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A Guide to

Wills Following Divorce or Separation

- Understand why it may be necessary to review or create a new Will.
- Understand the importance of protecting your estate.
- Understand the other considerations necessary when making a new Will.

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A change in your circumstances

We understand that going through a divorce or separation can be stressful and upsetting. We aim to do all we can to make the process easier for you, while at the same time making sure your best interests and financial position are protected.

During a relationship breakdown, your main residence, your assets and your family circumstances are all likely to be affected. Any provision that you have made in an existing Will may no longer be in accordance with your wishes.

If you are going through a divorce or separation it is important that you plan for your future by reviewing or making a Will.

Why do I need to change my Will?

It can take many months (in extreme cases, years) for a divorce to go through. We recommend that you consider making a new Will at the early stages of divorce proceedings to ensure that your assets will pass as you want them to.

You may prefer to do a short term or 'holding' Will, to change the provisions of an existing Will but with a view to preparing a more permanent Will after the divorce and when all financial matters have been dealt with.

Until the **Decree Absolute** has been issued by the Court, your ex-spouse would still be a major beneficiary under the terms of your Will or under the intestacy rules where you have not made a Will. For this reason, a review of your Will on **Decree Absolute** is essential. However, you should not wait until then before changing your Will but look to change it at the earliest opportunity.

What happens if I die without making a Will?

Not having a Will means that you will die "intestate" and your estate will be divided according to law and not your wishes.

We direct you to our '***What will happen if I die without making a Will?***' flowchart which sets out who will inherit your estate on your death and how much they will receive.

Whilst you are in the process of divorcing, the law means that part, if not all, of your estate will pass to your spouse, which may or may not be what you want.

- If you die leaving a spouse but no children then everything will pass to your spouse.

- If your estate is less than £322,000 (since 26/07/2023) and you die leaving a spouse and children then everything will pass to your spouse.

- If your estate is over £322,000 (since 26/07/2023) and you die leaving a spouse and children, then the first £322,000 and your personal possessions will pass to your spouse.

  Half of the remainder is divided equally between your children (held in trust until they reach the age of 18). Your spouse will receive the other half outright.

  This may trigger an inheritance tax liability depending on the value of your estate.

By making a Will you can state how you want your estate to pass, appoint Executors to administer your estate and Guardians to look after your children.

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What is the effect of divorce?

On divorce your former spouse is normally excluded from your Will as either a beneficiary or executor. If you do want your former spouse to be a beneficiary after your divorce then you will need to draw up a new Will or Codicil to your existing Will. You may not feel that your former spouse is appropriate to look after your finances and affairs on your demise.

If your spouse is given a gift in your Will, they will continue to be entitled to that gift until the decree absolute is granted. As a general rule, if you have appointed your spouse to be executor and trustee and you died before your decree absolute was granted, your spouse would be responsible for dealing with your estate.

If there is no Will your spouse will inherit under the law of intestacy. It is then essential to write a Will to ensure that your estate passes as you would wish and not as dictated by Government rules.

What is the effect of separation from my spouse?

A separation has **no effect** on a Will so your spouse could still inherit under the terms of your Will, no matter how long you have been apart. Even if you have not made a Will your spouse may still inherit under the intestacy rules.

How does it work if I own property jointly with my former spouse?

If you and your spouse own property jointly then you need to consider how the property is owned, whether it is as '**Joint Tenants**' or '**Tenants in Common**'.

If your property is held as **Joint Tenants** this means that irrespective of the terms of your Will, in the event of your death your share of the property will pass to the surviving co-owner (i.e. your spouse). Therefore, in many cases you need to consider whether to 'sever' the joint tenancy so that you own the property as **Tenants in Common**.

In your Will you are then free to leave your share of the property to whomsoever you wish.

We can advise you on how you currently own the property and prepare the necessary paperwork to give effect to severing the joint tenancy.

What if I remarry or start a new relationship?

If you get married or enter into a civil partnership after making a Will, the Will is automatically cancelled unless the Will expressly states that it is made in contemplation of marriage/civil partnership. If you have set a date for a wedding please inform us so that an appropriate clause can be included in the Will to prevent your Will being cancelled.

If you are reading this whilst contemplating a new relationship then you should consider whether it would be advisable to enter into a **Pre-Nuptial** or **Cohabitation Agreement**.

If you start another relationship after parting from your spouse you may also want to think about making a Will providing for new responsibilities. A partner to whom you are not married cannot inherit from you unless you make a Will providing for him or her.

You should bear in mind that if you buy a property with a new partner then it may be sensible to consider entering into a '**Declaration of Trust**' which sets out the proportions in which a property is owned, and clearly states the contributions made by each party. The Declaration of Trust can reflect your intentions and help to prevent any subsequent dispute over entitlement later on.

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What arrangements should I make about my children?

You should consider appointing a legal guardian to look after your children who are under 18. When a parent dies the surviving parent normally becomes the legal guardian.

This is because when you divorce, each of you continues to have parental responsibility, even if your child lives with the other parent or there is a residence or contact order in place.

The trustees appointed in your Will would have power to pay money to the guardians for the maintenance, education and general welfare of your children. Please note: unless the mother appoints him, an unmarried father will not automatically become the guardian of his natural child on the death of the mother.

Can someone bring a claim against my estate?

You have freedom to leave your estate to whomever you wish. However, the **Inheritance (Provision for Family and Dependents) Act 1975** provides that certain categories of people can bring a claim against your estate if they feel that reasonable financial provision has not been made for them. The categories of people who are able to bring a claim include:

- a spouse (including a judicially separated spouse).
- a former spouse who has not remarried (provided no order has been made barring them from bringing a claim in the divorce order). Orders for financial provision in favour of a former spouse are rare because the Court has wide powers to make capital adjustments between spouses by way of **Ancillary Relief** in the divorce proceedings.
- a person who during the whole of the period of **two years** ending immediately before the death lived in the same household as the deceased as husband and wife.
- any person maintained by the deceased immediately before his/her death.

It is important therefore to ensure that the Order dealing with your and your former spouse's financial affairs includes where appropriate a bar on the other party bringing a claim.

Also, if you feel that it is possible that a claim might be made against your estate on your demise then we recommend that you leave a written statement with your Will setting out your reasons for excluding or limiting a particular person's entitlement. If you were dependent on someone who has died or is about to die you do need to take specialist legal advice as a matter of urgency.

What about my Pension and Life Policies?

Given the change in your circumstances you may wish to reconsider any nominations or arrangements in place with regard to any life policies or pension provisions as until your divorce proceedings are settled, your current nominations are still valid.

What about Financial Matters?

It is sensible to review your financial position with a specialist financial planner given the change in your personal as well as financial circumstances.

You may need help with the investment of a lump sum settlement or perhaps fresh mortgage arrangements, life insurance or critical illness cover. We can put you in touch with an expert advisor who can help you get your finances back on track.

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Are there any other reasons that I should make a Will?

A Will provides a sense of security and puts you in control of how your assets (such as your savings, your personal effects, your business and your house) will be passed on after you have died.

We can help you to put your affairs in order and set out your wishes in regard to:

- Choosing responsible executors
- Providing for your spouse or partner
- Care and financial provision for your children
- Protecting business interests
- Protecting family heirlooms from distant relatives
- Gifts to friends and family
- Leaving a legacy to a charity
- Your funeral wishes

Each person or family has very different needs, so tailored advice is essential to achieve the best outcome possible.

'Knowing my affairs are in order has given me great peace of mind'

What should I do now?

Whether you are in the early stages of separation or if your divorce has been finalised it is important that you have a valid and up to date Will. As expert Will writing solicitors, we can help you protect the things you've worked hard for. Whether your estate is simple or complex, we can make the process of making a Will cost-effective and straightforward to ensure that your assets are protected and are dealt with in accordance with your current wishes.

For individual advice and assistance contact our Wills, Trusts and Probate Team to find out how we can help.

Disclaimer - This guide contains information on current legal issues applicable at the time of printing. Note there may have been changes subsequently which have not been incorporated into the material. This guide is intended for information purposes only and its content should not be applied to any particular set of facts or relied upon without legal or other professional advice.

Why choose Band Hatton Button?

We deliver excellent legal services with a human touch and are proud to have a reputation for being approachable and going the extra mile for our clients. We provide high quality, pragmatic advice and offer a comprehensive range of legal services, delivered by experts and supported by our culture of respect and understanding.

Our expertise includes:

- Wills, estate and succession planning;
- Powers of Attorney and Court of Protection;
- Administration of estates and post death planning;
- Trust creation and administration;
- Will disputes;
- Matrimonial and family law; and
- Buying or selling a property.

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