

When a relationship breaks down, individuals have a lot to consider and often the thought of reviewing the terms of your Will or a Power of Attorney at such a troubling time, can be far down the priorities. Scots law gives certain basic rights to spouses, civil partners and children in terms of succession. So it is vital that these documents are checked if a radical change to circumstances occurs.

1 Why do I need a will, doesn't everything just go to my partner?

Having a Will is vital (even when things are going well) and it's very important that you keep it updated if things change. Many people have the misapprehension that if they die without a Will (which the law calls being "intestate"), everything automatically is inherited by a person's partner. That is simply not true!

There are legal provisions which do apply in intestacy. The relevant law is over 50 years old and heavily favours a deceased's spouse. In essence, a person cannot wholly disinherit their spouse or their children in Scotland. But there are strict limits on what a spouse inherits in these circumstances if there are other relatives still alive. This can mean that young children can suddenly unexpectedly inherit significant sums which they are entitled to spend when they reach 16, while the spouse is left with less than expected. It could also mean that Inheritance Tax (currently at a rate of 40%) has to be paid when the presence of a Will might have avoided HMRC getting anything.

It could also mean that if a person dies intestate having separated but not divorced, the spouse will still have significant rights which may be exactly what the deceased person did not want.

The law of intestacy only applies to spouses / civil partners. Until 2006, a partner (who not a civil partner) of an intestate person would be entitled to nothing. Even now they would have to go to court to claim any rights which are again limited. If a deceased had a Will, then the partner is entitled to nothing other than what the Will leaves them.

Having a Will makes sure that, so far as possible, an individual can make sure that what they own is inherited by the people they want. They can also make sure that those who administer their affairs are the people they want. Intestacy causes unnecessary additional cost, hassle and delay at a traumatic time.

2 I have a will, but I have split up with my partner - what do I do?

You should consider getting a new Will drafted and revoke your old Will. That makes sure that you get to make the decision of what happens to your assets and not the law and courts. If the breakdown is serious and you are married or in a civil partnership, you may want to consider getting a divorce / dissolution of your civil partnership quickly so that your ex doesn't have extra legal rights you no longer want them to have.

3 I'm getting divorced, but I don't want to change my will

A recent change to the law means that the terms of any Will are in fact significantly affected if you get divorced, your civil partnership is dissolved or your marriage is annulled.

So if you make a Will in favour of your spouse or civil partner or appoint them as an executor (the person who administered to your estate after death) or trustee under your Will, and then get divorced etc, the bequest or appointment will (in the eyes of the law) be deemed to be deleted unless you specifically say that you do not want this to happen.

That may well not be what you wanted. You need to make sure your Will says the appointment or bequest is still to happen in these circumstances. It can also potentially disrupt who you want to look after your children after your death.

4 Joint house ownership after divorce

"What happens to our house, which is currently in joint names, with the title saying it passes to the survivor if one of us dies?"

In these circumstances, that so-called "survivorship destination" (the bit in the title that says the surviving automatically inherits on the death of the other) is affected. If you die having got divorced etc, the survivorship destination will no longer be valid. If this is not the outcome you intended then you need to take steps to clarify the position in your Will as soon as possible.

5 How do I protect my child's inheritance from their spouse?

In general, you can put provisions in your Will so that your child does not directly inherit your estate.

Depending on your family makeup, your Will can include simple or complex trust provisions. This means the Trustees, who you appoint, will manage your assets after your death and while they are in control, you can leave them guidance as to what you want done with your estate.

Such a trust is not foolproof (because of the inherent rights a child always has when a parent dies) but it means the majority of your assets will never be "owned" by your son after your death. Subject to the type of trust you set up, your son's rights to assets and any income they generated can be controlled.

You can also give powers to your Trustees so they can advance funds to your son as time goes on, so if everything is ok then he can receive assets. But if things go wrong, the assets still in the trust can't be touched in a divorce settlement.

If you have definitive concerns there are steps you can take while you're alive also, but you should always take professional advice first.

6 How do I ensure the safety of children from a previous marriage?

If you have had a second marriage, how can you make sure your children from the previous marriage are protected should you die?

You can put trust provisions into your Will so that your new spouse will have specific rights after your death. This could be the right to live in the home you own with the house then being inherited by your children when your spouse passes away. This means the new spouse never actually owns the house (so can't dispose of it in their Will) but can enjoy living there during life.

Such a Will is complex but we have significant experience in drafting such provisions to make sure what you want can be best achieved.

7 My ex was appointed under a Power of Attorney

If your relationship has broken down, you will want to ensure that your ex doesn't have rights you no longer want them to possess. If you have appointed your ex under a Power of Attorney this needs to be revoked immediately and new "attorneys" appointed. The last thing you would want would be an ex being able to take critical decisions if you lose mental capacity or indeed having rights over your assets.

8 Conclusion

Wills and Powers of Attorney are legal documents everyone should have in place irrespective of their circumstances. They make sure you can ensure you have as much control over your assets and wellbeing during your life and after your death. If the things in your life change, especially the breakdown of a relationship, speaking to a professional about reviewing the terms should be something high on your list of priorities. We can always help you have as much certainty as possible no matter what life throws at you.



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