

LEGAL RIGHTS – EXPLANATORY NOTE FOR TESTATORS

In Scotland, the right to make a will has always been regarded as a fundamental freedom. However, it is not wholly unrestricted. In Scotland, we have what is known as **legal rights**. It is important that an individual maker of a will should be aware that the terms of that will are not absolute.

Purpose

The client making a will is of course likely to be surprised to find that the division of his estate may not be wholly controlled by the terms of his will. Why should this be? In essence, this is due to the fact that Scottish Law does not wish to allow a situation to arise whereby a spouse or child can be wholly disinherited for no good reason.

Who can claim?

The range of those who can claim legal rights is restricted to:-

- Spouses — this also includes estranged or separated spouses unless there is in place a valid separation agreement in terms of which both spouses on separation have waived their respective entitlements to claim legal rights from the estate of the other.
- Children — this includes both adopted and illegitimate children.
- The issue of a child who has predeceased the maker of the will.

How are legal rights calculated?

Legal rights can only be claimed against the net moveable estate, valued as at the date of death, of the maker of the will. In essence, the estate of the deceased person is divided into two separate categories being:

- Heritable estate — the value of land and buildings (against which legal rights cannot be claimed).
- Moveable estate — effectively anything which is not regarded as being heritable. This includes cash deposits, the value of stocks and shares, insurance policies, furnishings, jewellery and personal effects, artworks, stamp etc. collections (and note this list is not exhaustive).

Where the maker of the will is survived by spouse and children, their respective entitlements are as follows:

- The spouse is entitled to claim one third of the net moveable estate.
- The children or their issue (where a child predeceases the maker of the will) are entitled to claim one third between them.

The meaning of “net moveable estate”

There is a tried and tested methodology for calculating the value of net moveable estate as at date of death. Firstly, the moveable estate is valued as at date of death. The figure as so calculated falls to be reduced by deduction of:

- Funeral expenses
- Debts due by the deceased as at his or her date of death (but excluding what are regarded as heritable debts — for example a mortgage)
- Costs incurred in valuation of the moveable estate (even although these costs are incurred after the date of death — for example the valuation of furniture, stocks and shares etc.)
- Legal expenses in relation to the winding up of the estate up to the point of obtaining confirmation

Can a beneficiary claim both legal rights and take his entitlement under the will?

The answer to this question is “no”. Under the Succession (Scotland) Act 1964 as amended, unless the relevant will specifies otherwise, those who are entitled to claim legal rights are put to an election. If they claim the benefit left under the will, they forfeit their entitlement to legal rights. Conversely, if they claim their entitlement to legal rights, they forfeit any benefit left to them under the will.

The executor's obligations

The law on this matter is clear. Even where, for example, the testator has made it clear that he does not wish a particular "black sheep" child to have any rights against his estate, the executors are obliged to advise all who might have a claim to legal rights of their entitlement. Whilst it is appreciated that this can be awkward for executors, their duties are clear. They are not obliged to encourage a claim to legal rights and similarly, they should not bring pressure on a particular individual not to claim. Having advised the relevant individuals of their entitlement to claim legal rights, the executors are required to make available to those individuals or their legal agents the information which is required to enable such potential claimants to decide whether or not to claim. Should an executor fail in the foregoing respect, he may find himself being pursued by a potential legal rights claimant.

How long does the right to claim subsist?

The answer to this is simple — 20 years. This can provide Executors with real difficulties where the potential claimant cannot be traced. In such circumstances, the executors may have no alternative but to retain on an interest bearing basis a sum to meet the potential claim of that missing beneficiary, notwithstanding the views of, or complaints on the part of, those who are beneficiaries under the relevant will.

Does the entitlement to legal rights earn interest?

Again, the answer to this is "yes". However, there is no statutory rate and if legal rights are claimed then they will carry a right to interest from date of death to date of payment. That rate of interest is, however, often difficult to calculate. Generally speaking the rate is equated to that which the remainder of the Estate gained interest during the relevant period. Obviously, however, if the remainder of the estate gained no interest (because it was invested, for example, in Premium Bonds, which are not interest bearing) then there is no entitlement to interest.

Can a claim to legal rights be defeated?

Again the answer is "yes". However, this can be difficult if not impossible to achieve. Where an individual dies leaving moveable estate then on the face of it, if there is a surviving spouse and/or children or the issue of predeceasing child, then the right exists. There are steps which can be taken in an attempt to defeat legal rights but, for the most part, these are impractical or might not be advisable. For example:

- The claim to legal rights only exists in respect of the deceased's moveable estate as at date of death. If the deceased deliberately expended his moveable estate prior to death in purchasing heritable property then legal rights cannot be claimed against that type of property.
- The testator may take steps to seek to secure that he has no personal moveable estate as at his date of death. However, Scottish Courts have shown themselves to be more than ready to "attack" what the courts regard as "sham" attempts to defeat a claim to legal rights.

Is a potential claimant obliged to claim legal rights?

The answer to this is "no". There is no obligation to claim legal rights. In fact, legal rights will normally be discharged where the benefit left to the potential claimant under the will is greater than the value of the entitlement to claim legal rights. Similarly, in most stable family situations, children will decline their entitlement to claim legal rights if they perceive that this will prejudicially affect the financial position of the surviving parent.

Conclusion

It is of great importance that the maker of a will should know of the existence of the entitlement to claim legal rights both on the part of a surviving spouse and children or the issue of a predeceasing child. If the existence of that entitlement causes concern, then the maker of the will should seek more specific advice as to his or her position and whether or not any practical steps could be taken to mitigate if not avoid the potentiality of such a claim against his or her estate to the potential detriment of the chosen beneficiaries under the will.