

Wills & executries

Making a will and dealing with executries:
a guide for legal consumers



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Wills and executries

A significant proportion of the complaints we see relate to wills and executries. Based on our experience of what causes complaints, here are ten things that you can do to help ensure things go smoothly.

1

Prepare before you meet

Prepare for the first meeting about your will. List what you own and think about who you want to benefit.

2

Ask about fees

Before you meet with a solicitor for the first time, ask about how fees are charged.

3

Be open and honest

At the first meeting about your will, the solicitor will need to ask a lot of questions. Answer as openly and honestly as you can.

4

Read your draft Will carefully

After your will has been drafted, check it carefully to ensure that it reflects your wishes.

our tips

5

Keep your will safe and up-to-date

If your circumstances change (e.g. divorce, sale of property) you may need to update your will.

6

Understand your role in the executry

In an executry, the client is the executor - not the beneficiaries.

7

Know the factors which take time

Things like selling property, locating beneficiaries and tax calculations can all take time.

8

Things aren't always straightforward

Even an executry which initially seems simple can prove more difficult and take more time.

9

It can be difficult to predict fees

In most cases, it won't be possible for a firm to provide an exact estimate of costs in winding up an estate.

10

Complain to your solicitor first

If you have concerns, speak or write to the solicitor first. Give them 28 days to reply before you contact us.



1. Preparation

Doing some preparation before you meet a solicitor for the first time will help ensure that you end up with a will which reflects your needs.

Make a list of your assets

Before your first meeting, list all the things that you would like to include, for example property, vehicles and savings. Don't forget about digital assets or online accounts. You may be asked about any debts you have.

Decide who will benefit

Be clear about who you want to benefit from your will and what you would like them to have. Don't assume that your spouse and children will necessarily inherit everything.

Choose an executor

The executor is the person appointed to carry out the terms of your will. Decide who you wish to name as executor and then check if they are willing to take on the role.

If your estate is large or complex, make sure that you choose people who you know will be able to cope. In some cases, a solicitor can be appointed as an executor.

Power of Attorney

Your solicitor may ask if you would like to appoint a Power of Attorney (someone who will manage your affairs in the event that you are no longer able to do so). A Power of Attorney is a separate document and is not a substitute for a will.

Digital assets

You might want to appoint someone to deal with your social media accounts and other online accounts. It is also becoming more common for people to include their preferred funeral arrangements in their will.

"Decide who you wish to name as executor and then check if they are willing to take on the role."

Making a will

Remember

- List what you own - don't forget your digital assets
- Decide who you want to benefit
- Choose an executor
- Consider Power of Attorney



2. Your first meeting

There can be a lot to take in at your first meeting about making a will. There are some things you can do to avoid information overload.

Consider bringing someone with you

Having a friend or relative there to support you and to take notes may make it easier to remember what you have been advised once the meeting is over.

They may also be able to ask important questions which you may not think of.

However, there may be some things the solicitor will want to discuss with you alone.

Be open and honest

At the first meeting about your will, the solicitor will need to ask you a lot of questions, some of which you might find personal.

Be as open and honest as you can when you are answering. Your solicitor will have met plenty of people in your position.

If you don't understand, ask

When it comes to your will, it's important that you understand what your solicitor is advising you. Your solicitor's job is to ensure that you understand the process, so asking questions will help both of you.

Ask for a follow-up letter

Ask your solicitor to follow the meeting up with a letter confirming what actions you both agreed beyond what is stated in the will.

Capacity - can you give instructions?

Before you make a will, your solicitor must be satisfied that you are legally capable of making one. That means, you must be of sound mind and understand what you are doing.

It is your solicitor's job to assess if you are capable of providing instructions.

If they have any doubt about your capacity they may take medical advice.

After the meeting

After you have met with the solicitor, discuss with those affected by the will, their roles and responsibilities.

Making a will

Case example

In the case of Ms Y, her cohabiting partner died without a will (intestate). Her complaint was that the solicitor had failed to advise her of her entitlement to make a claim within 6 months of the date of death.

We decided that the failure to advise Ms Y of her rights meant that she lost the opportunity of considering whether she wished to proceed to make a claim.

The failure to advise Ms Y of her entitlement and to take instructions from her amounted to inadequate professional service.

The complaint was upheld.

Remember

- Consider bringing a friend or relative
- If you don't understand - ask and ask again
- Ask for a follow up letter
- Be prepared for questions



3. Costs

Some of the complaints that we see about costs could have been avoided through better understanding of costs from the beginning.

Find out how fees are charged

When you're choosing a solicitor, and even after you have instructed someone, make sure that you're clear on how fees are charged.

For example, if your solicitor charges an hourly rate, you might want to bear this in mind in terms of meetings and queries.

Fixed fees

Some firms will offer a 'fixed fee' for writing and then storing a will safely.

However, if your circumstances and your will are more complex, it is likely that this will cost more than the fixed fee. So if you do decide to go for a fixed fee, make sure you know what the fee covers.

Read the Terms of Business letter

Once you have chosen and met with your solicitor, you should expect to see information about fees in a letter, generally referred to as Terms of Business or Letter of Engagement.

If it is not clear, then ask your solicitor to explain.

Ask about additional costs

Find out if there are any additional costs you need to be aware of such as registration fees and administration costs.

It's also worth asking how much a regular review and update of the will would cost.

Naming the solicitor as an executor

If you are considering naming the solicitor as an executor to deal with the administration of your estate, there should be no additional fee for this at the time that you are creating your will.

It is not possible for an executor to charge a fee for being the executor. However, a solicitor who is appointed as an executor is entitled to charge a fee for their work on the administration of the estate.

Check what's covered in your insurance

Some insurance policies may cover the costs of a solicitor preparing or checking a will but be aware that you may not be able to choose a solicitor - your insurance company may nominate a solicitor for you.

If you think you are covered, make sure to discuss this with the solicitor.

It is worth checking the terms of these policies before you meet with your solicitor.

Making a will

Will Aid & Will Relief

Will Relief Scotland

In September, some solicitors participate in Will Relief Month. Participating Scottish solicitors give up their fees for making wills in return for a donation to one of four charities.

www.willreliefsotland.co.uk

Will Aid

In November, some UK solicitors participate in Will Aid, meaning they waive their fees for writing a basic will. Instead, they invite clients to make a voluntary donation to Will Aid.

www.willaid.org.uk

Remember

- Find out how fees are charged
- Find out how much a will review will cost
- Look out for information about fees in the Terms of Business/ Letter of Engagement



4. After your will is drafted

Some complaints that we see in relation to wills come about because the complainer believes that the will doesn't reflect the client's intentions or because a will can't be located.

Read the will carefully

Before signing, read through your will carefully. Make sure that it matches the instructions that you have given and covers everything you wanted to be included.

Keep your will up to date

Your will should be updated when your circumstances change, for example when you get married, divorced, separated, have children, move house or when an executor moves abroad or passes away.

Ask about secure storage

Check with your solicitor that they will be storing your will and ask if there are any extra costs for this. Keep the paperwork in relation to the secure storage of your will.

Keep a copy of your will

You should ask the solicitor to provide you with a copy of the will. Keep a copy of your will and let family or friends know that you have made one.

"You may need to update your will when your circumstances change."

Making a will

Remember

- Read the will carefully to make sure you are happy with it
- Keep your will up to date
- Keep your will safe



5. Your responsibilities

Executory complaints are sometimes caused by people being unsure of their role. A good place to start is knowing who the client is.

Roles

An executry is the term used to describe the process of dealing with/ winding up all the deceased's assets (the estate).

Knowing who the client is in an executry helps clarify the roles of everyone involved. It also clarifies who the solicitor will take instructions from and communicate with.

Who is the client?

In executries, the client is the **executor**, not the **beneficiary**.

If a person dies intestate (without a will in place), the court will appoint an executor known as an Executor Dative. The Executor Dative is the client. If you are the executor you can instruct a solicitor of your choice to carry out the work required. There is no obligation

to instruct the same solicitor who prepared the will.

Executors do not have to follow the instructions of the beneficiaries, which happened in Mrs X's case (as can be seen in the case example on the next page).

Your role as an executor

If you are an executor, the solicitor will need your input at different stages. Depending on the size and complexity of the estate, you might find the work quite complicated and time-consuming.

Accountability

An executor can also be held accountable for any mistakes. It is important that, if you are an executor, you are aware of your role and responsibilities and feel comfortable carrying out the role.

"In executries, the executor, not the beneficiary, is the client."

Executries

Case example

Mrs X thought - as she was a named beneficiary in her late husband's will - that the firm had a duty to provide her with the information she requested about the winding up of the estate.

In executry work, the executor - (not the beneficiary) is the client. The firm had sought instructions from the executor on whether they should provide Mrs X with the information she requested.

They received instructions from their client that the information was not to be disclosed to Mrs X.

The complaint was - therefore - rejected.

Remember

- If you are the executor - be aware of your role and responsibilities
- If you are the beneficiary - find out what level of communication you can expect



6. Timescales

It is difficult to predict how long it will take to wind up an estate - but it's unlikely to be less than six months.

Expectations v Reality

Quite often, we receive complaints from people who expect an estate to be wound up quickly and are frustrated by the timescales.

It's important to be aware that creditors can make a claim up to six months after the date of death. This can have an impact on how quickly the estate is wound up.

Timescales which are given can - and often do - change. This is often outside the solicitor's control.

Timelines

Quite early on, your solicitor should provide you with a rough idea of how long things should take. It's a good idea to understand the different stages involved - ask your solicitor to provide you with an outline of the work to be carried out. Inheritance Tax cases rarely take less than 12 months to finalise.

Communication

If you feel that things are moving too slowly, ask the solicitor for an update. If there is anything you don't understand, ask questions. Be aware of the factors which can take time to deal with in an executry e.g.:

- Any property to be sold
- Prior/Legal Rights claim
- Intestate estate (there is no will)
- Locating beneficiaries
- Gathering information
- Inheritance Tax Valuations and Income Tax
- Claims by the Benefits Agency
- Delays by third parties in providing information, e.g. banks, insurance companies, HMRC
- Obtaining Confirmation - the application for a Certificate of Confirmation must be made in the area where the deceased last lived. The speed will depend on how busy the courts in that area are.

"All debts must be settled before an executor can distribute any of the estate to the beneficiaries."

Executries

Remember

- Try to get an idea of the stages involved in dealing with the executry
- Be aware of the factors which can take time to deal with in an executry
- Factors which can take time to deal with include selling property, tax valuations and locating beneficiaries



7. Communication

Most complaints that we see about the winding up of an estate are to do with communication or lack of information.

If you are an executor:

Expect updates at key stages in the process. Your solicitor should have explained to you what these key stages are and when an update is likely to be provided.

Executors should also be aware of when their input is needed. Before contacting the solicitor, remember that all communication is chargeable to the estate.

You should also be aware that regular communication between the solicitor and beneficiaries may increase costs chargeable to the estate.

Email may be a good way to contact your solicitor but won't necessarily be faster. As your solicitor is likely to be dealing with other cases, you should not expect an immediate response, even to an email or telephone call.

If you are a beneficiary:

The amount of information provided to you by the solicitor may be limited due to the rules around client confidentiality.

If you are experiencing communication difficulties, ask the executor(s) for information or updates. If you are unable to do so, check with the solicitor if they have authority to communicate with you.

Bear in mind that the solicitor may have instructions not to communicate with the beneficiaries.

If the solicitor has never communicated with the beneficiaries, then their duty to do so is minimal.

If the solicitor asks you for information, try to provide this in good time to prevent delays.

"As a beneficiary the amount of information the solicitor can give you may be limited."

Executries

Remember

- Agree at the outset with your solicitor how you will communicate and how often
- If you don't understand, ask
- **Executors:** agree how much communication the solicitor should have with beneficiaries
- **Beneficiaries:** check with the solicitor if they are able to communicate with you directly



8. Costs in an executry

In most cases, it will not be possible for a firm to provide in advance an exact estimate of the costs of winding up the estate.

Estimating costs

It is difficult for a solicitor to assess how much time it will take to gather all the information about the estate which is required before it can be wound up. Therefore it may not be possible to provide a precise estimate of costs.

Understand how fees are charged

Clarify how the fees and any outlays will be charged at the outset to avoid any unwelcome surprises when you receive the final bill, as happened to Mr Y in the case example on the next page.

Deduction of fees and outlays

It is possible that the solicitor's fees and outlays will be deducted from the estate funds at the same time as the fee note is issued. Outlays - for example fees which

must be paid for the Confirmation process - may be deducted from the estate prior to any fees being charged. [Probate is a process in England - in Scotland we have Confirmation]

There will be an executry account, which should list all the fees and outlays incurred during the administration of the estate.

Independent fee assessment

The solicitor may choose to refer the accounts to a law accountant or an auditor for an independent assessment of the fee.

If the executor(s) or beneficiaries disagree with the fee charged by the solicitor, it can be sent to the Auditor of Court for Taxation.

Bear in mind that the cost of doing this may be charged to the estate.

"There will be an executry account which should list all the fees and outlays incurred during the administration of the estate."

Executries

Case example

Mr Y (the executor) was shocked to find that the firm had deducted all of their own fees and the Auditor of Court's fees from the estate funds without his permission.

Mr Y complained about this to us. We decided that - while it would have been best practice had the firm advised Mr Y that they would be deducting their own fees from the estate - in terms of the Law Society of Scotland's rules, solicitors are entitled to deduct fees from a client account.

In relation to the deduction of the Auditor's fees, we decided that the firm was not entitled to deduct this from the client's account without notifying Mr Y. This was held to be a breach of the service standards.

The complaint was partially upheld.

Remember

- It will be difficult for the firm / solicitor to provide an advance estimate of costs
- Clarify how fees and additional costs will be charged at the outset
- If you don't agree with the fee charged by the solicitor there is a process for independent fee assessment known as Taxation



9. Complaints

If you are unhappy with the service a solicitor has provided to you, or feel that a solicitor's conduct is unprofessional, we are here to help.

We can normally only look at a complaint if the solicitor has already had the opportunity to put things right. Complaints can often be completely resolved at this stage.

Allow the solicitor 28 days to deal with your complaint.

If, after having done this, you are still not happy with the outcome, you can make a formal complaint to us.

It is best to make your complaint as soon as possible. The sooner you make the complaint, the more clearly you will remember the circumstances around it.

We can only consider complaints made within the time limits which are set out on our website.

If your complaint is not made within these time limits, we may not be able to accept it.

If you want to find out more about us and what we do, please visit www.scottishlegalcomplaints.com

We are open from 9am until 5pm, Monday to Friday, apart from Tuesday when we close for staff training between 10am and 11am.

If you need information in another language or in large print or on audio CD, please let us know.

"We can normally only look at a complaint if the lawyer has already had the opportunity to put things right"

Complaints

Remember

- Normally, you should contact the firm first to give them the opportunity to put things right
- Allow the firm or lawyer 28 days to respond
- Be aware of our time limits



0131 201 2130

If you require this information in an alternative format (such as audio, large print or braille) please contact us.
Our 'How to make a complaint' leaflet is available in four other languages on our website.

**Scottish Legal Complaints Commission
The Stamp Office
10-14 Waterloo Place
EDINBURGH EH1 3EG**

**Phone: 0131 201 2130
Fax: 0131 201 2131**

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