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LEGAL RIGHTS

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 are known as “legal rights”. The surviving spouse and/or children of the Deceased cannot be disinherited, for whatever reason, as they are entitled to certain legal rights irrespective of whether or not there is a Will in place. These rights are based on the fundamental principle of “family protection” and it is important that you are aware of these.

Who can claim?

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

- Spouses and registered civil partners — this also includes estranged or separated spouses/partners unless there is in place a valid separation agreement in terms of which both spouses/ partners 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 testator.

It is important to note that Legal Rights do not apply to unmarried partners, co-habitants or step-children.

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 testator. The estate of the deceased person is divided into two separate categories – these are:

- 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, business interests (and note this list is not exhaustive).

Legal Rights are a share of the value of the net moveable estate and not to any particular asset.

**However, note the position where there is an unregistered evacuation of a survivorship clause.*

Legal Rights claims are calculated as follows:

- Where the deceased is survived by spouse and children (or descendants of any pre-deceasing children i.e issue) the spouse is entitled to claim one third of the net moveable estate;
- Where the deceased left a surviving spouse and no children or descendants, the surviving spouse is entitled to claim one half of the net moveable estate.
- In turn the children of the deceased will be collectively entitled to 1/3 of the net moveable estate between or among them, or if the deceased was not survived by a spouse, 1/2 of the net moveable estate between or among them.

Example

The deceased owns a dwellinghouse having a value of £200,000. He had net moveable estate as at date of death which amounts to £120,000. He is survived by his spouse B and two children, X and Y. Neither B nor X and Y can claim against the value of the heritable property. They can, however, claim their respective entitlement to legal rights as against the value of the net moveable property. Thus:

- B can claim one third of the net moveable estate amounting to £40,000.
- X and Y can between them claim £40,000, i.e. £20,000 each. Note, however, that if, for example, X declines to claim his entitlement to legal rights this does not mean that Y can claim the total amount of £40,000. Y's claim is restricted to £20,000.

Further example

Let us take the same family save that unfortunately, A's child, X has predeceased him leaving two children of his own, D and E. As before, none of the beneficiaries who can claim legal rights can make any claim against the value of the heritable property. However, the moveable Estate against which he can claim remains the same. As before:

- B can claim £40,000.
- The legal right fund available to children and issue amounts to £40,000. This being so Y can claim £20,000 and D and E can both claim £10,000 each. Again, should Y choose not to claim, this does not increase the claims available to D and E.

The position changes where either there is no surviving spouse **or** no children /issue of any pre-deceasing children. The result here is that where there is a claimant, his or her entitlement increases. Thus:

- Where the deceased is survived only by his spouse but no children or the issue of any predeceasing child, then the surviving spouse is entitled to claim **one half** of the net moveable estate. In the example given above, B would therefore be entitled to claim £60,000.
- Where there is no surviving spouse, again the claim available to children or the issue of a predeceasing child is **one half** of the net moveable estate. Thus, in the first example given above, X and Y could each claim £30,000. If X chooses not to claim, this does not increase Y's claim — this still amounts to £30,000. Where there is no surviving spouse and X has predeceased A, D and E would each be entitled to claim £15,000.

The meaning of “net moveable estate”

The moveable estate is valued as at date of death. The figure as so calculated falls to be reduced by deduction of:

- Funeral expenses
- Moveable 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)
- Inheritance Tax
- Legal expenses in relation to the winding up of the estate up to the point of obtaining confirmation (the Scottish equivalent of probate) and realising the moveable estate.

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

The answer to this question is “no”. Those who are entitled to claim legal rights must choose. 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. In some circumstances i.e. a partial intestacy, a right to claim both can arise. However, this is very unusual.

Can a claim to legal rights be defeated?

Again the answer is “yes”. However, this can be difficult if not impossible to achieve. 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. If you are concerned about a possible legal rights claim, please let us know.

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.

A Potential claimant may delay making a claim. This could be useful for asset protection planning.

It is important to note that Legal Rights are an automatic entitlement which will endure for a period of 20 years from the date of death, if not discharged either during the deceased’s lifetime, after the death of the deceased, or if not claimed within 20 years from the date of death.

Executors have a duty to ensure that Legal Rights are either claimed or formally discharged before completing the administration of the Estate to avoid the risk of a claim being made against them in the future.