong person getting their *paws* on your estate then you best ensure that you regularly review your Will and estate plan.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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