

PrivateMatters

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Newsletter from Manches' family and private client team



Welcome to the fifth edition of *PrivateMatters*.

HAVE YOU GOT THE WILL?

A surprising number of people do not lodge their Wills with solicitors, banks or other organisations, or indeed even tell their family where their Will can be found.

Where an original Will is lost, it can still be valid if its terms and execution were clearly evidenced elsewhere, but the evidence must be very clear indeed.

The deceased's family may have to spend time tracking down the Will and may indeed never find it. This can lead to intestacy, or an earlier Will being relied upon and, occasionally, even more surprising consequences.

Late last year the case of *Fearnley v Napier* dealt with a situation where the deceased's partner believed a Will had been made which left substantial provision for her, but that it had been suppressed by the deceased's family in order to create an intestacy, which favoured them. Suppression of a Will could, of course, attract severe penalties. Her claim was based, at least in part, on a conversation overheard by an electrician who was working in the deceased's house at the time when his family were there looking for a Will; he believed that he had overheard a Will being read and that it was described as having been signed. The family denied that this was true. The case took nine days and ultimately the claimant was not successful, but even after a lengthy investigation there remained some uncertainty about what Wills had in fact been made and whether the deceased died intestate or whether another draft Will had in fact been executed. The case report does not deal with the issue of costs, but we can be sure that it was extremely expensive and distressing for all concerned and clearly delayed the administration of the estate.

Quite apart from making clear where your Will is kept, if someone in your family has died and you cannot find a signed Will, or you can find only old Wills which are clearly out of step with family circumstances, or no Will but evidence that one was made (for example correspondence with a solicitor, or a draft, or a reference in the deceased's correspondence to its existence) take advice quickly. There may or may not be a missing Will but this situation needs to be resolved and might also disclose competing claims on the estate.

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SEVEN REASONS A CUT-PRICE DIVORCE MAY NOT BE THE BARGAIN IT FIRST APPEARS...

People embarking on a divorce can face a bewildering array of solicitors offering their services, some slashing their prices in an effort to lure clients through the door. Anyone seeking the advice of a lawyer on family matters should seriously consider who takes on their case. Reduced prices in the first instance may not translate to a cheaper, quicker or better divorce in the long run.

1. Check your solicitor knows their stuff. Anyone who needs advice should make sure that the solicitor they speak to is an expert in family law, and experienced in that field.
2. Does the solicitor offer more than one service? If a solicitor also offers to look after your Will and the conveyancing for your property themselves (rather than referring you to a specialist), they are unlikely to be a specialist in family law.
3. Is the solicitor a member of Resolution? Resolution is an organisation for family lawyers, which promotes a code to be as conciliatory as possible. A member of Resolution should give you advice which is designed to resolve matters as swiftly and amicably as possible in the circumstances. The resolution website is www.resolution.org.uk.
4. Does this solicitor offer the service you think you need? There are many ways to approach a divorce. Some lawyers are trained in the collaborative law process, some are trained mediators. If you think (having looked at the Resolution website) that either of these might be suitable for you, you should speak to a solicitor who can provide these services.
5. Is your solicitor a Court junkie? Ask the solicitor how many cases he or she has which go all the way to a final hearing. Most solicitors will realise that fighting the matter out in court is the last option if at all possible. If the solicitor is always in court, it could tell you that he or she is not as proactive about settling cases as they could be.
6. Will they do all your work themselves (at a high charge out rate) or do they have assistants who can help with some of the day-to-day work on your case, keeping your costs down?
7. Where will proceedings be issued? Your local court may not be the best option for your circumstances, particularly if it has one or two Judges with a maverick approach to family law, and your solicitor should be familiar with all the local courts and the Principal Registry (the main family court) in London.

TROUBLE WITH WILLS

Families and friends of someone who has recently died may well be disappointed about the provisions made in his or her Will or be uncomfortable about the circumstances in which it was made. They may have to face the fact that there were things they did not know about the life of the deceased, however close that person may have been, and they may be very uncertain about what to do.

Just as the legal requirements for making a valid Will are strict, a person who wants to challenge a Will has to meet a very high standard of evidence in order to succeed in getting a Will overturned at trial. The grounds for challenge are broadly limited to failure to meet the requirements for a valid Will, lack of mental capacity, undue influence, fraud or duress.

However, there is no reason not to ask questions about the circumstances in which a Will is made, if you are uncomfortable about it. Experience suggests that suspicions about a Will often prove to be right and there is not always any need to resort to proceedings which should not, of course, be undertaken lightly. Asking questions may reveal evidence which will lead to the Will being set aside by agreement, or wrongful claims abandoned, but even if this is not the case, the information which comes to light may help the person who is unhappy about the Will to accept what has happened.

A recent case in which Manches advised involved the estate of an elderly widow who had made several substantial lifetime gifts to a young friend and eventually made a Will in his favour, cutting out her children and grandchildren almost entirely. Her children, and indeed many of her friends, believed that the gifts had been made as a result of undue influence.

The information which emerged in the investigation which followed led to the "friend" being advised to return the vast majority of the money he had been given to the family of the deceased. Although proceedings were issued in that case for technical reasons, they were very quickly settled.

As family structures become increasingly complicated, and children and their parents live further apart, this is not an uncommon story and emphasises the need to take advice quickly if you believe that there is something odd about a Will. It gets harder to investigate the longer it is left and the chance to challenge a Will might disappear altogether.

PROTECTING YOUR INHERITANCE

Many people know they should have a Will to ensure that they benefit the people they really want to rather than those decided by the intestacy laws. This is particularly true for couples who, whilst they may have lived together for many years, have either decided not to get married or have not yet got around to it.

What can happen if you do not make a Will?

Whilst many unmarried people think that they are in a “common law” marriage or partnership, under the intestacy rules such a relationship, however committed and long term, is not recognised. The surviving partner could well see themselves without a roof over their head if the home they shared was in the deceased’s sole name. Even if you are married or in a Civil Partnership, if your spouse or civil partner has children you may find that you end up sharing the ownership of your house with their children, as only the first £250,000 of your spouse’s or civil partner’s estate will go directly to you. You will have to share the rest with your spouse’s or civil partner’s children. If the children are under 18, you may even have to take them to Court just to be able to pay the mortgage or move house.

A question of tax

If you have been diligent and have made a Will, you will probably also want to make sure that you leave as much as possible for your beneficiaries, rather than see it go to the State through taxes and other costs. Inheritance tax is one major way in which the State can reduce the value of your estate, taking 40% of the value of your assets above the nil-rate threshold, which is:

- £325,000 for an individual; and
- up to £650,000 for a widow, widower or surviving Civil Partner.

With some forward planning, there are ways of reducing this tax burden on death.

Costs during your lifetime

Your assets may also be reduced during your lifetime. One of the biggest drains on an individual’s resources can be the cost of care in later life. For an elderly or infirm relative, the cost of care can be upwards of £450 per week and a local authority will only make a contribution towards this once the individual’s capital assets are worth less than £23,250.

This creates a huge problem for those millions of people who have saved responsibly during their lifetimes only to find that their hard-earned savings dwindle rapidly in order to pay for their care. Even harder to swallow is the prospect of the family home having to be sold to pay for the care once their savings have been used up. In either event, it can mean that there is little or no inheritance left to pass down to the family.

Protecting your estate

There is a way of taking more control over how your assets may be considered. As with most financial planning, the earlier you do this the better. By placing the family home into a trust, it is possible to protect its value by taking it out of the equation so far as any assessment of your assets in respect of local authority funding is concerned. Structured properly, this would ensure that the home-owner and their family maintained their right to live there for as long as necessary. In addition, should residential care be needed in the future, and the house is sold because it is no longer needed, the funds can be used to top up the level of care, rather than funding its entirety, allowing greater flexibility in your choice of care home.

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“It takes hands to build a house but only hearts can build a home.”



Buying a home

Buying and selling a property is one of the most important transactions you will face. Our residential property lawyers will ensure your move goes ahead with minimal delay and anxiety.

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MEDIATION NOW COMPULSORY...

From 6th April 2011, anyone who wishes to make an application to the Court for an Order regarding their children or in relation to their and their partner's finances must, with limited exceptions, attend an information meeting about family mediation and other forms of alternative dispute resolution. The rationale behind the new requirement is to increase knowledge about and access to mediation in both publicly and privately funded cases.

Mediation is being encouraged by the Government and the Presidents of the Family Division in light of the help it can offer in reaching a quick, informed and reasonably-priced resolution of family disputes and reducing the pain and cost often associated with protracted Court proceedings. Whilst mediation is not a panacea, Radio 4's Today Programme's recent survey suggested that more than 2/3rds of couples who took up mediation were satisfied with the results.

Agreements reached in mediation are more likely to be adhered to because they have been entered into voluntarily, the parties having reached an agreement that is considered reasonably fair by both of them and the terms of which have been fully discussed.

A mediator is trained to act neutrally in helping couples to determine the best way forward to meet the family's interests. They will bring their experience to bear and assist the parties in compiling their financial disclosure, looking at the options between them and "reality testing" those options.

It is important to find a mediator who has the skills that best fit your case. Mediators come from a range of backgrounds, including lawyer mediators and those from therapeutic backgrounds. Various forms of mediation are available: including "shuttle" mediation, where a mediator sees both parties separately and "co-mediation", where two mediators are used, possibly with different skill sets.

If you would like to discuss the appropriateness of mediation in your case, Alexandra Lewis offers a free initial telephone consultation and can be contacted on 01865 722106.

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Manches is a leading law firm in Oxford, Reading and London. We advise on all aspects of personal law including family, tax and trusts, Will writing and residential conveyancing. We also advise clients on all areas of business law, including property, corporate, dispute resolution, employment, intellectual property and technology law.

This newsletter is intended merely to provide a summary of the law in this area. It is not intended to provide legal advice for specific cases.

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