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A GUIDE TO – Transfer of Tenancies by Assignment and Succession

This guide outlines the ways in which an agricultural tenancy can be passed on to another person. It includes information on whether and how a tenancy might be assigned during a tenant's lifetime; bequeathing a tenancy; and intestate transfer of a tenancy.

Users of this guide are advised to obtain independent legal advice relevant to their particular circumstances before acting upon any of the information contained in this guide.

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INTRODUCTION

Succession planning is an important issue in any business and no less for farming businesses, particularly where a tenant wishes to pass on the tenancy to another person. Careful thought needs to be given to when and how to make the transfer which is normally to a member of the tenant's immediate or extended family. The appropriate steps must be taken as failure to follow the correct procedures may, in some cases, lead to the tenancy being terminated. This guide describes the ways in which a tenancy can be passed on and summarises the legal procedures associated with each of those. It is not intended to cover every situation, for example tenancies held by more than one person as tenant; nor does it give detail on the exact procedures to be followed so **it is strongly recommended that any tenant or landlord preparing for, or involved in, assignation or succession should take appropriate legal advice at the outset.**

The Basic Background Rules

The tenant cannot transfer a tenancy AT ALL to an entity which is not a single individual, (such as to a company, firm or club, or to two or more people), unless the landlord agrees.

Unless the landlord agrees, you can't normally pass the tenancy to just anybody. There is, however, a class of people related to a tenant to whom, by statute, the tenancy MAY be transferred. Within that class, preferential consideration as transferees is given to certain people, described as 'Near Relatives' of the tenant. Lists of these potential transferees are given in the Appendix.

Ways of Passing on a Tenancy

There are three main ways in which this can happen:

1. **A lifetime assignation.** During the tenant's lifetime the tenancy may be passed to one of a number of eligible assignees.
2. **Testate transfer on death.** The tenant may be entitled to bequeath the tenancy to a named person by making a bequest within a valid will.
3. **Intestate transfer on death.** If the tenant dies without having bequeathed the tenancy in a will, the tenant's executors may still be able to transfer the tenancy to another person.

Landlord's Rights to Object

In each of these situations the landlord has certain rights to object and in some cases, additional rights. These are described briefly in this guide.

Which route is chosen will depend on individual circumstances but, generally speaking, making an assignation during the lifetime of the tenant is likely to provide more certainty and involve less complexity.

The exact rules applying to any assignation or succession depend also on whether the tenancy is a tenancy under the Agricultural Holdings (Scotland) Act 1991 – a "1991 Act tenancy" – or one of the more modern fixed duration tenancies under the Agricultural Holdings (Scotland) Act 2003 – a "2003 Act tenancy" – which includes a Limited Duration Tenancy [LDT], a Modern Limited Duration tenancy [MLDT], and a Repairing Tenancy. (Note: the legislation for Repairing Tenancies is not in force at August 2019).

There may be other legal and taxation consequences flowing from the transfer of a tenancy so, again, professional advice should be taken.

1. Lifetime Assignment

1.1 1991 Act Tenancies

A tenant with a 1991 Act tenancy may assign the lease to any one of the persons listed in Appendix A if the landlord consents to the proposed assignation or if their refusal of consent is over-ridden by the Land Court. The list of potential assignees is extensive and a distinction is made between potential assignees who are near relatives (part 2 of the appendix) and those who are not (part 1 of the appendix). The importance of this distinction is that the ability of the landlord to withhold consent is different depending on whether or not the assignee is a near relative.

The tenant must give the landlord notice in writing of the intention to assign the lease and must provide details of (1) the assignee, (2) the terms on which the assignation is to take place and (3) the date on which the proposed assignation is to take place.

The landlord may seek to withhold consent to the assignation but the grounds for objection vary depending on whether the proposed assignee is a near relative or not.

Objections to non-near relatives

If the proposed assignee is not within the class of near relative, the landlord may object on any reasonable grounds, including the grounds that the proposed assignee:

- a) would not have the ability to pay the rent due or to be able to pay for adequate maintenance of the leased property; or
- b) does not have the skills or experience that would properly be required to manage and maintain the land in accordance with the rules of good husbandry.

Objections to near relatives

If the proposed assignee is from the class of near relative, the only grounds on which the landlord can withhold consent are:

- a) that the person is not of good character
- b) that the person does not have sufficient resources to enable the person to farm the holding with reasonable efficiency
- c) the person has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable the person to farm the holding with reasonable efficiency.

The last of these grounds can be overcome if the intended assignee:

- a) is engaged in, or will begin within 6 months of the date of the notice of assignation, a course of relevant training in agriculture which the person is expected to complete satisfactorily within 4 years of that date, and
- b) has made arrangements to secure that the holding is farmed with reasonable efficiency until the proposed assignee has completed the course.

If the landlord wishes to withhold consent, the grounds for withholding consent have to be given to the tenant in writing within 30 days of the giving of the notice of assignation by the tenant and if no such intimation is made within this period, the landlord is deemed to have consented to the assignation.

If the intended assignee disputes the landlord's reasons for withholding consent, the prospective assignor (the existing tenant) must apply to the Land Court in order to contest the matter.

1.2 The Short Limited Duration Tenancy (SLDT)

The tenant of a SLDT has no right to assign the lease and must therefore rely on the consent of the landlord if assignation is desired.

1.3. The Limited Duration Tenancy (LDT)

There is no restriction on the range of persons to whom a LDT may be assigned and, on receiving a notice from the tenant that assignment is proposed, the landlord has three options:

- a) to consent to the proposed assignation
- b) to object to the proposed assignation
- c) to acquire the tenant's interest in the lease.

As with a 1991 Act tenancy, the tenant must give the landlord notice in writing of an intention to assign the lease and must give (1) particulars of the person to whom the lease is to be assigned (the assignee), (2) the terms on which the assignation is to take place and (3) the date of which it is to take effect.

Objections to non-near relatives

If the assignee is not a near relative the landlord may withhold consent if he has any reasonable grounds for doing so and in particular if the landlord is not satisfied that the proposed assignee:

- a) would have the ability to pay the rent due; or
- b) would have the ability to pay for adequate maintenance of the land; or
- c) has the skills or experience needed to properly manage and maintain the land in accordance with the rules of good husbandry.

Objections to near relatives

If the assignee is a near relative (see Appendix A Part 2) the grounds on which a landlord can withhold consent are restricted to:

- a) the person is not of good character
- b) the person does not have sufficient resources to enable the person to farm the land with reasonable efficiency
- c) the person has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable the person to farm the land with reasonable efficiency.

This last ground can be overcome if the proposed assignee is engaged in, or will begin within 6 months, a course of relevant training in agriculture that the person is expected to satisfactorily complete within 4 years and has made arrangements to ensure that the land is farmed with reasonable efficiency in the meantime.

An objection by a landlord to a proposed assignation must be made in writing to the tenant within 30 days of receipt of the notice of assignation. If no objection is given within this timescale the landlord will be deemed to have consented.

Responding to an objection by a landlord

If the landlord objects to the assignation of a 1991 Act tenancy or of a LDT or MLDT and the tenant believes that the landlord is seeking to withhold consent unreasonably, the matter can be referred to the Land Court.

Landlord's right to buy back the lease of an LDT

On receipt of a notice of proposed assignation the landlord is entitled to acquire the tenant's interest in the lease. This right is specific to LDTs and is not available to landlords in the case of assignation of a 1991 Act tenancy or an MLDT. To exercise this right the landlord must give written notice to the tenant of an intention to do so within 30 days of the tenant having given the notice of assignation. The terms on which the landlord acquires the interest must be no less favourable to the tenant than the terms on which the proposed assignation was to have been made. So, for example, if the tenant proposed to assign the tenancy to another person for a payment of £10k, the landlord would have to pay the same amount to the tenant in the event that the landlord wished to acquire the tenant's interest in the lease.

1.4 The Modern Limited Duration Tenancy (MLDT)

The ability to assign a MLDT, the way in which the tenant notifies the landlord of an intent to assign, and the grounds on which a landlord can withhold consent, are the same as for a LDT. However, in the case of a MLDT the landlord has no right to acquire the tenant's interest by buying it back.

2. Transfer by Means of a Bequest in a Will (Testate Succession)

2.1 1991 Act Tenancies

A tenant may be able to bequeath the tenancy to a nominated person in a valid will but must first establish whether the terms of the lease allow this. Many leases will contain a common provision which excludes the right to bequeath the tenancy. If this is the case, the right to bequeath is often only available where there is no formal written lease.

The range of potential beneficiaries is set out in Appendix A Part 1 and is the same as the list of people to whom the tenancy may be assigned during the tenant's lifetime.

A person to whom the tenancy has been bequeathed must give notice of the bequest to the landlord within 21 days of the death of the tenant or, if there is some unavoidable reason for being unable to do so, as soon as possible thereafter. If the notice is given outwith the 21 day period without reasonable cause, the right to claim the tenancy will be lost. In the case of a dispute, the Land Court may be called upon to decide whether the delay was reasonable or not and is very unlikely to accept excuses such as ignorance of the correct procedures to be followed.

Objection by the landlord to a near relative

If the person who is bequeathed the tenancy is a near relative of the tenant (see Appendix A Part 2), the only grounds on which the landlord can object are:

- a) that he is not of good character
- b) that he does not have sufficient resources to enable him to farm the holding with reasonable efficiency
- c) that he has neither sufficient training in agriculture nor sufficient experience to enable him to farm the holding with reasonable efficiency.

This objection can be overcome if the legatee is engaged in, or will begin within 6 months of the notice to the landlord being given, a course of relevant training in agriculture that he is expected to complete satisfactorily within 4 years from that date and has made arrangements to secure that the holding is farmed with reasonable efficiency in the meantime.

If the landlord wishes to object to the proposed legatee a counter notice of objection must be given in writing to the legatee within one month of receipt of the legatee's claim. The onus is then on the landlord to apply to the Land Court for an order declaring the bequest to be null and void and to show that the grounds for objecting are established. The application to the Land Court must be made within one month of issuing the counter notice.

If the Land Court accepts that the landlord's objection is valid, it will make an order declaring the bequest to be null and void but if the landlord fails to justify the objection, the Court will make an order declaring the legatee to be the tenant under the lease as from the death of the deceased tenant. If the landlord doesn't issue a counter notice of objection or does so and then fails to meet the deadline for lodging an application to the Land Court the legatee will succeed to the tenancy, on the same terms as the current lease, from the date of the death of the tenant.

Objection by the landlord to a non-near relative

Where the legatee is not a near relative, on receiving notice of the bequest the landlord has one month in which to give the legatee a counter notice of objection which states that the landlord objects to receiving the legatee as tenant and that the lease is declared to be null and void.

If the legatee does not accept the landlord's objection the only recourse for the legatee is to appeal to the Land Court against the counter notice and this must be done by the legatee as prospective tenant within one month of the issue of the counter notice. At a Land Court hearing, both sides are likely to be expected to present evidence to support their case, but the onus will be on the legatee to convince the court that there are no reasonable grounds for preventing succession to the tenancy. If the legatee is successful, the Land Court will issue an order quashing the counter notice but if the landlord is successful the order will confirm that the objection is valid.

2.2 The Fixed Duration Tenancies (SLDT; LDT; MLDT)

The rules for bequests of the 2003 Act tenancies are the same as for the 1991 Act tenancies.

3. Intestate Succession

In both 1991 Act and 2003 Act tenancies, in circumstances where a tenant dies without bequeathing the tenancy in a will, (and it may be that the tenant leaves a will which deals with their affairs in general but does not bequeath the tenancy) it may still be possible for the executors to transfer the tenancy to another person (referred to as the 'acquirer') but this requires a two-stage process and the landlord again has the ability to object to the transfer.

The executor(s) must establish that the deceased was indeed a tenant under a lease and must include the deceased's interest in that lease as a specific item of estate, and attribute a value to it, in the inventory of items that is part of the procedure for Confirmation of executors.

The executor may transfer the interest to anyone in Appendix A, but if that person is a near relative (Appendix A Part 2) the ability of the landlord to object is more restricted. The executor must transfer the interest within one year from the death of the tenant unless there is an extension to the time period agreed with the landlord or granted by the Land Court.

Once the acquirer has received the transfer from the executor of the interest in the lease, written notice of the acquisition must be given to the landlord within 21 days. The landlord then has one month in which to issue a counter notice objecting to the acquirer as tenant. The process for dealing with an objection by the landlord differs according to whether the acquirer is a near relative or not.

Objections to near relatives

Where the acquirer is a near relative of the deceased, the landlord's grounds for objection are limited to:

- a) the person is not of good character
- b) the person does not have sufficient resources to enable the person to farm the land with reasonable efficiency
- c) the person has neither sufficient training in agriculture nor sufficient experience in the farming of land to enable the person to farm the land with reasonable efficiency.

This last ground can be overcome if the proposed assignee is engaged in, or will begin within 6 months, a course of relevant training in agriculture that the person is expected to satisfactorily complete within 4 years and has made arrangements to ensure that the land is farmed with reasonable efficiency in the meantime.

Within one month of issuing the counter notice the landlord must apply to the Land Court for an order terminating the lease. If the case is heard in the Land Court, the onus will be on the landlord to justify his objection.

Objection to a non-near relative

If the acquirer is not a near relative, the landlord has one month in which to issue a counter notice, objecting to the acquirer's acquisition of the lease and stating that the tenancy will be terminated on a date between one year and two years of the date of the counter notice.

If the acquirer does not accept the landlord's objection the only recourse for the acquirer is to appeal to the Land Court against the counter notice and this must be done by the acquirer as prospective tenant within one month of the issue of the counter notice. At a Land Court hearing, both sides are likely to be expected to present evidence to support their case, but the onus will be on the acquirer to convince the court that there is a reasonable ground for not preventing succession to the tenancy. If the acquirer is successful, the Land Court will issue an order quashing the counter notice but if the landlord is successful the order will terminate the tenancy.

If the landlord doesn't issue a counter notice of objection or does so and then fails to meet the deadline (in the case of a near relative) for lodging an application to the Land Court the acquirer will succeed to the tenancy, on the same terms as the current lease, from the date of the death of the tenant.

Landlord's right to acquire the tenant's interest

In the case where a 2003 Act tenancy (that is, an SLDT, LDT, MLDT or Repairing Tenancy) passes by intestate succession, the landlord is entitled to give notice to acquire the late tenant's interest by giving notice in writing within 30 days of receiving notice of an acquisition from the acquirer. The landlord is obliged to acquire the tenancy on no less favourable terms than those on which the lease was transferred to the acquirer.

4. Final word

Anyone who is involved in the transfer of a tenant's interest in a lease must remember that there are laid down procedures that have to be followed. The following flowcharts do not show every detail of the procedures, they are indicative only. Professional advice is strongly recommended and this should be taken in good time.

APPENDIX A

Note 1. Lines (b) and (d) (spouses/civil partners of the tenant's children and siblings) in the list in Part 1 are in effect the same as lines (d) and (g) in the list of 'near relatives' in Part 2. The remainder of the 'non-near relatives' are more remote relations than the 'near relatives'.

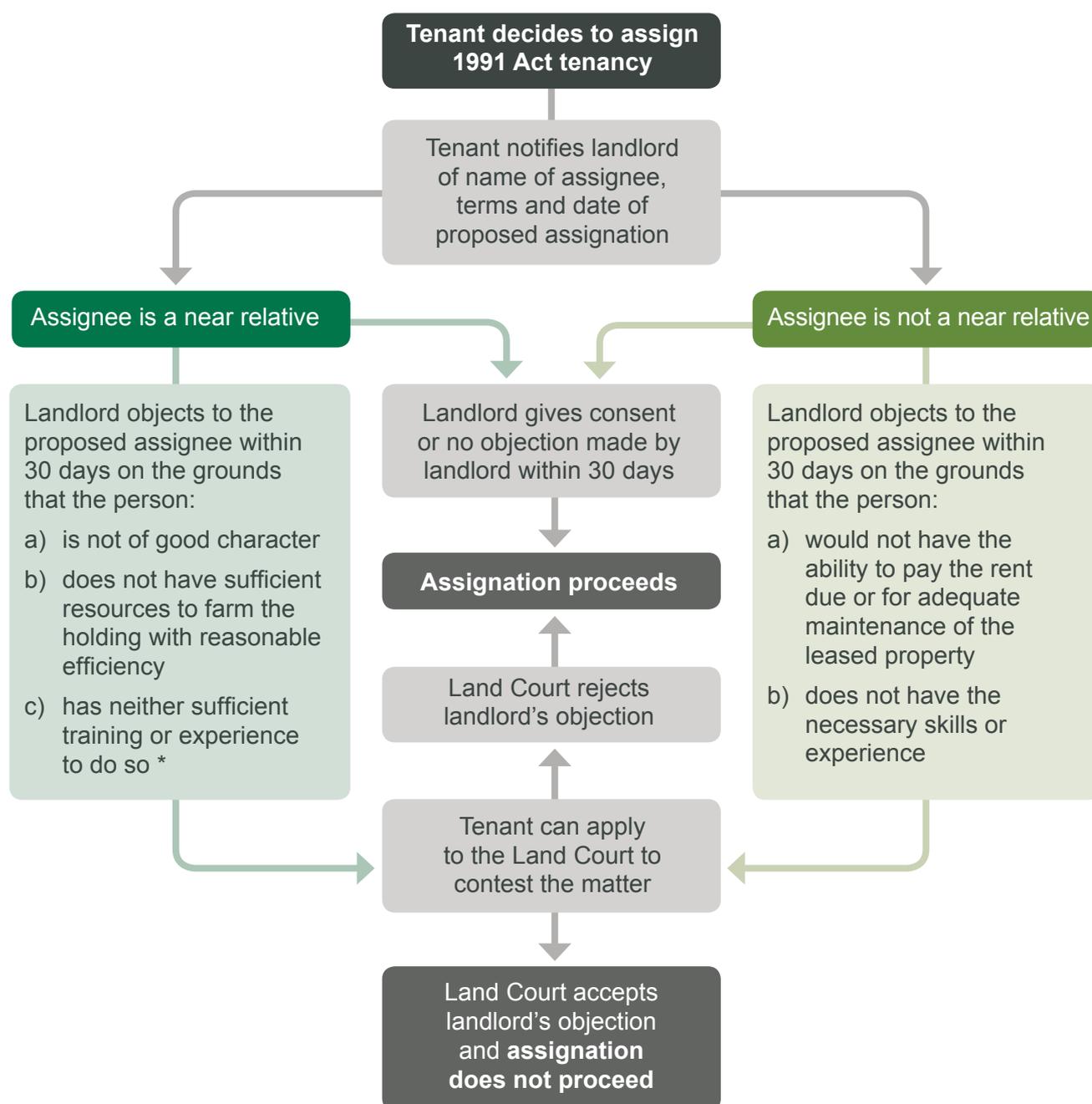
Part 1 – Potential transferees

- (a) any person who would be, or would in any circumstances have been, entitled to succeed to the tenant's estate on intestacy by virtue of the Succession (Scotland) Act 1964
- (b) a spouse or civil partner of a child of the tenant
- (c) a spouse or civil partner of a grandchild of the tenant
- (d) a spouse or civil partner of a brother or sister of the tenant
- (e) a brother or sister of the tenant's spouse or civil partner
- (f) a spouse or civil partner of such a brother or sister
- (g) a child (including a step-child) of such a brother or sister
- (h) a grandchild (including a step-grandchild) of such a brother or sister
- (i) a step-child of the tenant
- (j) a spouse or civil partner of such a step-child
- (k) a descendant of such a step-child
- (l) a step-brother or step-sister of the tenant
- (m) a spouse or civil partner of such a step-brother or step-sister
- (n) a descendant of such a step-brother or step-sister.

Part 2 – Potential transferees who are near relatives

- (a) a parent of the tenant
- (b) a spouse or civil partner of the tenant
- (c) a child of the tenant
- (d) a spouse or civil partner of such a child
- (e) a grandchild of the tenant
- (f) a brother or sister of the tenant
- (g) a spouse or civil partner of such a brother or sister
- (h) a child of a brother or sister of the tenant
- (i) a grandchild of a brother or sister of the tenant
- (j) a brother or sister of the tenant's spouse or civil partner
- (k) a spouse or civil partner of such a brother or sister
- (l) a child of such a brother or sister
- (m) a grandchild of such a brother or sister.

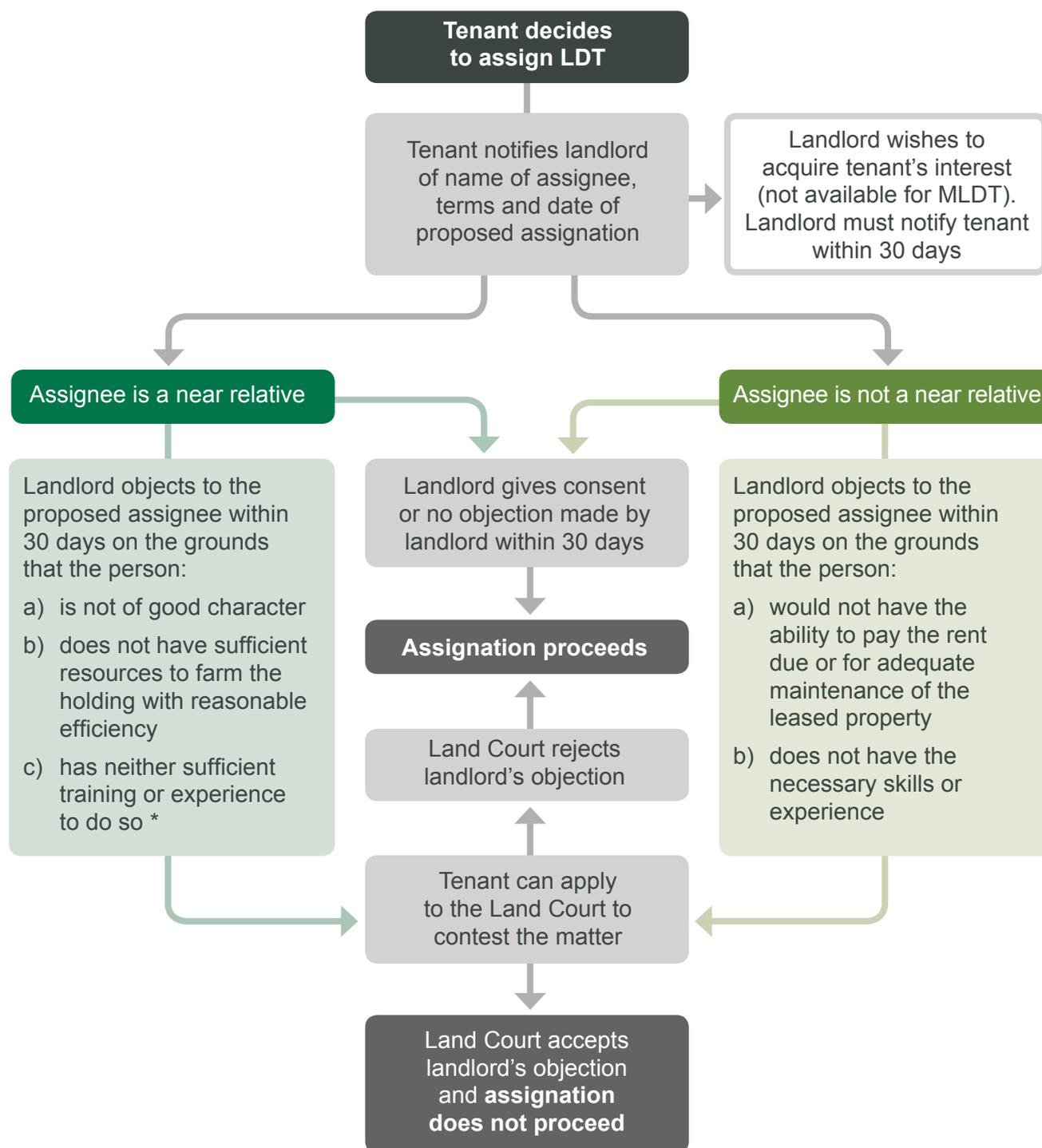
1(a). Lifetime Assignment 1991 Act tenancy



*This can be overcome if the person:

- a) is engaged in, or will begin within 6 months of the date of the notice of assignation, a course of relevant training in agriculture which the person is expected to complete satisfactorily within 4 years of that date, and
- b) has made arrangements to secure that the holding is farmed with reasonable efficiency until the person has completed the course.

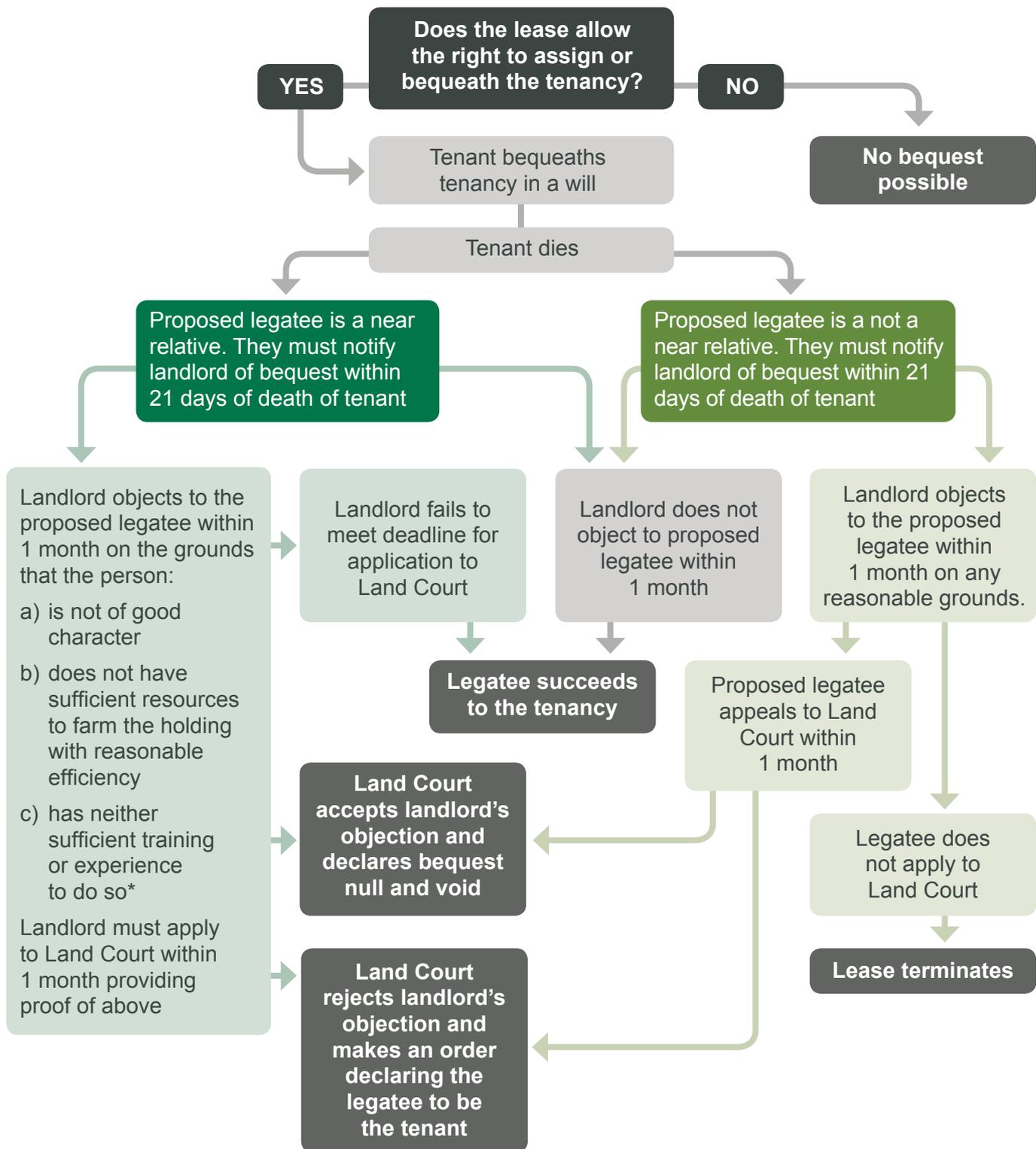
1(b). Lifetime Assignment Limited Duration Tenancy (LDT)



*This can be overcome if the person:

- is engaged in, or will begin within 6 months of the date of the notice of assignation, a course of relevant training in agriculture which the person is expected to complete satisfactorily within 4 years of that date, and
- has made arrangements to secure that the holding is farmed with reasonable efficiency until the person has completed the course.

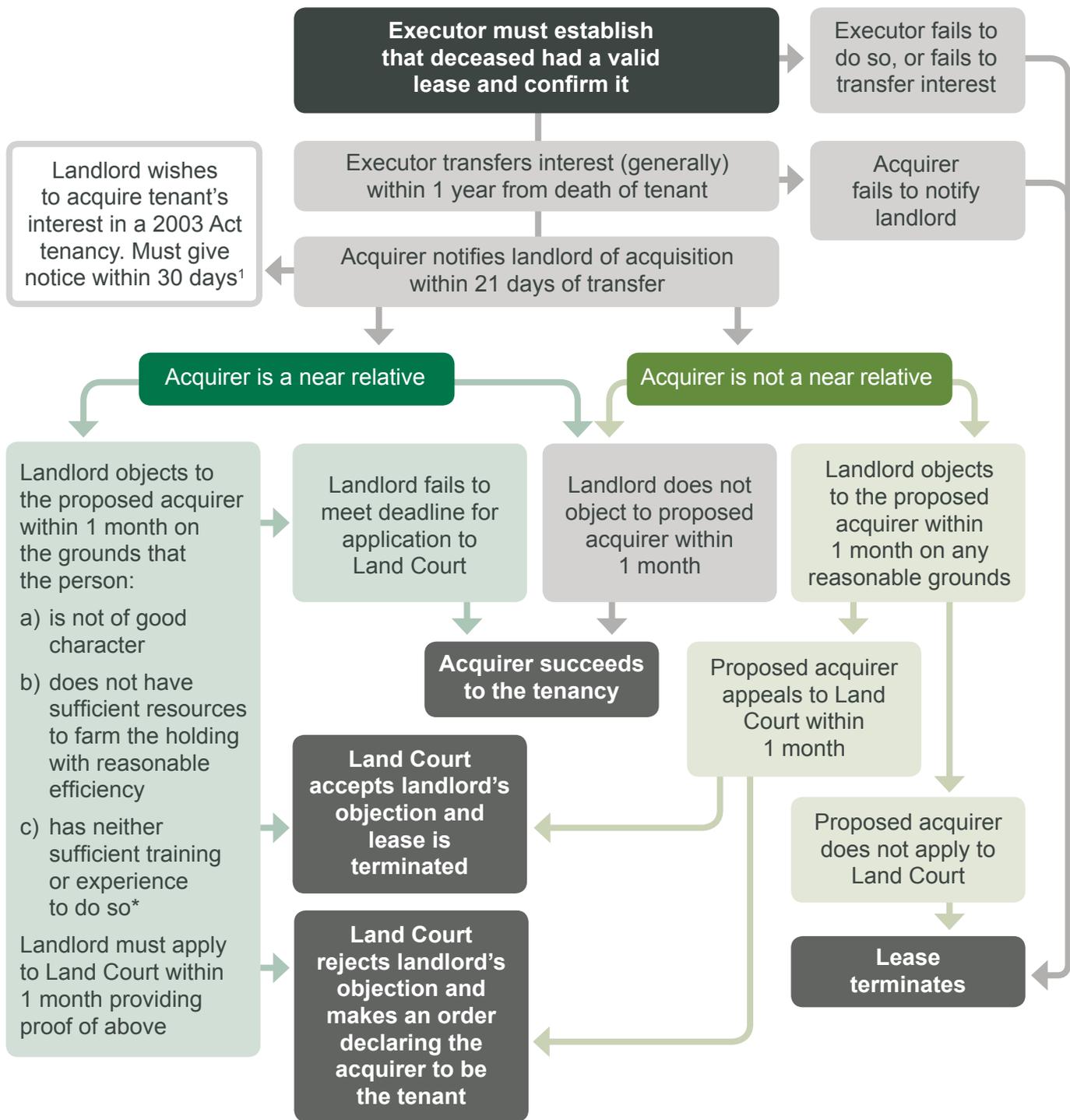
2. Testate Succession (Bequest in a will)



*This can be overcome if the person:

- a) is engaged in, or will begin within 6 months of the date of the notice of assignation, a course of relevant training in agriculture which the person is expected to complete satisfactorily within 4 years of that date, and
- b) has made arrangements to secure that the holding is farmed with reasonable efficiency until the person has completed the course.

3. Intestate Succession (No bequest in a will)



*This can be overcome if the person:

- a) is engaged in, or will begin within 6 months of the date of the notice of assignation, a course of relevant training in agriculture which the person is expected to complete satisfactorily within 4 years of that date, and
- b) has made arrangements to secure that the holding is farmed with reasonable efficiency until the person has completed the course.

¹ SLDT, LDT and MLDT (and once in effect Repairing Tenancies). Landlord may acquire the tenancy on 'not less favourable terms' by giving notice to an acquirer.