

WILLS IN SCOTLAND

LEGAL ADVICE GUIDES

N.B. These guides provide general background information only to the questions most often asked. They should not be treated as a definite statement of the law. There are many complex and developing areas of the law with some conflicting court decisions and expert views. Please consult your solicitor for specific advice about your own circumstances.

Wills – Validity

This is only a general background guide. Consult your solicitor for specific advice on your own circumstances.

For a Will to be valid it has to comply with the law of the country in which the deceased died domiciled, habitually resided or of which the person was a national at the time the Will was signed, or in accordance with the law of the country where it was signed. The laws about Wills and Inheritance rights are very different in England, Wales and Northern Ireland let alone in countries outwith the UK. Tax rules make things even more difficult. This is a complicated and highly specialist field of law. This Guide relates to the laws of Scotland only.

Scottish Wills

In Scotland, you are not entirely free to leave your estate (your assets) to anyone you choose. 'Legal rights' of spouses and children are explained later in this Guide.

Requirements for a valid Will

To be valid a Will must conform to a number of legal rules. The person making the Will must be aged 12 years or over. Scots law presumes that a person is sane. If it is shown that the person was insane at the time they signed the Will then this could overturn it. The test is whether the person understood the nature and effect of their Will. A person can sign a valid Will during a lucid interval. If there might be any argument about mental capacity a medical certificate should be obtained. In the past when someone was mentally incapacitated Scots law did not allow a Will to be made for them. There is a longstanding rule in England which allows this. Recent changes to the law in Scotland under the Adults With Incapacity legislation have resulted in a few Court cases where changes have been allowed to the Wills of adults who no longer have mental capacity.

Formalities

Wills signed on or after 1 August 1995 must comply with the *Requirements of Writing (Scotland) Act 1995*. A valid Will may be "self-proving" if it meets with the formalities set out in the Act. If it is not "self-proving" it may still be valid provided that it can be proved to the court, by independent witness evidence

that the person did sign it. This is not always easy so you should be certain that your Will and any amendments or additions comply with the legal rules about what is “self-proving”.

Cancelling or changing Wills

This is a very high risk area which can lead to lengthy court disputes after your death about what you intended. The safest way to cancel a Will is to make a new one in which you confirm that you are cancelling any earlier Wills.

Marriage or divorce does not affect the validity of a Will. A Will can be invalidated if you later have a child for whom the Will makes no provision. Solicitors commonly draft Wills in such a way that the possibility of future children is taken into account. This is intended to prevent the whole Will being overturned if you later have or adopt another child. The Will is only invalidated if the child in question brings a court action. If the Will makes some provision (no matter how small) for the future child, then the Will is not cancelled. If it can be shown that the person making the Will deliberately did not make any provision for the future child, then the Will remains valid.

If you remember to describe people in your Will by more than just their name and address it can avoid having to change the Will later on when people move address. It is always a good idea to mention your relationship with named people so that they can be identified even if they move or there is more than one person with the same or a similar name.

Types of Legacies

There are different types of legacies. A specific legacy leaves certain named property that can be identified, such as “my Piaget Navigator Series III Watch upon which is engraved my initials and the date 1 January 1980”. A specific legacy only takes effect if the item as described is owned at the time of death; otherwise, the legacy lapses and the beneficiary receives nothing. Vague descriptions such as “my gold watch” lead to problems and should be avoided. Great care should be taken with descriptions and consideration should be given to spelling out what happens if you no longer possess the item particularly if it is very valuable. Is the beneficiary to receive a cash bequest or a share of the Residue instead? A pecuniary legacy is a gift of a certain cash amount.

The remainder of the estate after all debts, specific and pecuniary legacies have been settled is known as the residue and the Will should always provide what is to happen to it.

Unless the Will provides otherwise, debts and liabilities are paid from the residue of the estate first. If the residue is insufficient they must be paid from the legacies which are said to “abate”. There are rules about the order in which legacies abate.

If the person who is left a legacy dies before you then the legacy will not pass on to their family but it will lapse and form part of the residue of your estate and be passed on to the people who inherit the residue.

Legal rights of Spouses and Children

Scots law includes an element of forced heirship known as 'legal rights'. The people who can claim legal rights are your lawfully wedded surviving spouse or same sex civil partner and your children. If any child has died then their children stand in. The claim is limited to the net moveable estate. It does not extend to land and buildings owned by individuals although it can cover these if owned by a firm or business. Cohabitants are not entitled to Legal Rights and nor are step-children. Illegitimate children are entitled even if you did not know they existed and the same applies to the illegitimate children of a predeceasing child. Adopted children are generally treated in the same way as children born to you. This was not always the case and different rules might apply to inheritance from people who died before 10 September 1964 or whose Wills predate that.

A spouse or civil partner is entitled to claim one-half of the net movable estate if there are no surviving children, or one-third if there are surviving children. Surviving children are entitled, among them, to claim one-half share of the net movable estate if there is no surviving spouse or civil partner or a one-third share if there is a surviving spouse or civil partner.

Legal Rights are an entitlement to a payment of cash only. The claimants are not entitled to any particular items of the estate

A claim for Legal Rights must be made within 20 years or they time lapse. If they are claimed then the person claiming them forfeits any bequests made to them in the Will.