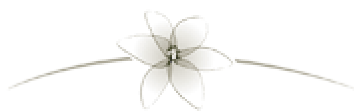

Guide To Differences in Wills Between Scotland & England

For more information or to speak to one of our trained advisers please telephone our Senior Issues team on 0845 855 3300

The Caesar & Howie Group
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Despite many years in the “United Kingdom” Scotland and England retain their distinct and perhaps enriching differences in many areas of modern life. Nowhere is this diversity more noticeable in than in legal issues. The truth is two entirely different legal systems exist in this small island. Scots Law derives largely from principles akin to the Roman tradition and remains distinct from the English approach which has a heavier emphasis on precedent and equity.

The law relating to wills and succession and indeed practice in this area is quite different. In a short commentary like this only a few issues can be touched on, and readers should not consider the following as at all exhaustive, or other than a brief introduction to the issues.

On a purely practical issue it seems that the Legal Aid authorities in Scotland are much more receptive to Legal Aid being granted to write wills – it is readily available to all eligible citizens. In England however the legal help scheme limits availability to those over seventy, or single parents wishing to appoint a guardian, or to disabled people or those making provisions for disabled people in their will.

The Scots seem to trust their youngsters a little more also since in Scotland you can make a valid will at the tender age of twelve. In England a valid will cannot be made until age eighteen is reached. An executor under a will in Scotland need only be sixteen whilst again in England the age of eighteen must be reached before that office can be held.

The formalities of execution of the will document vary. In Scotland a will must be signed on every page before one witness, in England signature is not required on every page but two witnesses are required. In Scotland should a will not contain a “testing clause” in it giving the date it would be invalid, whilst the absence of a date of signing on the document may not be critical in England although evidence for date of signing may have to be presented to the probate office.

A very key difference exists in the effect of marriage on a will. In England a will is invalidated by marriage (unless it is made in anticipation of marriage) whilst in Scotland a will is not invalidated by marriage or divorce. So a divorced spouse in Scotland must alter the will or the former spouse could inherit if that is what the old will said. Scottish divorcees beware! Similarly the birth of a child in Scotland after the testator has made a will and that child is not provided for has the effect of making the will potentially voidable.

Children seem to be rather more fairly treated perhaps in Scotland. No matter what a will says children always have the right to claim their “Legal Rights”. It is virtually impossible to completely disinherit children in Scotland – unless the whole estate of the deceased comprises land and buildings. It is difficult to imagine many estates comprising this type of property only. In Scotland a child left out of a will, or where his or her parent has died without leaving a will, still has an automatic claim to a proportion of all the estate which is not land and buildings. The child’s need is not an issue which is a clear contrast to England where children can make claims if left out of a will but only based on need or proof of maintenance of the child.

Widows in Scotland can also elect to claim “Legal Rights” rather than the entitlement set out in the will. So again it is almost impossible to disinherit a spouse. In England if a spouse were left out she would have to litigate or seek to settle with the beneficiaries to obtain a share.

“Prior Rights” and “Legal Rights” are also available to widows in Scotland whose spouses die without a will but it is important to note that these rights are limited to the matrimonial home, plenishings and moveable property up to set financial limits and it is quite possible that in this situation the surviving spouse might not inherit the whole estate. In England, however, it is very much more likely in a similar case that the surviving spouse would inherit everything.

The practice in each country differs also in will storage. In England the District Registry and Probate Sub-Registry offers safe storage for wills, although many are stored in solicitors’ offices or bank storage facilities. In Scotland no court storage facilities are available at all and most wills are stored privately. After the death in Scotland the will is normally sent to The Books of Council and Session where it is effectively saved for all time, but prior to death while this could be done it seldom is by Scottish agents.

THESE ARE JUST A FEW POINTERS TO THESE NATIONAL DIFFERENCES. IF ANYTHING THERE IS EVEN MORE DIFFERENCE IN THE LAW IF A DEATH OCCURS WITHOUT A WILL. WHEN THAT HAPPENS IT CAN BE AN ESPECIALLY TRYING TIME FOR FAMILIES SO WHETHER YOU ARE LIVING IN SCOTLAND OR ENGLAND WHILST READING THIS – GET THAT WILL WRITTEN!