

SPOUSES AND CHILDREN – KNOW YOUR INHERITANCE RIGHTS

LEGAL TERMS

Testacy = Legal term used when person dies having made a valid Will

Intestacy = Legal term used where a person dies without making a valid Will

WHAT ARE SPOUSE'S AND CHILDREN'S INHERITANCE RIGHTS IN INTESTACY?

When a person dies intestate (without a Will) the law dictates how the deceased's estate is divided.

There are three possible scenarios:

1. **Spouse and no children** – spouse entitled to all of the estate
2. **Spouse and children** – spouse entitled to two thirds and children share the remainder
3. **Children only** – children share in entire estate

WHAT ARE THE RIGHTS OF A SURVIVING SPOUSE IN A TESTATE SITUATION?

The surviving Spouse has very definite and automatic rights in a testacy situation. The Succession Act provides that irrespective of the terms of a Will a spouse is entitled to a specific share in an estate. This is known as the 'Legal Right Share'. The purpose of this Legal Right Share is to prevent the deceased from disinheriting the surviving Spouse.

The size of the 'Legal Right Share' depends on whether the deceased had children. Where there are children the Legal Right Share of the spouse is

a 1/3rd of the estate. Where there are no children the Legal Right Share is ½ of the estate.

WHAT IS ESTATE AND SUCCESSION PLANNING?

Estate planning is planning the transfer of assets to the next generation in a tax efficient way.

While making a Will is certainly the first step in planning ahead there are other issues to consider depending on your own particular circumstances. In certain circumstances it might be appropriate to make gifts to the next generation during your lifetime.

For instance, you may wish to transfer your business or farm to one of your children who are working in the business or on the farm. Or, you may want to give your children a benefit now as they start out in their adult lives to help get them set up.

It is always vital to remember that you take measures and retain enough assets to maintain yourself for your lifetime, such as a nest egg for nursing home care or retaining a right of residence in the family home on the transfer the ownership.

You may also wish to plan for when you may no longer be able to make decisions for yourself. In which case, you would put in place an Assisted Decision Making Agreement and a Advanced Healthcare Directive.

CAN A TRANSFER OF ASSETS BEFORE DEATH BE MADE TO AVOID THIS?

It is very important to be aware that if a person decides to gift assets during their lifetime for the sole purpose of avoiding their legal obligations a court if satisfied this was the sole reason for the disposition can nullify any transaction which was made within 3 years of the death of the deceased.

WHAT HAPPENS IN A SITUATION WHERE THE SURVIVING SPOUSE IS NOT IGNORED BUT PERHAPS GETS A TOKEN INHERITANCE?

The spouse has a right of election. This means that the spouse can choose between the Legal Right Share and the Bequest OR if the Legal Right Share exceeds the bequest the right to take the gift as partial satisfaction of the Legal Right Share.

CAN A SPOUSE LOOK TO GET A SPECIFIC ASSET TO MAKE UP HIS/HER LEGAL RIGHT SHARE?

The general rule is no, the spouse cannot pick and choose. An exception exists where the Spouse has the right to specifically require that the dwelling in which he/she resides is given to the spouse in satisfaction of his/her Legal Right Share.

Usually, the surviving Spouse will have to pay the difference in value if there is one. However, there are circumstances where this rule is relaxed.

DO THE RIGHTS OF INHERITANCE AND THE LEGAL RIGHT SHARE SURVIVE MARITAL BREAKDOWN?

Spouses living apart informally

When spouses are living apart informally they continue to be spouses in the eyes of the law and therefore their rights under the Succession Act are not affected.

Deed of Separation

In a situation where a married couple have executed a Deed of Separation very often they will have renounced their entitlements under the Succession Act and in the event of the death of either of them they will not be entitled to inherit.

Judicial Separation

Often, but not always, the Courts in judicial separations will grant an order extinguishing a spouse's rights under the Succession Act.

Divorce

When a divorce is obtained in Ireland the marriage is dissolved and, therefore, the Spouses lose their rights to their share on intestacy or their Legal Right Share.

DO CHILDREN HAVE SIMILAR ENTITLEMENTS?

Intestacy

On intestacy children have a right to a 1/3 share in the Estate if there is a surviving Spouse. If there is no surviving Spouse they are entitled to share the entire estate equally.

Testacy

In testacy situation children, in contrast to the rights of a spouse, do not have a right similar to the legal right share.

In contrast they have a right to apply to the Court to have provision made for them out of the estate. The Court will only do so if it finds that the deceased parent has failed in his moral duty to make proper provision for the child in accordance with his means.

The courts will look at all the surrounding circumstances, in particular:

- The age of the child
- Their position in life
- The age and position of the other children of the testator
- The means of the parent
- Whether and what provision the parent made for the child during his lifetime

- They may look at the conduct of the child towards their parent

Whether that child had a need which the parent was able to satisfy in accordance with his/her means.

There are strict time limits within which applications must be made by an aggrieved child, making it imperative to seek legal advice at the earliest opportunity.

WHAT IS THE IMPACT OF THE CIVIL PARTNERSHIP ACT?

With the new Civil Partnership Act qualifying cohabitants can make an application to the Court for provision out of the estate of their deceased partner.

WHAT ABOUT FARMERS – WHAT CAN BE DONE TO HELP PASSING THE LAND FROM ONE GENERATION TO THE NEXT?

Traditionally in Ireland, land continuously passes from one generation to the next. This transfer of ownership does not always go smoothly. While there is no magic formula to guarantee the successful transfer of a farm from one generation to the next, major difficulties can be avoided if the farm transfer process is efficiently planned.

You need to examine all the options open to you. Traditionally Irish family farms were passed to the eldest son. However with the increase in third level education it is now becoming more common that there are no children actively farming. New and different ways of retiring from farming are becoming more

commonplace. Entering a partnership with a non-family member, leasing out or selling land are all options which should be explored.

One of the issues that people either worry a lot about or else ignore completely are the potential taxes that could apply to any transfer of a farm business. The ideal attitude here is neither to worry about nor ignore the tax aspects but to get proper advice in advance of any transfer and to plan the process so that taxes are minimised. With good advance

planning and preparation the issue of taxes should not have a major negative impact on the farm business transfer.

Changes in Budget 2015 were generally welcomed by the farming community in a move that was said to encourage long term farming. The government's aim through the measures was to try to maximise land use and efficiency while making it easier for farms to be transferred or gifted so as to assist the younger generation of farmers coming through the ranks.

In summary some of the available tax measures that were introduced were:

- A Stamp Duty exemption for leases of agricultural land to active farmers lasting between five and 35 years;
- Allowing reduced Stamp Duty of 1% (instead of 2%) on transfers of non-residential property to certain relatives (who are active farmers) until the end of 2017;
- Capital Acquisitions Tax Relief continuing for agricultural property gifted to or inherited by active farmers or those who are not active farmers but lease the land to active farmers on a long term basis;
- Capital Gains Tax retirement relief expansion so that the relief would still apply if land is leased out for up to 25 years prior to disposing it (previously up to 15 years was allowed);
- Allowing Capital Gains Tax farm restructuring relief to the end of 2016 and broadening it to allow for restructuring through whole farm replacement;
- Extending Capital Gains Tax retirement relief to land let under conacre which is disposed of, or converted to long term lease before the end of 2016;
- Income tax exemption threshold increasing by 50 % for those leasing out farmland and also allowing relief to companies and those who are under 40 years of age;

LEGITIMATE EXPECTATION/PROMISSORY ESTOPPEL

These claims can arise as an adjunct to s.117 claim or as stand-alone claims.

In the case of legitimate expectation the deceased must have made a representation to another in respect of a specific property, that other must have relied on that representation to their detriment and the deceased fails to fulfil that promise by gifting that property to another or by failing to make a will and therefore the rules of intestacy apply.

A typical example of this is whereby a family member has worked on a family farm or business, in the belief and on the basis of representations made to them that the farm or business would be theirs on the death of the deceased. In relying on this representation that forego other business opportunities or job offers,

Another example of a legitimate expectation claim is where a family member or carer moves in to live with an elderly person and carries out improvements to the property in the belief that the dwelling will be left to them.

In terms of a timeframe, in this instance s.9 of the Civil Liability Act 1961 applies;

It states that in respect of any claim against an estate that;

- Proceedings must be pending at the date of death;
 - Be brought within the relevant period pertaining to a cause of action
- OR**
- Be brought within 2 years of the date of death, whichever period expires first.

Successful proceedings under this section can lead to a declaratory order and/or damages in lieu.

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