

Wills, Trusts & Estates

Estranged couples who don't change their wills: Unintended consequences

By **Barbara Green**



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(June 20, 2019, 8:16 AM EDT) -- The divorce rate in Canada has been pretty much flat for decades, sitting somewhere between 38 and 42 per cent. It is no secret that lawyers are expensive. A few years back, there was an article in the media about how (some) lawyers themselves could not afford to pay their own fees if they needed legal services.

While some separating couples are highly litigious, arguing over every plate and that wagon-wheel coffee table like in the film *When Harry Met Sally*, others disengage entirely. They don't talk to their spouse and do not ink nor execute a formal separation agreement. Or, perhaps they make their own arrangements to share childcare responsibilities and expenses. Consciously or unconsciously, they decide not to finalize the end of their marriage by getting a divorce.

Importantly, if they do not divorce, they probably also neglect to change their wills, or they have no wills at all. Not changing your will is like drag racing on the highway at 2 a.m: it's a bad idea to start, and you will pay for it in the end.

Every couple of years, pollsters reconfirm that more than half of Canadians (51 per cent) do not have a will. And every November, the Canadian Bar Association designates November as "Make a Will Month." Clearly, the message is not getting through.

And so, the estranged spouses go about their separate lives for years and decades until, inevitably, one of them dies.

Kicking this can down the road may have severe unintended consequences. You may be leaving significant amounts of money to your estranged spouse, even though you may consider yourself separated or divorced. From a legal perspective, the law says that an estranged spouse is still your legally married spouse, regardless of your intentions.

As an estate litigator, this scenario of estranged spouses comes up from time to time. Undoubtedly, it will come up again. In one such case, a very significant amount of money was inherited by an estranged wife (whose estranged husband had died without a will), even though the "couple" had not been in communication for over 10 years. Clearly, this was not the plan. But here we are.

And far too often, I see legally unenforceable wills. And, as my son says: "Make a proper will, you won't die any sooner."

To be clear, the rules of intestacy (i.e. the rules which apply when you die without a will) apply to legally married spouses, but the rules of intestacy differ for common law spouses. Separation does not affect a common law partner's will. However, where there is no will, a common law partner has no statutory entitlement (dependant's relief claims aside).

Some people believe that it would be unconscionable for any former spouse to inherit money not intended for him or her. Or, they hope that judges will rely on some nonexistent moral high road doctrine (of sorts) to do the "right thing" by depriving an unintended beneficiary. Unfortunately, the moral high ground has no impact on the laws of inheritance in Canada.

So, the law views an estranged spouse as your current spouse, unless a divorce has been granted. Canadians need to understand that this is the way our legal system works. For the purposes of determining who is the estate trustee and beneficiary, an estranged spouse may have a claim on your estate. Without wills, separated couples are leaving themselves vulnerable to not having their last wishes fulfilled.

Here are important things to remember:

- Separation does not revoke inheritances under an existing will.
- When there is no will, a separated legally married spouse is entitled to the preferential share of an estate (the first \$200,000), and then to a further portion of the residue, depending upon how many children the deceased had.
- A divorce decree or annulment will revoke any gifts made to a former spouse in a will.
- A divorce decree or annulment revokes any appointments of a former spouse. These appointments include: executors, estate trustees and guardians (from a legal standpoint, the will takes effect as if the former spouse had predeceased the deceased, unless the will expresses intention otherwise.)

The best way to handle the situation is to update your will while you are negotiating a separation agreement (if you choose to negotiate one) and then you may need to create a new will after your divorce is finalized, with a new estate trustee and new beneficiaries. Yes, this is a lot of paper work and a lot of liaison work. But this way, you and your estate will be protected from the Law of Unintended Consequences.

The potential bad situations set out above can be avoided by first speaking to a family law lawyer about proper arrangements and then speaking to an estates lawyer about preparing a new will, with a new estate trustee and new beneficiaries.

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