ROSE & ROSE

WINTER 2018

Your quarterly bulletin on legal news, views and advice from Rose & Rose

CHANGE IN DIVORCE LAW EXPECTED AFTER SUPREME COURT RULING

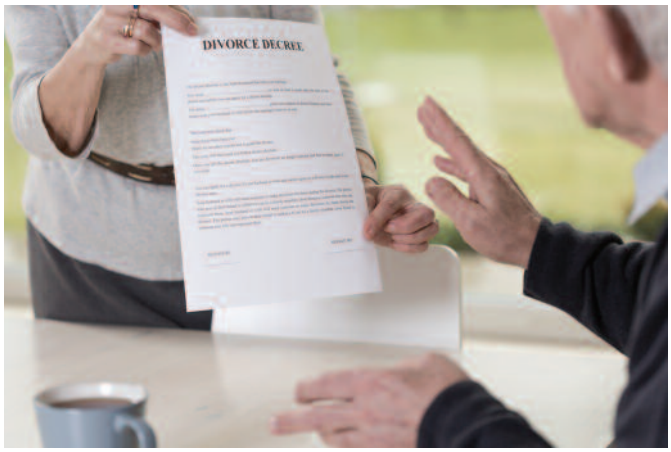
The Supreme Court judges' decision to prevent a wife from divorcing her husband, which was made 'without enthusiasm', has led to proposals to introduce 'no fault' divorce.

The case arose after a wife's application for a divorce was opposed by her husband on the basis that the marriage had not irretrievably broken down. Such challenges are extremely rare. Under the law, there is an automatic right to a divorce only in a limited number of circumstances. These are:

- Divorce without consent can take place where the couple have lived apart for five years;
- A couple who have lived apart for two years can divorce with the consent of both spouses; or
- A couple can divorce where there is an irretrievable breakdown in the relationship. This can be evidenced in several ways, including adultery, but the essence is that the behaviour of the spouse is such that the other spouse cannot reasonably be expected to live with him or her. In this instance, the husband's behaviour, though far short of what might be expected in a normal loving relationship, was not so egregious as to meet that test.

The husband believed that a reconciliation was possible and the couple had not lived apart for five years.

When a petition for divorce is made on the ground of unreasonable behaviour, the normal practice is for such behaviour to be dealt with very briefly, as a detailed exposition can increase the ill-feeling at



what is always a difficult time and that in turn can make other aspects (such as the residence arrangements for children and the financial arrangements) more difficult to negotiate. The wife's evidence in respect of her husband's behaviour was therefore limited.

The appeal to the Supreme Court dealt in essence not with the husband's behaviour as such, but the effect it had on his wife. Under no fault divorce the need to show evidence of unreasonable behaviour would be removed.

Our experts in family law are experienced in dealing with all aspects, contentious or not, of family breakdown.

LAW OVERRIDES WILL THAT EXCLUDES PARTNER

The Inheritance (Provision for Family and Dependants) Act 1975 allows someone who was dependent on a deceased person during their lifetime to make a claim against their estate if there is no, or inadequate, provision for them in the will. This does not apply only to blood relatives.

In a recent case, a 70-year-old woman was awarded £325,000 from the estate of a man with whom she'd had a relationship lasting more than 20 years, the last seven of which they had spent together in the man's home.

His will left his £1 million estate entirely to his two daughters, both of whom are comfortably off. When his former partner made a claim under the Act, they opposed it, contending that the relationship was not one of permanence and substance.

The judge concluded that the man had clearly had a responsibility to his partner and made the award.

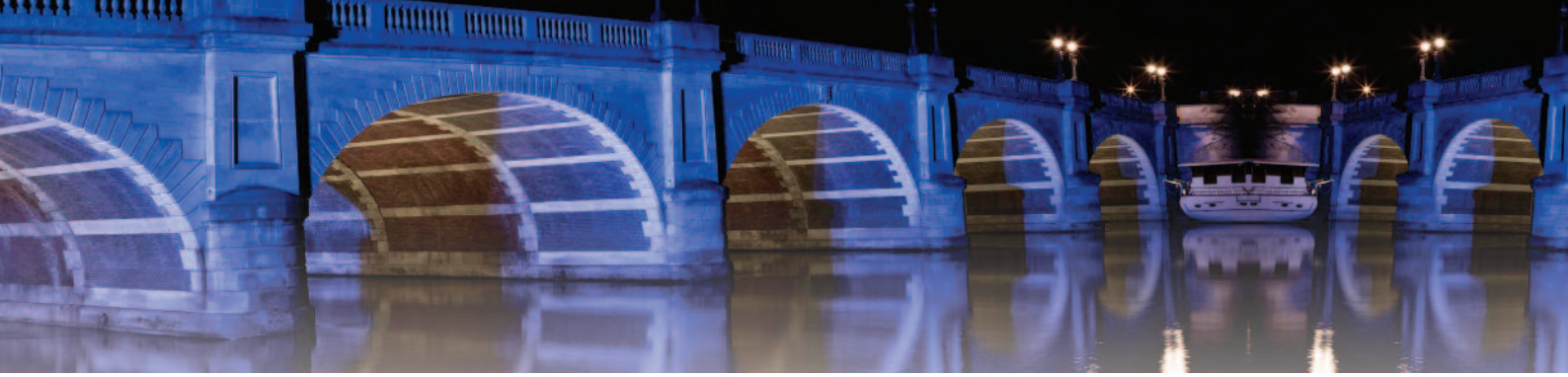
If you are in a situation in which appropriate provision has not been made for you, you may be able to launch a successful legal challenge.

Lexcel Practice Management Standard Law Society Accredited

SOLICITORS FOR THE ELDERLY
Sally-Ann Joseph is a member

THE LAW SOCIETY ACCREDITED Conveyancing Quality

resolution first for family law



RECORD IHT HAUL SPELLS WARNING FOR FAMILIES

News that HM Revenue and Customs (HMRC) collected a record £5.1 billion in Inheritance Tax (IHT) in 2017 will come as a warning for many people, the near half billion pound increase over the previous year being largely due to more homeowning families being drawn into the IHT net.

With the average house price in the UK now more than £217,000 (and more than double that in London) and with an IHT threshold (although there are extra reliefs for the family home) of £325,000, there is a distinct danger that anyone with reasonable savings and other assets will leave an estate that exceeds the threshold.

Fortunately, IHT is a tax which is usually avoidable with planning and if action is taken in good time.

For advice on how to make sure your family wealth passes to those you choose, not to HMRC, contact us.

COURT AGREES TO CORRECT TRUST ERROR

We all make mistakes...and when a contract is set up the terms of which clearly do not reflect what was intended, the court can be asked to rectify it. A recent case shows that that approach can also be taken with regard to incorrectly drafted trust documents.

When a couple wrote their wills, they provided that on death a family trust was to be set up. This was part of an Inheritance Tax (IHT) mitigation exercise. When the wife died, the family home was transferred into the trust, with the husband as the beneficial owner of a half share in the property and their two daughters entitled to a quarter share each.

The potential beneficiaries of the trust included the settlors, who included the two daughters. The trust deed allowed the trustees to apply the trust fund for the benefit of any of the beneficiaries.

Regrettably, a later clause specifically prevented the settlors from benefiting from the trust – a clear drafting error. The apparent position was made worse by the addition of a clause that meant if the trust 'failed' for any reason, the trust assets would be given to charity.

The rectification of the drafting required a visit to court, and although the family were all happy for the trust deed to be amended, the judge did have to consider the potential implications for a future spouse or any children of the settlors, as the trust deed made them a 'contingent gift'.

In a judgment that ran to 36 paragraphs, the High Court ruled that the clause which prevented 'any part of the trust income or capital' being applied for the benefit of a settlor was void.

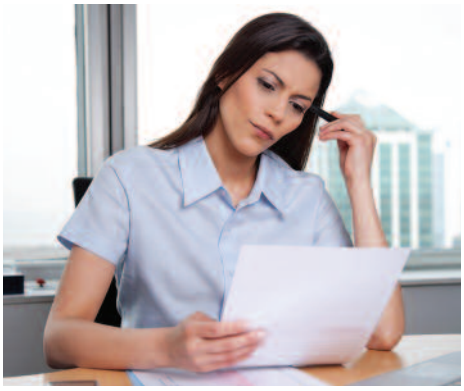
The High Court is an expensive place to get trust deeds put in the correct form. In this case, careful drafting and a diligent reading by the settlors, who may well have picked up the error themselves, could have avoided the significant cost of even an unopposed application.

ACAS ISSUES GUIDANCE ON EMPLOYMENT REFERENCES

The Advisory, Conciliation and Arbitration Service (Acas) has issued guidance informing job applicants and employers of the legal requirements appertaining to employment references.

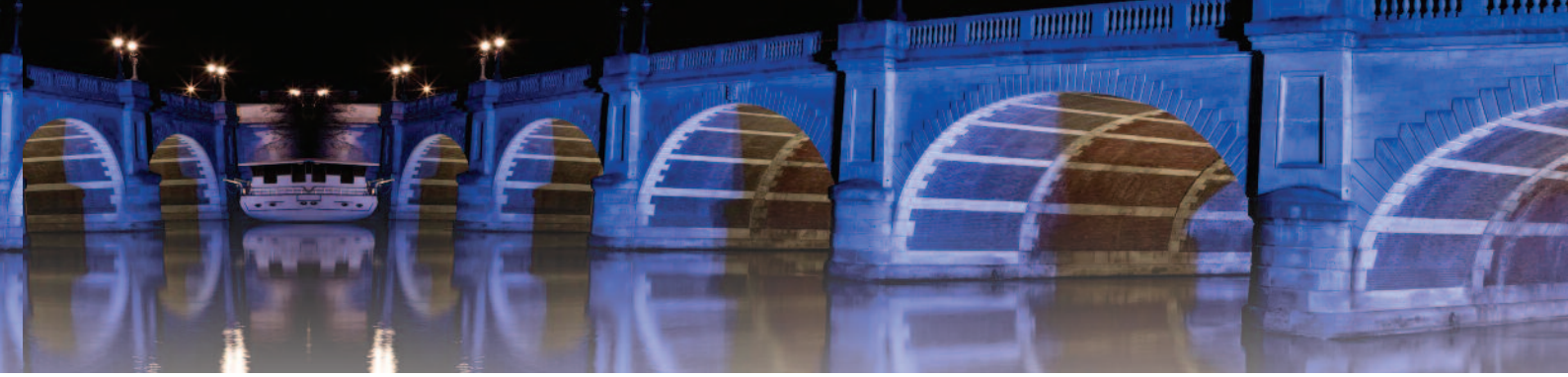
Where a reference is provided, it must be accurate and fair. It must not include misleading or inaccurate information and should avoid giving subjective opinions or comments that are not supported by facts. Employers who ask for references must handle them fairly and consistently.

The topics covered by the guidance include:



- Does an employment reference have to be provided?
- What can an employment reference include?
- When are employment references needed?
- Job offers and references;
- Can an employer give a bad reference?
- Resolving problems with references.

It is wise for employers to have a policy in place to help them overcome the risk of claims of a breach of the law when handling reference requests or references provided by a former employer.



CAN A WILL BE VALID IF YOU CAN'T READ IT?

One of the requirements for a will to be accepted as valid is that the person who makes it must have 'knowledge and approval' of its contents...in other words, they must understand what the will says and what it means in practice.

It might seem, therefore, that a will in a language the testator could not read would be difficult to validate, but that was not the view of the High Court in a recent case.

The son of a couple who had executed 'mirror wills' contested his late mother's will. The will, written in 1998, gave her estate to his younger brother. He argued that she could not have understood the will, which

was written in English, as her command of the language was insufficient to give her knowledge and approval of its contents.

However, the Court ruled that in the absence of any evidence to the contrary or any suspicious circumstances surrounding its execution, the will should stand.

The bar is set high for those who wish to challenge a will on the basis that the person making it lacked knowledge and approval, with the burden of proof resting on those seeking to invalidate it.

However, in a case like this, the provision of a signed and certified translation in the language of the person creating the will is a sensible precaution.

ELDERLY CARE CRISIS LOOMS AS DEMENTIA RISK IGNORED

A report published recently by Solicitors for the Elderly (SFE) makes worrying reading as it highlights the growing gap between the number of people expected to develop dementia and the number who have created a lasting power of attorney (LPA).

An LPA can be used to give another person the ability to administer your affairs should you lose that capacity and can be set up to allow management of both financial and health and welfare issues.

In practice, when there is no LPA the results can be a mess. Dementia is a progressive disorder and it is usual for the erratic behaviour to start gradually and worsen. Much damage can occur before the family seize the nettle. With an LPA, the whole process can be dealt with in a much more orderly fashion.

According to SFE, there are more than 12 million British residents at 'high risk' of developing future incapacity. However, fewer than one million people have made a health and welfare LPA.

All adults should consider making an LPA appointing one or more attorneys so that their affairs can be managed by a responsible person and their care needs met. Failing to do so can cause a great deal of stress for their family.

For advice on all matters relating to elderly care and estate planning, contact us.

WIFE MUST PAY FOR HER OWN MISTAKES

The Supreme Court recently decided a case which made clear some of the limits that apply when financial issues were resolved within a consent order at the time of a divorce but where circumstances have changed over time and one spouse seeks to have the arrangements revisited by the courts.

It concerned an application by the ex-wife of a businessman to have the financial settlement they agreed when they divorced in 2002 revisited. Under the settlement, the wife received most of the couple's cash assets – some £230,000 – and maintenance of £13,200 a year for life. She used the capital sum to buy a house with a mortgage as a top-up, but she over-extended herself and by 2015 was in debt and living in rented accommodation.

She applied to have her maintenance increased as she could no longer afford her rent, and her ex-husband applied to have the payments stopped. The argument went to the Court of Appeal, which increased the maintenance payments to more than £17,000 a year. The ex-husband appealed against that order. The Supreme Court agreed with the ex-husband: the original settlement had taken housing costs into account. His ex-wife's situation was the result of decisions she had made subsequently and it would not be fair to expect him to foot the bill for those.

Experienced legal representation can help ensure the best possible financial settlement on marriage break-up.

Contact us for help and advice.

FAMILY COURT HAS HIGH COURT POWERS

When a couple divorced, their financial settlement was complicated by the fact that both of the properties they jointly owned were mortgaged. The Family Court ordered that they should each have one of the properties and use their best endeavours to release the other from their obligations under the mortgage. If that proved to be impossible, each should indemnify the other against any liability under the respective mortgages, such that each alone would be responsible for the payment of the mortgage on the house they occupied.

When problems occurred with regard to the payment of one of the mortgages, a legal argument arose as to whether the Family Court had the power to make an order including the indemnities or whether its powers were 'confined to the four corners of the Matrimonial Causes Act'.

In a terse judgment, Mr Justice Mostyn stated that "The Family Court has all the powers of the High Court. The High Court unquestionably has the power...to order an indemnity. If awarded, that represents a legal right in favour of the person so indemnified. The court can award an injunction in support of a legal right. To order someone who has been ordered to indemnify the other party in respect of a mortgage to use his or her best endeavours to keep up the payments on that mortgage is of the nature of an injunction in support of a legal right.

In my opinion, this provision is squarely within the power of the High Court to order, and is therefore within the power of the Family Court."

The ruling confirms that the Family Court has the powers of the High Court in these circumstances. This means it can make orders for indemnities and injunctions, which may be necessary in cases where the existing financial arrangements are tricky to separate out.

Contact our experienced family law team here at Rose and Rose for help and advice on any matrimonial issue.

ROSE & ROSE

Services for you
Conveyancing
Disputes
Employment Law
Residential Leases
Family Law
Landlord & Tenant
Injury claims

Motoring offences
Wills & Probate

Services for business
Buying or selling a business
Disputes
Employment Law
Managing your business
Property

Lexcel Practice Management Standard Law Society Accredited

Follow us on Twitter @Roselegal1

The Law Society Accredited Conveyancing Quality

www.roselegal.co.uk

Rose & Rose

40 High Street, Kingston Upon Thames, KT1 1HL Tel: 020 8974 7490 info@roselegal.co.uk

(Registered office)

Partners: Saphel Rose, Andrew Perryman, Sally-Ann Joseph (FCILEx), Ricki Bansoodeb, Hollie Redman, Richard Turney, Nikhil Amin, Zubair Dharamsi, Jason Pethers (Non-Lawyer) Consultants: Tim Cheshire, Mark Sherwood-Edwards