

Briefing Note

Legal Rights in Scotland

The Nature of Legal Rights

Under Scots law a surviving spouse, civil partner and children are entitled to certain legal rights when a person dies with or without a will. These rights are known as Legal Rights. Legal rights do not extend to unmarried partners or cohabitants. However, where a cohabitant dies without a will, the surviving cohabitant is able to make an application to the court for a share of the deceased partner's estate.

This fact sheet only considers situations where a person dies with a will as this would be the scenario most relevant to charity beneficiaries.

Legal rights are intended to reflect the view that a person should not be able to dispose of his or her estate entirely according to individual preferences but should be bound to leave something to those with whom he or she had the closest ties.

Legal rights are based on the fundamental principle of family protection for the benefit of the surviving spouse and the deceased's children. Legal rights arise regardless of the terms of a person's will. Although, any person who has rights under a will as well as legal rights has to choose between them; he or she cannot have both.

The right of a spouse or civil partner is called Jus Relicti (where the surviving spouse/civil partner is male) or Jus Relictae (where the surviving spouse/civil partner is female). The rights of children and remoter descendants are called Legitim.

Calculation of Legal Rights

A legal rights claim is calculated as a proportion of the value of the deceased's worldwide net moveable estate. This includes such things as money, shares, cars, furniture and jewellery. Heritable estate, which includes land and buildings, is excluded from legal rights claims. The date of death value of the moveable estate is reduced by deducting moveable debts, funeral expenses, inheritance tax, the expenses incurred obtaining Confirmation (Probate) and realising the moveable assets

A surviving spouse or civil partner is entitled to one-third of the deceased's worldwide net moveable estate if the deceased left children (or descendants of children) or to one-half of it if the deceased left no children (or descendants).

The children are collectively entitled to one-third of the deceased's worldwide net moveable estate if the deceased left a spouse or civil partner, or to one-half of it if the deceased left no spouse or civil partner. Each child has an equal claim. It should be noted that the position of adopted children is the same as that of natural children for the purposes of succession in Scotland.

Legal rights are an automatic entitlement. Legal rights can only be rendered extinct if they are discharged during the deceased's lifetime, renounced after the deceased's death, or not claimed in 20 years after becoming enforceable.

Executors should always ensure that legal rights are either claimed or formally discharged before they complete the administration of the estate, so that there is no risk of a claim being made subsequently.

Payment of legal rights and interest

A spouse, civil partner or children acquire a vested right to claim legal rights at the date of death. These rights pass to their executors if they die before payment is made. Interest accrues from death to the date of payment. The rate of interest is not fixed. It is what the sum earned or could have earned by prudent management.

Legal rights are rights to the payment of a sum calculated on the value of the net moveable estate, and not to a particular asset. However, if all the beneficiaries are in agreement, assets can be made over to a claimant in satisfaction of legal rights.

Representation

The Succession (Scotland) 1964 Act allows a grandchild to represent a child who has predeceased, i.e. to step into his or her shoes and inherit his or her claim. Representation applies to both adopted and illegitimate grandchildren of the deceased.

Collation

The issue of previous advances does not alter the position of whether or not a child is able to claim his or her legal rights. However, previous advances would reduce the share of the legal rights fund to which that child would be entitled. This is known as *collatio inter liberos*. In other words, any advances made to a child by the deceased parent during his or her lifetime are taken into account in calculating and distributing the fund.

The purpose of collation is to ensure equality in the distribution of the legal rights fund among claimants. If one claimant has received advances from the deceased during his life, other claimants can require the advances to be notionally added to the fund. However, it applies only when there is more than one claimant. One claimant cannot insist on non-claimants collating in order to increase the legitim fund.

Claimants below the age of legal capacity

The age of legal capacity in Scotland is 16. However, in certain circumstances, where a person is under the age of 21, a transaction which was entered into when a person was of or over the age of 16 but under the age of 18 could be set aside if it is found to be a prejudicial transaction. Accordingly, a child cannot make a valid binding election till aged 18, and the executors will need to retain funds to cover a possible election at that point.

If there are children under the age of legal capacity and the surviving spouse/civil partner is the sole beneficiary, the executors may wish to pay out the entire estate to the spouse/civil partner, on the understating that there may be a potential claim by the children when they attain the age of 16. It would be prudent for the executors to insist on the surviving spouse/civil partner granting the executors an indemnity in respect of any future claims.

Under section 147 of the Inheritance Tax Act 1984, the executors may elect to pay inheritance tax now as if a claim to legal rights had been made. A repayment of tax can be made later if such beneficiaries elect not to claim legal rights when they attain the age of 18. The inheritance tax legislation provides that a claimant has until the age of 20 to renounce or disclaim legal rights for the purposes of an inheritance tax reclaim.

Discharge of Legal Rights

A person may discharge his or her legal rights prior to the death of a spouse, civil partner or parent. The effect of this is that the estate available for legal rights is divided between claimants as if the person giving the discharge had died before the deceased. In the event of a lifetime discharge by child, representation does not apply.

If legal rights are discharged after a death, the legal rights fund is calculated as if the discharge did not take place. The legal rights fund is divided between all the claimants, including any person who discharged their legal rights.

How this applies to charities

Where charities receive a fixed legacy, the existence of legal rights should not affect the amount of their legacy unless the estate is not large enough to meet the legacy and the legal rights claim.

Where charities are residuary beneficiaries, it is extremely important to consider whether legal rights exist. Otherwise, residuary beneficiaries may be subject to potential claims if legal rights have not been discharged/claimed formally.

Although executors must ensure that all potential claimants have had an opportunity to claim/discharge their legal rights, executors do not have a duty to check whether the deceased left any illegitimate relations and the executors are free to distribute the estate. In this situation, the executors need not retain an amount to cover a potential legal rights claim by an estranged illegitimate child.

Charities should be particularly alert when a deceased leaves a surviving spouse, civil partner and/or children who are not named in the will. If the children are under the age of 16, executors may wish to retain a sum to cover the potential legal rights claim. This will affect the amount of the residuary legacy left to the charity. On the other hand, executors may decide to distribute the estate on the understanding that a potential claim may arise and residuary beneficiaries may be asked to sign an indemnity in favour of the executors.

Charities should check all legal rights calculations and, where legal rights have been discharged, residuary beneficiaries should be provided with a copy of the legal rights discharge.

This factsheet is intended to provide a brief summary of legal rights in terms of the Succession (Scotland) Act 1964. No responsibility can be accepted for any action taken in reliance on this note and specialist advice should be taken in every case. If you have any specific questions, please contact Douglas Connell or Peter Littlefield at Turcan Connell.

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