Marriage, Divorce and Death:
What Effect does Marriage and Divorce have on a Will?

Article by Wills + Estates Lawyer, Cathy Fon.
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If you marry, divorce or separate from your partner, it is critical to talk to a solicitor to ensure your Will and EPA are updated to reflect your new situation.

When you are planning a wedding, the last thing on your mind will be the effect this may have on your Will. But you should turn your mind to it sometime between ordering the invitations and saying 'I Do', because getting married will have a big effect on your Will, your Enduring Power of Attorney and other legal matters.

A divorce or defacto separation will have an effect on these issues as well.

Below, are seven things you really should know.

1. Will

In general, a Will is revoked by the marriage of the testator (that is, the person making the Will).

This rule does not apply, though, if the Will appoints your new spouse as the executor or guardian or trustee in the Will or if they are already named as your beneficiary. This is often the case for people who are already in a defacto relationship and they have prepared Wills recognising each other.

There is also no revocation if the Will specifically mentions that it is being signed in contemplation of your marriage.

2. Divorce

Wills are also affected if the testator gets divorced. If they have a current Will naming their ex-spouse as executor or guardian or trustee, or if they have named them as a beneficiary, then those parts of the Will, will be revoked upon the divorce.

It is very important to note that this revocation only occurs when the divorce order is made final by the Family Court. Until that date, a separated person's Will is valid, even if it appoints an ex-spouse as executor or guardian or trustee, or if the ex-spouse is a beneficiary under the Will.

The same rules apply when a defacto relationship comes to an end.

3. What if there is no Will?

If a person passes away without a Will, and therefore does not nominate an executor, then this will cause a problem in the administration of the estate. There will be no obvious person with legal authority to deal with banks, super funds, nursing homes etc. It may be necessary for someone close to the deceased to apply to the Court to be appointed as administrator.

The law sets out an order of priority for the person that can be appointed. The Court would first expect to appoint a spouse, then adult children, then parents and so on. Mostly this is not problematic.

However, this can become a problem where a person has, for example, a spouse from whom they have separated but not yet divorced. In such a situation, the husband or wife (even though separated from a deceased person for years) will be in a good position to apply to the Court to be appointed as administrator of the estate. They may even still be the person legally entitled to be the beneficiary of the estate.

The best way to avoid such a situation is to prepare a Will as soon as a separation or divorce occurs.

4. Superannuation – Nomination of Beneficiaries

Upon separation, a new Nomination of Beneficiaries form should be signed to ensure that, in the event of death, superannuation is paid to someone other than an ex-spouse.

5. Enduring Power of Attorney

All adults should have an Enduring Power of Attorney (EPA), a document which appoints a person who will make decisions for that adult if they cannot make decisions for themselves.

If a person signs an EPA and then gets married, then the EPA is revoked if it gives power to someone other than the person's new spouse.

If a person signs an EPA and then gets divorced, then the EPA is revoked if it gives power to the person's ex-spouse.

It is important to note that these laws do not apply to defacto relationships. If you have signed an EPA which gives power to your defacto partner, and you then separate from that partner, you will need to take positive action to revoke and replace the EPA. This is especially important if the power to make financial decisions has already begun.

6. Jointly Owned Property

Many married and defacto couples own property together, usually as 'joint tenants'. This means that if one partner passes away, then their share of the property automatically passes to the surviving partner. This law is usually perfectly appropriate for a couple.

However, in the event that the couple separates, then such a joint tenancy should probably be severed. This means that the couple instead become 'tenants in common'. In the event, then, that one ex-partner dies, then their share in the property will not pass automatically to their former partner but will pass to the beneficiaries under their Will instead.

7. So what's our advice?

Make sure you **ALWAYS** have an up-to-date Will and Enduring Power of Attorney.

If you marry, divorce or separate from your partner, **ALWAYS** talk to a solicitor to ensure your Will and EPA are updated to reflect your new situation.

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