

Red Flag Checklist

Drafting a Will



Initial Instructions

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| 1. You are satisfied the client has capacity and there is no indication of undue pressure etc. | <p>Yes Great.</p> <p>No Risk that the prospective client lacks capacity to give instructions in this matter. Consider taking further steps to assess capacity e.g. seeking the opinion of a doctor. See the Law Society's guidance on vulnerable clients. Keep detailed notes of any concerns regarding capacity and note all instructions received and advice given.</p> |
| 2. The client is over 16 years old. | <p>Yes Great.</p> <p>No Risk that the Will will be invalid. To make a Will, the person must be over 12 years old, Age of Legal Capacity (Scotland) Act 1991, section 2. If the child is not over 12 years of age, instructions should be declined.</p> <p style="padding-left: 20px;">If the child is between 12 and in the 16 years old, that might still raise issues around accepting and obtaining instructions and advice and guidance should be sought.</p> |
| 3. The client is able to read and write. | <p>Yes Great.</p> <p>No Notarial execution will be necessary.</p> |
| 4. The client is married or in a civil partnership. | <p>Yes If the client is married or in a civil partnership, questions should be asked of the client. Will the spouse also be instructing the firm to make a Will? Why not? Are these to be mirror Wills? Care must be taken to avoid a conflict of interest if spouses originally instructed mirror Wills. See article in the Law Society of Scotland Journal which provides useful information.</p> <p>No Great.</p> |

<p>5. The client is in a second marriage or relationship.</p>	<p>Yes</p> <p>No</p>	<p>Risk of distorting effect on the likely inheritance for the predeceasing party's children, where there is a second marriage or relationship and everything is left to the second spouse. This is particularly the case if they are doing mirror Wills leaving everything to each other and then equally between all of their children. The surviving party could well change their Will to benefit only their children. This may well limit the predeceasing party's children simply to a claim for Legal Rights.</p> <p>Great.</p>
<p>6. The client has step-children</p>	<p>Yes</p> <p>No</p>	<p>Risk that clients confuse children/adopted children with stepchildren. Make sure the position is made clear to clients. If a step-parent wishes to benefit a stepchild, then he or she must specifically provide for this in his or her Will.</p> <p>Great.</p>
<p>7. The client owns joint property.</p>	<p>Yes</p> <p>No</p>	<p>Risk of survivorship destination. The client should be advised on survivorship destinations and legal titles to any joint property should be checked.</p> <p>Great.</p>
<p>8. The client is domiciled in Scotland.</p>	<p>Yes</p> <p>No</p>	<p>Great.</p> <p>Client will need to take specialist advice as Will may not be valid even if only dealing with Scottish property.</p>
<p>9. Your terms of business letter outlines that you will not be responsible for advising on any area relating to overseas rights or assets.</p>	<p>Yes</p> <p>No</p>	<p>Great.</p> <p>Risk that client will expect advice about overseas assets. This client should be made aware that specialist advice will be required for any overseas assets.</p>
<p>10. The client has heritable assets overseas.</p>	<p>Yes</p> <p>No</p>	<p>Risk that you will be expected to deal with laws in a foreign jurisdiction and therefore risk a complaint or claim. The client should be advised to seek the advice of someone specialised in the laws of that country.</p> <p>Great.</p>
<p>11. You have specifically asked about children, including children from previous marriages or relationships or children with whom they do not speak or who have moved abroad.</p>	<p>Yes</p> <p>No</p>	<p>Great. It is good to have a file note on these matters.</p> <p>You should put these questions to the client. It is good to have a file note confirming that you asked about these matters and advised accordingly.</p>

12. The client has children and want to name their children in the Will.	Yes	Risk that future and possible circumstances are not considered. Beware of <i>conditio si testator sine liberis decesserit</i> . If parents want to name their children in the Will, always add “...and any other child of mine born to or adopted by me after the date of these presents...” (see <i>Greenan v Courtney</i> 2007 SLT 355).
	No	Great.
13. The client is leaving property subject to a restriction or condition which might be inconsistent with a right of full ownership (e.g. subject to child reaching particular age).	Yes	Risk that such a clause will fail on the basis of repugnance. Requires valid trust provision.
	No	Great.
14. You have advised the client about the effect of legal rights after his or her death (protection from disinheritance).	Yes	Great.
	No	Need to manage client expectations otherwise there is a risk of client dissatisfaction or complaint. Client should be advised that there is not complete freedom in Scotland to leave his or her estate to whomsoever he or she chooses.
15. You have advised the client about executors and trustees.	Yes	Great.
	No	Risk that client is not aware of importance of requirement. The role of executors should be explained and the client should be given adequate time to choose the person or people responsible for administering the estate. The client also needs to be advised on trustees and trusts where appropriate (where there is provision for an ongoing trust, for example).
16. The client wants you to act as executor.	Yes	Risk – do you want to take on duties of an executor in this estate? Speak to senior partner or other authority within the firm if client requests you or the firm as executor.
	No	Great.
17. The client is making you a beneficiary or making provision that could reasonably be perceived to give unfair benefits to you or those connected with you by family or professional relationships.	Yes	Risk of breaching Rule B2.2.2 or B.2.2.3 . These rules preclude anything reasonably perceived as allowing solicitors or those connected with them by family or professional relationships to exercise undue influence and obtain an unfair advantage. Ensure the client is advised that any legacy in favour of the solicitor (or any other type of request that might breach these rules) cannot be accepted.
	No	Great.

18. The client has had time to consider specific legacies, bequests and whom to leave the residue of the estate and has provided you with clear instructions on these matters (he or she might have considered these matters before instructing the solicitor of course).	Yes	Great.
	No	Risk that client is rushed into deciding on matters. Client should consider carefully what to leave behind to the persons who are important to them.
19. You have received instructions to leave something to charity.	Yes	Check charity details – full name, Registered Charity Number and current address. Do not simply rely on the details provided by the client. Advise client about tax position for legacies to charities.
	No	Great.
20. There will be a trust in the Will.	Yes	Consider the tax implications of using that trust and if in any doubt as to the consequences, take specialist advice, or advise client to do so.
	No	Great.
21. There is a bequest of furniture and house contents in life-rent.	Yes	Furniture and house contents will deteriorate and this can bring the life-renter into conflict with the fiars. If you are asked to draft a Will, in terms of which a bequest of a dwellinghouse is to a particular beneficiary in life-rent, it is always better not to include the furnishings and contents within the life-rent. It would be better to persuade the client that the furniture and contents should be left absolutely to the life-renter.
	No	Great.
22. There is a specific bequest of heritage.	Yes	Is the bequest to be free of any mortgage or charge secured over the property at the testator's date of death, or subject thereto? The client's position should be ascertained.
	No	Great.
23. There is direction within the Will that you or a particular solicitor or firm of solicitors have to wind up the testator's estate.	Yes	Risk of breach of practice Rule 2.2.3(b) . Ensure the Will contains no such provision.
	No	Great.
24. The client is aware of how the burden of inheritance tax will fall in terms of the legacies and residue.	Yes	Great.
	No	Provide the client with inheritance tax advice relating to the legacies and residue or outline in your letter of engagement that you will not be responsible for advising on inheritance tax matters and advise the client to seek specialist advice.

Drafting the Will

25. There are complex or unusual clauses that are not covered in the firm's Will Styles bank.	Yes	Suggest looking at legal textbooks such as "Drafting Wills in Scotland – 2nd Edition". Might need to advise client that expert help might be required in relation to particularly complex requirements and provide outline of costs of that help.
	No	Great.
26. You have included a clause in the Will saying that any previous Will is revoked.	Yes	Great.
	No	Always ensure that you include an appropriate clause of revocation (regardless of whether the client thinks there is an existing Will). A blanket revocation clause might not be appropriate if the client has a separate foreign will covering assets outwith Scotland. In these circumstances, it might be sensible to restrict revocation of previous wills only to those made in Scotland or to all previous wills but only in so far as they might be deemed to include assets in Scotland."
27. The final draft of the Will identifies all the people or organisations that the testator wishes to benefit from his or her Will and what he or she wishes them to receive.	Yes	Great.
	No	Testator's wishes have not been met. You should revise the draft Will.
28. You have checked your draft carefully. It has been checked again by a colleague.	Yes	Great.
	No	There is a risk that an error has been made. Always check your drafts carefully. The use of one small simple (and wrong) word can have a dramatic effect.
29. A draft has been sent to the client for approval.	Yes	Great.
	No	Always send a copy of the draft to the client to be approved by them. In the English case of <i>Hawes v. Burgess and Another</i> 2013 EWCA Civ 74 the Court of Appeal allowed a challenge to a Will on the basis of "want of knowledge and approval". Inter alia, even although the Will had been read over to the testator prior to signature, the Court placed some importance on the fact that a draft had not been sent to him for approval prior to his meeting with his solicitor to sign the document.

Execution of the Will

30. The client has read and understands the terms of the Will.	Yes	Great.
	No	It is vital that the testator should have read and understood (at the least the effect of) the terms of the Will. The Will should be expressed simply and should be comprehensible. If the client has difficulty understanding any part of the Will following discussion with him or her then this matter should be raised with the senior partner.
31. The client has signed every page of the Will in front of a witness.	Yes	Great.
	No	This is required in order to make the Will valid – see the Requirements of Writing (Scotland) Act 1995 section 3(2).
32. You have verified that the witness is over the age of 16 and has capacity.	Yes	Great.
	No	You have verified that the witness is over the age of 16 and has capacity.
33. The witness is a beneficiary.	Yes	Risk of challenge on basis of conflict. It is advisable to use someone who is not a beneficiary as witness as allowing a beneficiary to witness you sign could leave the Will open to challenge.
	No	Great.
34. The witness has signed the last page and added their name and address.	Yes	Great.
	No	Risk that the Will is not valid. The witness must sign the last page, complete their name and address and the date and place of signing must be inserted.
35. The date and place of signing has been properly included at the signing.	Yes	Great.
	No	Risk that the Will is not valid. Always include these details.
36. Arrangements have been made and recorded for safe storage of the Will.	Yes	Great.
	No	Ensure that this is discussed with the client and any arrangements are recorded on file. Consider Registering in the Books of Council and Session at the Registers of Scotland. If you are storing the Will (or a copy of the Will) within a Will safe in the office, a separate record should be kept showing all movements in and out of the safe.