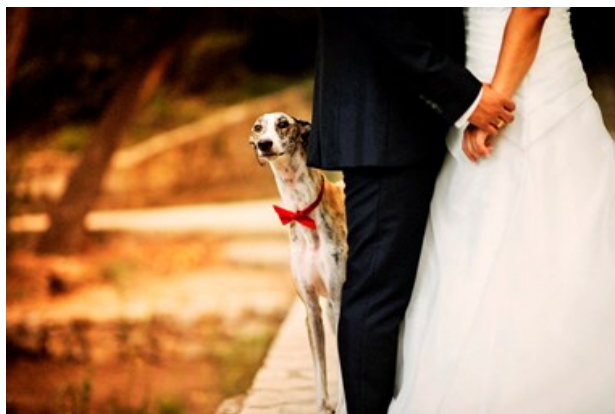




Effect of marriage on your Will and other estate planning documents

Author: [Chris Alfonso](#)

Email: chris@ealawyers.com.au

Date: Monday June 29, 2020

Your [Will and Estate Plan](#) may not rank highly on the list of things to think about when you are preparing for the big day. But getting married ([or divorced for that matter](#)) can have significant impacts upon any Will, Power of Attorney or Appointment of Guardian you already have in place. Likewise, if you didn't have any of these documents before marriage, now's the time (before marriage or divorce), to get them done. They are more 'valuable' than many people think.

Effect marriage has on an existing Will

Marriage **will** revoke any Wills made prior to that marriage unless an exception applies.

If you have a Will that was prepared and signed prior to your marriage, then there is a chance that the Will has been automatically revoked and would not direct your estate in the way you might expect or want.

Exceptions to revocation upon marriage

The exceptions to the general rule of marriage revoking previous Wills include:

1. If the Will is made 'in contemplation' of the marriage; and
2. Provision made under the Will to the new spouse is not revoked.

How does "in contemplation" work?

For a Will to be made 'in contemplation' of marriage, it is advisable to include a clause expressly stating that the Will would not be revoked in the event of marriage.

If the Will does not include this clause, it can be extremely difficult and costly for your executors to try to prove that it was made with the impending marriage in mind using supporting evidence. This is particularly difficult if the time between the preparation of the Will and the date of death may have resulted in much of that supporting evidence being lost, forgotten, or destroyed.

Example

- James made a Will on 26 January 2000 gifting assets to his de-facto partner, Sarah, and his children from a prior relationship.
- On 25 April 2000, James and Sarah get married with little notice to the rest of the family.
- There was no 'in contemplation' clause in the Will.
- After 20 happy years together, James passes away.
- In the process of managing the estate, it comes to the executor's attention that the Will was made prior to James' marriage to Sarah.
- For the Will to stand, the executor now needs evidence to attempt to prove to the Court what James intended in the Will. This could include including statements from Sarah and James' children attempting to recall circumstances from 20 years ago.
- Despite the relatively short amount of time between the original Will and marriage (about three months in this scenario), this is not a straightforward process and can result in substantial delay and come at additional costs in attempting to deal with the Court's requirements.
- This could all have been avoided by including a clause referring to James' contemplation of marriage to Sarah.

While the 'in contemplation' clause does not need to refer to a particular marriage, it is often preferable that it does so. Otherwise, if the Will doesn't provide for a future spouse and is not updated again, then after marriage the Will may not provide for your spouse.

Example

- Jessica prepares a Will in 2005 leaving her estate to her parents with a general 'in contemplation' clause that states that the Will should not be revoked when she gets married.
- In 2010, Jessica meets Brandon and they marry a few years later.
- In 2020, Jessica dies without having updated her 2005 Will.
- The 2005 Will was not revoked by her marriage to Brandon and remains Jessica's last Will, meaning that Jessica's estate is left to her parents instead of her husband.

Provision to spouse (including 'gifts')

Even if a Will does not have an 'in contemplation' clause, any gifts made under a Will to your new spouse will continue. But these are the only parts of the Will that would continue after the marriage. Gifts made to beneficiaries who are not a spouse of the

deceased are revoked and would not apply.

This can cause issues if there were additional gifts to others in the Will.

Example

- James prepared a Will shortly before his marriage to Sarah.
- James' Will provided for a gift of \$100,000 to his parents to reimburse them money they had gifted to him.
- The rest of his estate would go to Sarah.
- The Will failed to include any provision relating to a potential marriage to Sarah in the future or an 'in contemplation' clause.
- Shortly after James and Sarah's marriage, James is involved in a serious accident killing him instantly.
- Because Sarah survived James, the gift to Sarah would still apply following the marriage as it falls under one of the exemptions to the rule that marriage revokes the provisions of a Will (as the gift was a provision to the surviving spouse).
- But, the gift of \$100,000 to James' parents under his Will was revoked by his marriage to Sarah and would no longer apply. James' parents do not fall into the category of people who the exemption would apply to protect.
- James' parents would not receive the gift that he had originally intended to provide to them and instead, the whole of the estate would pass to Sarah.
- If James had updated his Will upon marriage, the gift to his parents would succeed.

Effect of marriage on your Enduring Power of Attorney

Marriage **does not** automatically revoke a previously made [Enduring Power of Attorney](#). The persons who were appointed as your Attorneys would still be able to act after you marry.

It's also important to note that a later made Power of Attorney does not automatically revoke an earlier Power of Attorney. When creating a new Power of Attorney, any older Powers of Attorney should also be considered. If the new Power of Attorney is intended to replace the older document, then a written revocation should be prepared and provided to the Attorneys under the older document.

A written revocation of the Power of Attorney provides clear proof of the revocation should you or your new Attorney need to prove it at a later stage if a dispute arises.

If you wanted your new spouse to also be your Attorney and make legal or financial decisions on your behalf if needed, then you may need to revisit your estate plan and ensure it is current and up to date.

Example

- Jackson appoints his mother, Roslyn, as his Enduring Attorney.

- Ten years later, Jackson marries Emma and makes a new Enduring Power of Attorney appointing Emma as his Attorney.
- Jackson forgets to revoke the old Enduring Power of Attorney to Roslyn.
- Emma and Roslyn have a strained relationship.
- Jackson is injured in a car accident and needs assistance in making decisions.
- Both Roslyn and Emma are equally entitled to act, each with different ideas as to what is in Jackson's best interests or what his wishes may be.

Effect of marriage on your Appointment of Enduring Guardian

Marriage **will** automatically revoke any previously made appointment of a person as your Enduring Guardian unless the appointment was of your new spouse. An Enduring Guardian is a person who makes decisions on your lifestyle or medical needs in the event you are unable to make those decisions yourself. If there were any joint Enduring Guardian's alongside your new spouse or any alternate Enduring Guardian appointments, they would be revoked by marriage and your spouse would remain the sole Enduring Guardian.

Example

- Keith appoints his de-facto partner, Amanda, as his Enduring Guardian and his sister, Holly, as his substitute Enduring Guardian.
- Keith and Amanda later marry and the Appointment of Enduring Guardian is not updated.
- Amanda and Keith are involved in an accident and are both in a coma; unable to make decisions for themselves.
- Holly's appointment as the substitute Enduring Guardian was revoked by marriage, so she cannot make decisions on Keith's behalf.
- Holly, or one of Keith's other close relatives, would need to approach the NSW Civil & Administrative Tribunal to seek a guardianship order to be able to make medical or lifestyle decisions on Keith's behalf while Keith is unable to do so on his own behalf (and while Amanda is also incapable of acting).

In summary

Under most circumstances (save for some exceptions), getting married can have significant consequences on the effect of any previous Will, Power of Attorney or Appointment of Enduring Guardian.

If you're contemplating marriage, we strongly recommend you and your spouse arrange to update your previous estate planning documents or, in the event you have no documents, arrange to get new ones completed.

At E&A Lawyers, [our estate planning team can assist you with any requirements for your Will, Power of Attorney or Appointment of Guardian](#). We will look at your specific requirements (including the need to consider children from a previous relationship) and ensure you and your new spouse create your documents to reflect your wishes.

Get help from a Wills and Estates lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

[02 9997 2111](tel:0299972111)

info@ealawyers.com.au

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact E&A Lawyers.