

## **TRANSFER OF TENANCIES**

1991 Act Tenancy

### **TRANSFER BY ASSIGNATION**

Assignment is the method by which a tenancy is transferred during the lifetime of the existing tenant. Most leases specifically exclude assignment and even if there is no specific exclusion, this is implied at common law. The Agricultural Holdings (Scotland) Act 2003 introduced a right for a tenant to assign a tenancy to any of the persons who, at the time of the assignation, would be entitled to succeed to his estate under the laws of succession applicable where there is no Will (“intestacy”). This requires the tenant to give the landlord notice and the landlord can only withhold consent on reasonable grounds – in particular, whether the proposed assignee has the ability to manage the financial demands of the tenancy and the necessary skills and experience to work the farm.

If the tenant wishes to assign his tenancy to a person who falls outwith the class of persons who can succeed on intestacy, the consent of the landlord is still required but, in this case, the landlord has absolute discretion. The consent can be explicit such as where the landlord signs a form of consent or implicit where, for example, the landlord does not object to a new tenant to whom the tenancy has been assigned and proceeds to treat the new tenant as the tenant of the farm.

### **TRANSFER BY BEQUEST IN TENANT’S WILL**

Provided that the lease does not specifically prohibit transfers by bequest or assignation, a tenant can bequeath his tenancy to his son-in-law or daughter-in-law or any one of the persons who would be entitled to succeed to his estate under the laws of succession applicable where there is no Will. It is important to note, however, that if the bequest is to anyone other than the tenant’s spouse or one of his children or adopted children (known as near relatives successors) then the legatee is in a vulnerable position as the landlord may serve a notice to quit which the legatee cannot contest.

For the bequest to be successful, the legatee must intimate his acceptance to the landlord, in writing, within 21 days of the death of the tenant unless there is an unavoidable cause preventing him from doing so. Provided that the landlord does not object, the legatee will become the tenant with effect from the date of death of the previous tenant. The landlord may, however, decide to object. To be successful, an objection must be on reasonable grounds and relate to one of three matters pertaining to the legatee –

- his agricultural knowledge and skill
- his financial resources in relation to the farm
- his personal character and repute.

The success or otherwise of the objection will be determined by the Scottish Land Court on the application of the legatee.

If the objection is rejected, the Scottish Land Court will make an order declaring the legatee to be the tenant under the lease. If the objection is upheld, the bequest will be declared null and void. The executors may then seek to transfer the lease as if the deceased tenant had died without leaving a valid will ("intestate").

It is recommended that specialist advice should be obtained if any of these circumstances apply.

## **TRANSFER ON DEATH WITHOUT BEQUEST**

Provided that the lease does not specifically prohibit transfers on death, the executors must first obtain confirmation (probate) of the tenant's interest in the tenancy. The executors then have one year from either the date of death of the tenant or the date the Land Court declares a bequest null and void, to transfer the lease to one of the class of eligible acquirers. An acquirer must be one of the persons who would be entitled to succeed to the tenant's estate under the laws of succession applicable where there is no Will. Within this class the executors have complete discretion as to who they choose, but if they choose someone other than the tenant's spouse or one of his children or adopted children (known as near relative successors) then the acquirer is in a vulnerable position as the landlord may serve a notice to quit which the acquirer cannot contest.

The acquirer must intimate to the landlord the transfer to the acquirer within 21 days of the date of transfer unless an unavoidable cause prevents him from doing so. The landlord then has one month to object and, after the expiry of a further month, can apply to the Scottish Land Court for an order terminating the tenancy. To be successful, an objection must be on reasonable grounds and will relate to one of three matters pertaining to the acquirer –

- his agricultural knowledge and skill
- his financial resources in relation to the farm
- his personal character and repute.

If the objection is rejected, then the Scottish Land Court will make an order refusing the application and the acquirer will become the tenant as if the objection had never been made. If the objection is upheld, the Scottish Land Court will make an order terminating the lease.

It is recommended that specialist advice should be obtained if any of these circumstances apply.

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