



Information Sheet: The effect of Divorce on your Will

When going through a divorce it is important to start planning for the future by reviewing or making a Will. The average time for a divorce can take approximately six months from start to finish. However, sometimes it can take substantially longer if there are complications.

Your Will should be reviewed at an early stage of the divorce proceedings to make sure you have taken the necessary precautions to prevent any problems that may occur. The unexpected death of a party to divorce proceedings is not as uncommon as you may think and can cause undesirable outcomes.

While going through the transition of a divorce, the spouse remains a spouse until the divorce is made absolute. If you have a Will in which all your estate has been left to your spouse and you die before the divorce is made absolute, your spouse will still inherit your estate under the terms of your Will. Further, if you have not made a Will the rules of intestacy make provision for your spouse.

By making a Will, you are able to do many things which would not be possible if you were to die intestate (without making a Will). This includes stipulating who should administer your estate (the executor), making your intentions clear about who will inherit your assets, appointing a guardian to look after minor children and choosing the age a child may inherit.

Case note

Mark and Ann are married; it is a second marriage for each of them.
Ann has a son from her previous marriage, John who is 27.
Mark also has a son from his previous marriage, George who is 32.
They have one daughter together, Isabelle who is 18.
They separated in 2006 and, in 2007, divorce proceedings began.

In his Will, Mark appointed Ann as the executrix to deal with the administration of his estate and has also devised and bequeathed his entire estate to her. Mark realises he should review his Will but keeps putting it off.



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Mark unexpectedly dies before the divorce has become absolute. Ann, inherits all his estate, which would be more than she would receive through an Ancillary Relief or Consent Order had the divorce been made absolute.

Mark's son, George is incensed. He never particularly liked the way Ann treated his father but realises his father should have changed his Will. He thinks about contesting the Will but, as he was not dependant on his father, he realises he has no grounds.

Ann feels her relationship with George deteriorated when they separated and since his death, it has become worse. Although when they both made their Wills, Ann and Mark had agreed that all three children would inherit equally from their joint estates, things have changed since then. She decides to change her Will leaving her estate between her two children John and Isabelle. This is something Mark would not have wanted.

Mark should have updated his Will, possibly excluding his wife or giving her reasonable financial provision. He could have made sure that part of his estate passed to his children and step-son and, if he owned the matrimonial home jointly with Ann, he could have changed the nature of the ownership so that his share did not pass automatically to Ann but instead under the provisions of his Will (see below).

Once your divorce has become absolute, it does not make your existing Will void. Any gift to your former spouse takes effect as if they had died at the date your divorce becomes final and therefore any such gift fails.

Further, any appointment of a former spouse as an executor or as a guardian is deemed to have been revoked at the date of the divorce unless a contrary intention is provided for in your Will.

Ownership of Property

When going through a divorce, if you and your spouse own your own home, it is also essential to check how you own your property early on in the divorce process. Should you die before your divorce is absolute, the way in which you own your property will determine to whom it passes to on your death.



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Most married couples own their home as 'beneficial joint tenants' which means that their share in the property automatically passes to their spouse in the event of their death. You may not want this to happen if you are divorcing.

It is possible to prevent this from happening by 'severing the tenancy' to your property. By doing this, you will own your property as 'tenants in common' and you and your spouse will own one half of the property each. Your half will then pass to the named beneficiary in your Will or if you have not made a Will under the rules of intestacy.

If you are unsure how you and your spouse own your property, we would be happy to check this for you.

Appointing a Testamentary Guardian

One real concern for any parent when a relationship breaks down is what will happen to their children in the event of their death.

If you have parental responsibility (which means the legal rights, duties and authority of a parent) for your child or children, you can appoint a guardian in your Will to take care of them if they are minors at the time of your death.

The appointed guardian will have parental responsibility for your child or children which means they will have the right to decide on your child's welfare, education and health care.

The appointment of a guardian will not usually take effect where there is a surviving parent with parental responsibility unless following divorce proceedings a residence order has been made in favour of the parent appointing the guardian. In this case, the appointment will take effect on that parent's death.

By simply appointing a guardian in your Will you will have the power to choose the most suitable person to care for your child or children on your death.



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HOW WE CAN HELP:

Making or reviewing your Will when divorcing need not be complicated. With the help of our specialist team in the Private Client Department, we can give you the peace of mind that the interests of your family, friends and dependents will be safeguarded for the future.

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If you need any further information about matters in this information sheet, please do not hesitate to contact us.