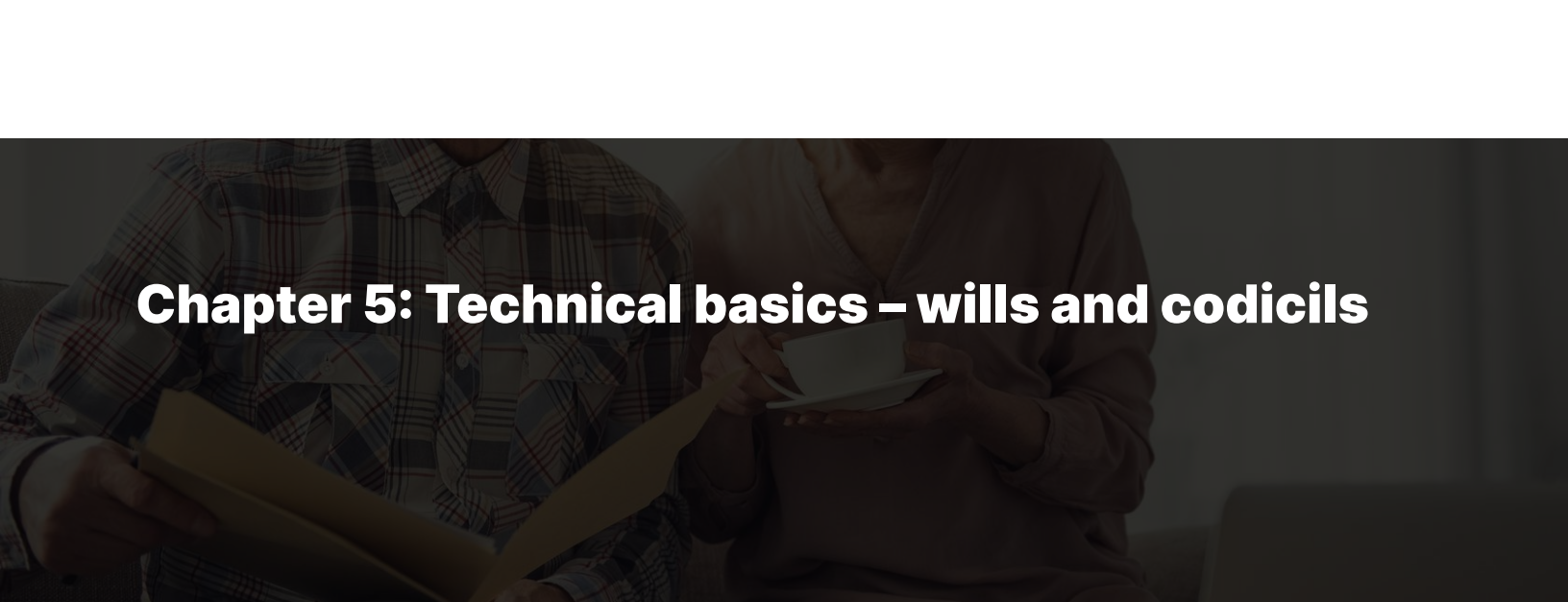




Chapter 5: Technical basics – wills and codicils

≡ Aims of this Chapter

≡ 5.1 Purpose of a will; the reasons for making a will

≡ 5.2 Format and structure of a will

≡ 5.3 Gifts in wills

≡ 5.4 Gifts to children

≡ 5.5 Ademption

≡ 5.6 Lapse of a gift

≡ 5.7 Administrative clauses

≡ 5.8 The executor

≡ 5.9 Capacity to make a will

≡ 5.10 Intention; dealing with a blind or illiterate testator, or where another signs on their

≡

 **behalf**

 **5.11 Revocation of wills**

 **5.12 The forfeiture rule**

 **Knowledge check**

 **5.13 Chapter summary**

Aims of this Chapter

A trainee in the private client department must understand the significance of a testator client making a will and the formalities and procedures which must be followed to ensure that the will is valid. This is an area of practice where the mental capacity of the client who wishes to make a will is crucial, and the pitfalls in relation to signing a will must be avoided. This chapter will consider these important issues and will also provide an introduction to the different types of gifts that can appear in a will.

This chapter will cover:

- making a will
- formalities under **s9 WA 1837**
- gifts
- executors
- capacity to make a will, and
- revocation.

Now let's move on to consider each of these in turn.

CONTINUE

5.1 Purpose of a will; the reasons for making a will

5.1.1 Why make a will?

The person who makes a will is called the “**testator**”. The main reason for making a will is so that the intestacy rules – the strict rules which govern what happens if there is no will – can be avoided. Under those rules, persons may benefit against the wishes of the deceased. Very broadly, the intestacy rules follow the bloodline of the deceased. By making a will, a person can control what happens to their property when they die.

There are other important reasons for making a will:

- it can specify the executors, who may be professionals;
- it can include wishes such as burial arrangements or organ donation (though these wishes are not binding on the executors, and it is advisable to tell them of these wishes before death because often a will is not looked at until after the funeral);
- gifts of specific items can be included – for example, family heirlooms;
- guardians for children can be specified; and
- it can include thanks and gifts for kindness shown during life as well as gifts to charities.

The intestacy rules can also work harshly against the interests of cohabitees. It is, therefore, essential for unmarried couples to make wills. The **Inheritance (Provision for Family and Dependants) Act 1975** allows cohabitees to apply to court for a share of the deceased's assets, but this is inevitably a costly and distressing experience, and there is no guarantee of success. The 1975 Act is outside the scope of this course book.

Another important reason for making a will is for tax planning purposes. Inheritance tax (IHT) is payable at the rate of 40 per cent on the value of a person's estate over £325,000. There are exemptions and reliefs available to reduce the tax liability, but making a tax-efficient will can be a useful way of mitigating this liability.

A practical reason for making a will is to relax the strict statutory rules which apply in relation to the administration of the estate. This is particularly relevant where there are children or a business. The inclusion of clauses to ease the administration of the estate can help the **personal representatives (PRs)**.

CONTINUE

5.1.2 Joint property

It is quite common for two people – often, but not always, a married couple or civil partners – to own bank accounts or other assets jointly. With one exception, discussed later, such assets are held as “**joint tenants**”, which simply means that if one of the owners dies, the asset passes immediately and outright into the sole name of the surviving owner.

The consequences of this are that the deceased's share:

- does not pass to her personal representatives, and it does not pass under her will (or, if there is no will, under the intestacy rules); and

- does not count towards any gift left to the surviving owner in the will (or the survivor's entitlement under the intestacy rules).

The **exception** to this rule is a type of joint ownership called “**tenants in common**”, which can only apply to the ownership of land (houses, farmland, etc.). If two or more people own land as tenants in common, their shares will form part of their estate on death, and so will pass under their will or intestacy.

Note that, with both types of joint ownership, the value of the deceased's interest is still counted as the estate for inheritance tax purposes

CONTINUE

5.1.3 Characteristics of a will

A will declares the intentions of the testator (or testatrix), which are to take effect on their death.

It is an important document and has the following characteristics:

- it covers the disposition of property and other arrangements;
- it is a declaration of intent;
- it must be in a prescribed form (with some exceptions);

- it can always be revoked (cancelled);
- it takes effect on death; and
- (if properly written) it will dispose of the testator's entire estate as at the date of death, including assets acquired by the testator after execution (i.e. signing).

It is vital that the will accurately reflects the client's instructions, which should be carefully recorded in the file. Once the client is dead, which is usually the time when problems become apparent, it is too late to make a new will!

The testator can change the terms of the will by making a **codicil**, a document prepared and signed in accordance with the same rules as the will. A codicil makes some alteration (usually minor) to the terms of the original will, such as adding a beneficiary or replacing an executor. In all other respects, the terms of the original will are unchanged. The codicil must be stored with the original will, if possible.



If a person wants to make major changes to a will, they should always make an entirely new will. More than one codicil can be executed, but too many documents might cause confusion.

CONTINUE

5.2 Format and structure of a will

5.2.1 Formalities

For a will to be valid, **s9 WA 1837** must be complied with. This section relates to the preparation and signature of the will. It states that:

No will shall be valid unless:

- *it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and*
- *it appears that the testator intended by his signature to give effect to the will; and*
- *the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and*
- *each witness either:*
 - *attests and signs the will; or*
 - *acknowledges his signature,*

in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.

To look at these criteria in more detail:

The will must normally be in writing (except for a privileged will – discussed later). The will does not have to be typed: it can be handwritten in pen or pencil and can be on any material provided that it is in writing. In ***Hodson v Barnes [1926]*** a will written on an eggshell was declared valid. Pencil amendments to a typed or ink-written will may be ineffective because the amendments may be seen by the probate registry as deliberative only – the testator simply mulling over possible changes.

The testator must intend by their signature to give effect to the will. In ***Marley v Rawlings [2014]***, the Supreme Court considered a case where an unfortunate married couple signed each other's "**mirror**" (identical) wills by mistake. On the face of it, the requirements of **s9** had not been met, since each testator must sign, or direct someone to sign on his or her behalf, his or her own will. However, the Supreme Court used the legal concept of "**rectification**" to amend the main part of the will which Mrs Marley had signed (the will which had been originally drafted for **Mr** Marley to sign) so that it could be submitted to probate as **her** will.

If the testator is physically too weak to sign the will, they can ask someone else to do it on their behalf, provided that the testator and the person signing are in the room together at the same time. ***Barrett v Bem and Others [2012]*** dealt with a will being signed on behalf of the testator.

Here, the testator (who was very infirm) attempted to sign the will himself, but his hand was shaking too much and he was unable to do so. The sole beneficiary, Anne, was present with the witnesses and she intervened, taking the pen and signing on the testator's behalf.

The fact that the person signing on the testator's behalf was a beneficiary was not the problem (although it was, of course, undesirable).

The court stated that

"something more than acquiescence or passivity on the part of the testator is required. What is required is something in the nature of an instruction".

Looking at the facts of the case, the court found:

"There is no finding here ... that [the testator] asked Anne to step in and sign the will; or that Anne asked him whether she should sign the will before she 'stepped in'".

The will was held invalid on the ground of lack of proper execution.

5.2.2 No form of attestation is necessary

At the end of any properly drafted will, there will be an attestation clause. Usually, the testator signs alongside the clause, and the witnesses sign immediately below it. The purpose of the clause is to describe the process by which the will was signed, and to make it clear that it followed the requirements of **s9 WA 1837**. The absence of an attestation clause will not of itself make a will invalid, but a presumption of “**due execution**” is raised if one is included. If no such clause is included, it may be necessary for a witness to swear an affidavit of due execution confirming that the correct formalities of signature by testator and witnesses were followed.

Common wording for an attestation clause is provided in **Figure 5.2a**.

The diagram illustrates the layout of an attestation clause. It consists of three main horizontal sections stacked vertically, all enclosed within a thin black border. The top section is a dark grey rectangle containing the text: "Signed by [insert testator's name] in our joint presence and then by us in his/her presence and in the presence of each other." To the right of this text is a large closing curly bracket "}" and the text "[testator signs here]". The middle section is an orange rectangle containing the text: "[Witness 1 signs here {name, address, occupation}]" in white. The bottom section is another orange rectangle containing the text: "[Witness 2 signs here {name, address, occupation}]" in white.

Figure 5.2a.

It is usual for the will to be signed at the end of the document. This was a positive requirement until **Administration of Justice Act 1982 (AJA 1982)** provided that as long as the testator intends their signature to give effect to the will, it will be valid no matter where it is signed.

In ***Wood and Another v Smith and Another [1991]***, the Court of Appeal held that a handwritten will, made two days before death, was valid because it commenced with the words “*My will by Peter Winterborne*”. It was not signed at the end, but the writing of the name and disposition were all one operation.



Link to Practice

If the testator is unable to write, it is sufficient for them to make their mark – for example, a cross or a thumb print. If there is likely to be any doubt in the future as to the way in which the will was signed, the legal adviser should ask for the witnesses (such as a doctor if the testator is weak) to prepare an affidavit confirming the circumstances of the signing. This type of evidence is crucial because the testator will not be around to ask in the event of a dispute after death.

CONTINUE

5.2.3 Privileged wills

Provided they are in actual military service or are sailors at sea, people aged 14 or over can make valid wills without complying with the formalities set out earlier. These are called **privileged wills (s11 WA 1837)**.

Privileged wills enable persons in military emergencies or at war to make a valid will without complying with all the formal requirements usually imposed. The law recognises that these people, as a matter of public policy, should be allowed to make wills which can be oral and, if in writing, need not be witnessed.

This privilege is conferred on:

- soldiers and airmen in actual military service;
- mariners or seamen at sea; and
- members of HM naval or marine forces in actual military service.

Wills made in these circumstances remain valid after the emergency or hostilities have finished. In ***Re Booth [1926]***, for example, a privileged will made by the testator while on actual military service in 1882 was held to be valid after his death in 1924.

CONTINUE

5.2.4 Witnesses; s15 Wills Act 1837

The testator must sign or acknowledge their signature in the simultaneous presence of **two** or more witnesses.

Witnesses do not need to know the content of the will, but they must know that they are witnessing the signature of the testator – that is, they must be competent. This means that mentally disordered or blind people would not be competent witnesses. If the witnesses are not competent, the will is invalid, even if everything else is satisfactory.

The witnesses must then sign or acknowledge their respective signatures in the presence of the testator. When the testator signs, he must sign in the presence of both the witnesses. If a witness signs the will **before** the testator has completed the first stage the execution is **invalid**.

Note that, for this purpose, “**signature**” does not necessarily mean “signature” in the common understanding of the term. It does not have to be the witnesses’ unique personal marks. It is sufficient for a witness to write his or her name with the intention of attesting the will. This point was discussed in *Re Payne [2018]*, in which the witnesses wrote out their names in capital letters. The will was held to be valid.

In *Re Whelen [2015]* the testatrix wrote out a home-made will, signed it, and handed it to a friend, who had also written a will. The friend then took both wills to two colleagues for witnessing. The witnesses added their signatures to both wills, but because the sheets of paper on which the wills were written were stacked one on top of another the witnesses did not realise that they were witnessing two separate documents.

Following the testatrix’s death, her will was held invalid because the witnesses had not been present when she had signed, it, and she had not been present when they added their signatures. The fact that they did not know they were witnessing her will was not relevant.

NB There is **no** requirement that both witnesses sign in each other’s presence, although this is best practice.

The witnesses must **not** be beneficiaries named in the will, nor the spouse or civil partner of a named beneficiary

(s15 WA 1837).

A witness who is a beneficiary (or whose spouse or civil partner is a beneficiary) does **not** invalidate the will in its entirety, but the witness (or his spouse or civil partner) cannot receive the gift under the will unless certain statutory qualifications apply.



Link to Practice

For example, Oona Brown makes a will and leaves £2,000 to Fred, £2,000 to Colleen and the rest to Dave. Fred and a family friend, Ellen, witness the will. The will is valid, but Fred loses his legacy of £2,000.

The gift to the witness beneficiary can be saved if **s1 Wills Act 1968** applies. This states that if there are more than two witnesses and it is possible to find two non-beneficiary witnesses, the signature of the beneficiary witness can be disregarded and he can take his gift under the will. In the example discussed earlier, if Oona's will is also witnessed by Godfrey, Fred **will** inherit his legacy of £2,000.

An important practical point is that there are very rarely more than two witnesses to a will, so this provision will not usually save the gift.

It is very important to ensure that the method of execution and the requirements regarding

witnesses are clearly explained to a client,
especially if the will is being sent to the client for
signature.

Figure 5.2b helps ensure that the formalities requirements have been met.

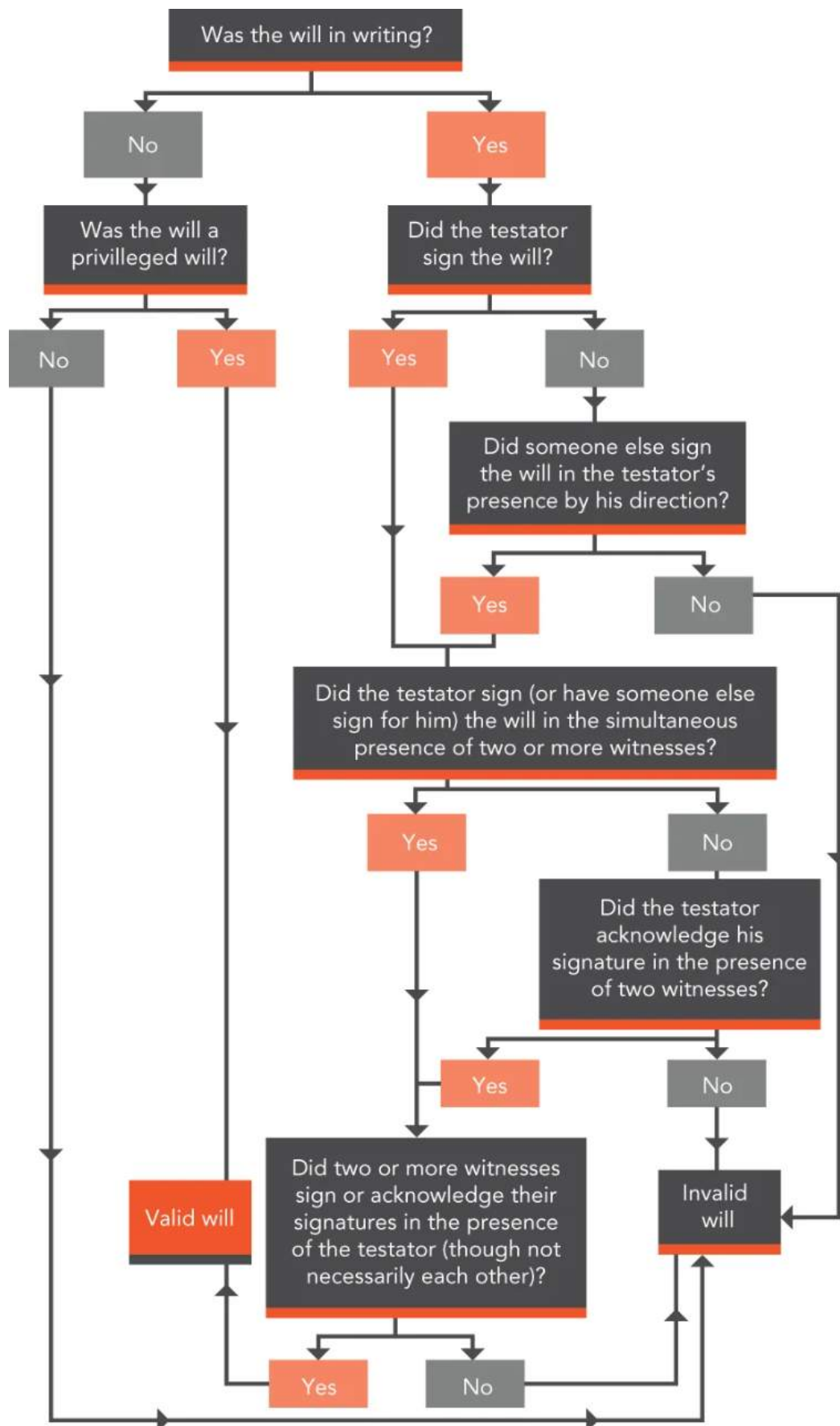


Figure 5.2b



Link to Practice

The client should be politely urged to come into the office to sign the will, and this is always best practice. In ***Gray v Richards Butler [2000]***, a solicitor who had sent his client the will to sign with very comprehensive instructions was not negligent when the client failed to comply with them. The court held that the correct approach was to decide whether the client was capable of following the instructions. The legal adviser must, however, ensure that they check the executed will subsequently.

An alternative is for the legal adviser to visit the testator at home to arrange execution. If this is not possible, a letter containing clear step-by-step instructions must accompany the will and should take the following form:

1. Enclose the will, asking the testator to check it through carefully to ensure that it reflects their wishes. The client must not sign it if there are any discrepancies.
2. Instruct the testator to ensure that there are two competent witnesses who must also be independent – they must not be named as

beneficiaries in the will, nor be married to or be the civil partner of a beneficiary.

This should not be confused with a witness who is named as an **executor** in the will. It is possible for an executor to witness the will. Executors often do benefit under the will, however, so it is best practice to ensure that executors do not serve as witnesses either.

3. The two witnesses and the testator remain together in the same room and must stay together until all of them have signed the will.
4. The testator must sign the will in ink first next to the attestation clause with both the witnesses present while he does that.
5. The witnesses must see the testator sign, but they do not need to know the content of the document.
6. All must stay together while each witness signs their name and adds their address and occupation underneath where the testator has signed (address and occupation are added for practical purposes – they are not a legal requirement – it may make it easier to trace the witnesses to explain the circumstances of attestation if there are queries after death).
7. The testator must date the will in their own handwriting on the day that it was signed.

8. The testator must be advised not to pin, clip or staple anything to the will. This precaution must also be followed at all times by the legal adviser.
9. The testator must be told to return the signed will in an enclosed stamped addressed envelope. It is essential that a will is stored safely, and the testator must be advised not to keep it at home.

The signed will should be checked carefully once it is returned.

One certified copy of the will should always be sent to the client, and another certified copy should also be placed in the file. In the event that the original will is lost, it may be possible to send a copy to the probate registry.

It is common for the will to be stored at a bank, but many law firms offer a free storage facility to ensure that the client comes to them if they ever want to change the will, or the beneficiaries contact the firm in the event of death. The executors may then be encouraged to instruct the firm to administer the estate.

When the grant of probate is applied for from the probate registry after death, the will is sent with the application. The Registrar or District Judge checks the will very carefully. If they see a staple mark or paperclip mark, this will inevitably delay the issue of the grant of probate because they will

raise a query as to what has been formerly attached to the will. The Registrar or District Judge must be satisfied that there were no codicils, for example. The Registrar or District Judge will require an **affidavit of plight and condition** to be sworn to verify what caused the marks on the will **(r14 Non-Contentious Probate Rules 1987 (NCPR 1987))**. This causes great inconvenience, especially if the marks were simply made by attaching a letter to the will when it was returned to the law firm's office.

Finally, a client must also be reminded that a will is not necessarily a once-in-a-lifetime document. It should be kept under review and amended to reflect changes in the testator's (or testatrix's) circumstances, particularly marriage, civil partnership or divorce.

CONTINUE

5.2.5 Remote witnessing of wills (video witnessing: Covid-19)

The **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 SI 2020/952** provided for the legalisation of the remote witnessing of wills during the coronavirus (COVID-19) pandemic. The government stressed that this procedure should be used only as a **last resort** and every effort should be made to execute wills in the usual manner.

This meant that wills witnessed via video link will be legally recognised, so long as the quality of sound and video was sufficient to see and hear what is happening. The measures were backdated to 31 January 2020 and, following the **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2022 (SI 2022/18)**, remained in place until 31 January 2024.



Although no new wills may be executed using these procedures, wills correctly executed between 31 January 2020 and 31 January 2024 will continue to be valid.

Guidance on how wills should have been executed under these procedures is available at [Guidance on making wills using video-conferencing - GOV.UK](#)

CONTINUE

5.3 Gifts in wills

Before considering taking instructions, it is important to understand the different types of gifts that can be made in a will. These are called **testamentary gifts**.

Many years might pass between a testator (or testatrix) making a will and the date of their death, and during that time their circumstances might change extensively. Before looking in detail at the different types of gifts a will can contain, it is important to be clear about the date from which a will “**speaks**”.

For example, suppose that in 2015 Harry Harris, who lives at 2 Hill View, made a will in which he says:

“I leave my wine collection to my neighbour at Number 1 Hill View, and I leave the rest of my estate to my cousin Toby Goode.”

When he made the will, he owned 30 bottles of wine. Shortly before his death, he bought 360 more bottles, at a cost of £15,000.

In 2016, his neighbour at number 1 (Colin Cooke) moved out and Sally Thompson, moved in. Harry never met Sally. Harry died in early 2019.

Two questions arise:

1. How much wine passes under the gift – the 30 bottles Harry had in his collection (and, presumably, had in mind) when he wrote the will, or the full collection of 390 bottles which he owned when he died?
2. Who gets the wine? Clearly, as at the date of death, it is Sally, not Colin, who fits the description of the beneficiary.

There are two legal rules which deal with these situations:

Under **s24 WA 1837**, as far as property is concerned, a will speaks ***as if it had been executed immediately before the death of the testator*** (unless there is anything in the will itself to suggest that this should not be the case).

With regard to beneficiaries, however, the will is to be read as referring to the people who fit the relevant descriptions as at the date of the will, not the date of death (again, unless there is anything in the will itself to suggest that this should not be the case). It is worth noting that, in practical terms, the rule regarding beneficiaries is most likely to be relevant with reference to children of the testator (or testatrix) – if the will says “*I leave each of my children £10,000*”, and a later son is born after the will is made, he would not benefit under this gift. (If, as is usual, the will said “*I leave each of my children **living at the date of my death** the sum of £10,000*” then, of course, the later child would be included.)

So, in the case of Harry’s wine, the full 390 bottle collection (i.e. the property as at the date of death) will pass to Colin (i.e. the person who fits the description as at the date of the will).

Careful drafting of the will should prevent this sort of uncertainty from arising.

For the purpose of defining gifts in wills, it is important to remember the distinction between **real** and **personal** property. Real property consists of immovable property such as land and houses. The freehold estate in land is therefore real property. A gift of “land” includes freehold land only (i.e. **not** leasehold land). Everything other than freehold land is called personal property and includes, for example, the leasehold estate, cars or jewellery.

- A gift in a will of freehold land is called a “**devise**”.
- A gift of personal property is called a “**bequest**” or a “**legacy**”. There are different types of legacy, and it is important to use the correct terminology.

Legacies can be divided as follows:

1

Specific legacy

This is a gift of a particular thing which is identified **as belonging to the testator**: it must be clearly described in the will – for example, “*I give **my** three-stone diamond engagement ring*” or “*I give **my** Picasso painting*”.

2

General legacy

This is a gift of an unspecified item. It is a gift of property which is not distinguished from other property of the same type, or a gift of an item which the testator may or may not possess at the date of death but which could be purchased to fulfil the gift – for example, “*I give **a** car*” or “*I give **a** horse*”. It is rare for a testator to make a gift like this deliberately – they are more likely to arise from poor will-drafting.

A **pecuniary legacy** is a general legacy which is a gift of money out of the general estate – for example, “*I give £1,000 to Adiba*”.

Note that a precise definition does not necessarily make a gift “**specific**”. A gift of “*a bottle of Chateau Latour 1982 wine*” would be a general gift, whereas a gift of “*my wine*” would be specific; if, at the date of death, the testator did not own any Latour 1982 wine, the executors would have to buy a bottle for the beneficiary.

3

Demonstrative legacy

A demonstrative legacy is a gift of a general nature which is to be paid out of a specified fund rather than out of the general estate – for example, “*I give £1,000 from my Barclays Bank account to ...*”. If the specified fund is inadequate to meet the legacy (e.g. because the Barclays Bank account at the date of death contains only £700), the balance of the legacy must be met from the residue of the estate. Again, these gifts are rarely created on purpose.

4

Residuary legacy

The part of the estate that is left once all debts have been paid and all other gifts have been distributed is called the **residuary estate** or **residue** and is often referred to in the will as “**my residuary estate**”. Testators often leave a few small gifts to named individuals or charities. They usually leave the residuary estate to one person such as a spouse, and to

children or grandchildren if the spouse dies before the testator. The gift of the residuary estate is often the largest gift to be made in the will. Every will should include a clause dealing with the residue. A legal adviser who fails to include such a clause is likely to be professionally negligent.

Partly for historical and technical reasons, it is common for wills to include a clause stating that the residue of the estate is left to trustees, who hold it on trust to pay debts etc., and pass the balance to the residuary beneficiaries. Since the trustees of residue are almost always the same people as the executors, this has no practical impact on the administration of the estate: the most common consequence is that it can catch out the unwary executor who wants to renounce.

There is scope here for confusion, not least on the part of testators who are surprised to find reference to a trust lurking in their gift of residue. It is important to distinguish between:

(a) a transitory and, in practical terms, usually inconsequential trust of residue through which the estate fleetingly passes on its way to the beneficiaries; and

(b) a full-blown trust which the testator might want to set up in which, for example, the residue might need to be held if they die while their children are still minors.

If **(b)** applies, consideration should be given to inserting clauses into the will which extend the trustees' powers in running the trust, such as how they invest the trust assets.

The distinctions between the different types of gift are very important because the classification of the gift determines what happens to legacies made in a will when the estate does not have enough assets to pay all the testator's debts and to pay all the gifts made in the will. The process of deciding which gifts should be paid and which should not is called **abatement**.

The executors gather in the assets of the testator and ensure that all persons to whom the testator owes money are paid first (the creditors). It is only once all the creditors have been paid that the beneficiaries referred to in the will can receive anything that is left.

CONTINUE

5.4 Gifts to children

It is important that a client understands the two **different** ways in which property may be left to children: a gift may be either **contingent** or **vested**.

CONTINGENT	VESTED
A contingent gift is one that is subject to a precondition which must be met before the named beneficiary can inherit the gift. A typical contingency might specify that the beneficiary must reach a certain age before they can take the property. Consider, for example, the clause <i>"I leave £1,000 to Paul Chang provided that he attains the age of 18 years"</i>. If Paul Chang dies at 15; he will not inherit the £1,000 because the contingency has not been fulfilled. The £1,000 will not pass into Paul's estate. Unless the will says otherwise, the £1,000 will simply be added to the residuary estate. The use of the phrase "provided that" usually indicates a contingency. The contingency does not have to relate to age (though it almost always does), but could relate to other events, such as passing a driving test.	
CONTINGENT	VESTED
A vested gift is one without any precondition, so the property that is the subject matter of the gift will vest in the beneficiary (i.e. they will become entitled to it outright) provided they survive the testator (or testatrix). A person who is under the age of 18 when they inherit under a will cannot actually take	

the property until they reach 18 (because, as a minor, they cannot give a valid receipt for it). So, if an infant beneficiary acquires a vested gift under a person's estate, the testator's executors will place the funds on trust (will invest it) until the beneficiary reaches 18. If the infant beneficiary in this case dies **before** reaching 18 years, the gift will pass into the infant's estate. **Do not** confuse this age of majority requirement with a gift which is contingent upon reaching 18.

The scenarios in **Figure 5.4** may assist.

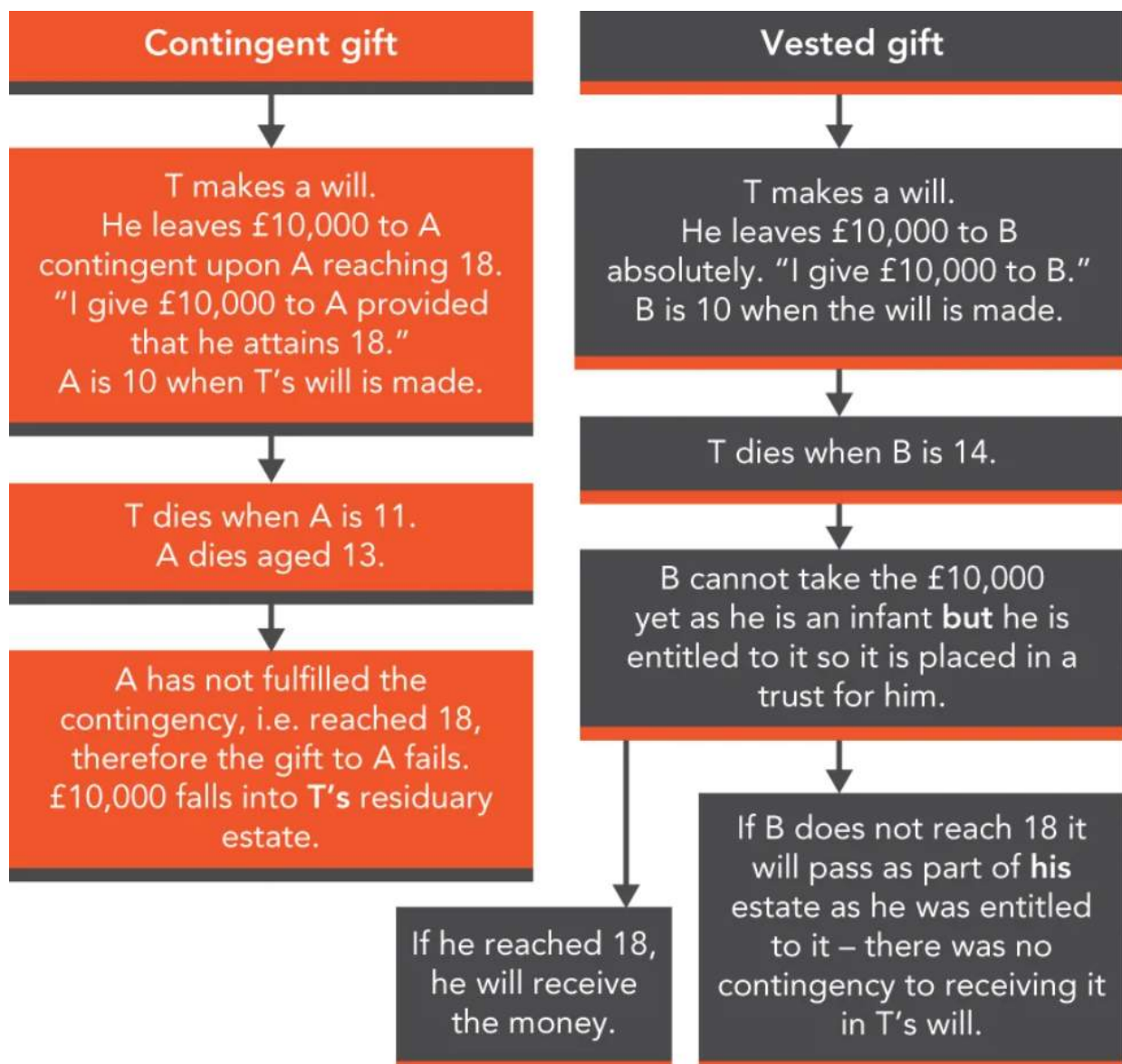


Figure 5.4

CONTINUE

5.5 Ademption

Ademption means that a specific gift will fail if the subject matter of the gift **no longer forms part of the testator's estate** at the date of their death.

It applies only to specific gifts: it does not apply to general legacies.



Link to Practice

Suppose the will says “*I give **my** Picasso painting to Pedro*”. Clearly, at the time the will was drafted, the testator, Tariq, owned a specific Picasso painting which he wanted to leave to Pedro. If Tariq had sold the Picasso painting before his death, the gift to Pedro would fail. The executors would not be under a duty to acquire another Picasso painting to pass on to Pedro, and Pedro does not receive the sale proceeds.

Ademption can occur also when the specific gift referred to in the will has been destroyed or lost before the testator's death. In ***Durrant v Friend [1852]***, there was a gift of personal effects which were lost when the testator drowned at sea: the gift failed; it adeemed.

The doctrine of ademption can be very harsh if a specific devise (gift) of freehold land is involved. The gift of a specific property will adeem if the land is no longer owned at the date of the testator's death.



Link to Practice

A will might say "*I devise my property, 10 Acacia Avenue, Swindon, to Jane*". Six months before death the testatrix sold 10 Acacia Avenue and purchased 2 The High Street. In this instance it would not be presumed that the testatrix meant Jane to receive 2 The High Street. If it is the testatrix's intention that a beneficiary acquires a property in which she is living at the date of her death, the will should state this.

This can be done in two ways.

Example A

"I devise such property as I may own as my principal residence at the date of my death, to Jane absolutely".

Or

Example B

"I devise 10 Acacia Avenue or such property as I may own as my principal residence at the date of my death, to Jane absolutely".

Example A is a more general statement and would be safe to use if it is likely that the testatrix will own only one property at the date of her death. Example B is more appropriate if the testatrix expects to own more than one house at the date of her death but only wants Jane to receive the one she is living in at the date of her death.

Contrast the doctrine of ademption relating to specific gifts with a situation regarding general gifts. **Ademption does not apply to general gifts.** The estate will have to purchase the general gift referred to in the will if it is not owned at the date of death.

For example, if the will says “*I give a horse to Kamal*” and the testator did not own a horse at the date of his death, the personal representatives would have to purchase one to ensure that Kamal acquires the gift to which he is entitled under the will. Unless the testator has provided further guidance, the executors will have a free choice as to what sort of horse – the beneficiary may receive a racehorse or a Shire horse.

Note, in particular, that a **demonstrative legacy**, which is a type of general legacy, will not adeem. A gift of “*£3,000 from my Santander bank account*”, which only had £2,000 in it at the date of death, would require the remaining £1,000 to be made up from the residue.

Careful drafting of legacy clauses in a will is crucial because the obligation to purchase assets not owned at the date of death can be onerous (**Figure 5.5**).

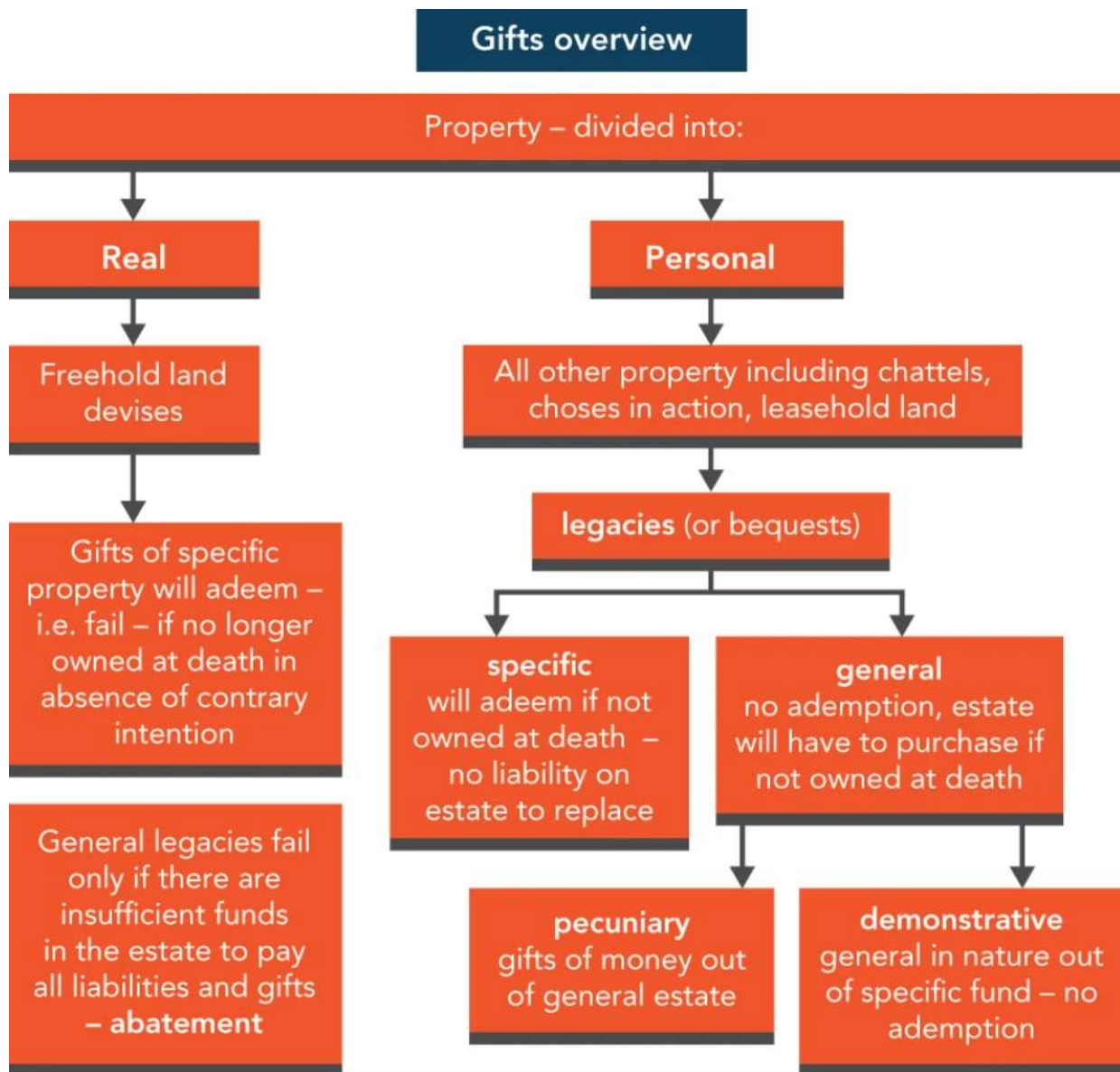


Figure 5.5

CONTINUE

5.6 Lapse of a gift

Do not confuse the failure of a specific gift via the doctrine of ademption with the **lapse** of a gift. In a general sense “lapse” also means “fail”, but ademption refers to the status of the **object** of the gift at the date of death. “**Lapse**” refers to the status of the **beneficiary** at the date of death, irrespective of the type of gift to that beneficiary.

Normally any gift will lapse (fail) if the beneficiary dies before (predeceases) the testator, because a will is effective only when the testator dies. Until that time, the beneficiary has no interest in the property and cannot benefit under the will if they predecease the testator.

For example, John Jones makes his will in 1992 and includes the following clause:

“I give my mahogany dining room table to Bob Brown”.

Bob Brown dies in 1994 and John Jones dies in 2020. As Bob has predeceased John, the gift to Bob lapses and the table becomes part of the residuary estate.

To avoid this situation, it is possible for the testator to include a **contrary intention** in the will such as:

“I give my mahogany table to Bob Brown but if he predeceases me then to Andrea Green”.

If Bob Brown predeceases the testator but Andrea Green is alive at the testator’s death, Andrea will inherit the mahogany table and the gift will not lapse.

s33 WA 1837 provides an **exception to the general rule of lapse**. A gift can be saved where the beneficiary named in the will is a child or remoter direct descendant (such as a grandchild) who predeceases the testator but has children (or grandchildren or great-grandchildren) of their own living at the date of the testator's death. The children (or grandchildren or great-grandchildren) will inherit the gift due to the predeceased beneficiary (if there is more than one child, they will take a gift in equal shares). **s33** applies **only to issue (direct descendants) of the testator (or testatrix)** and only in the absence of a contrary intention shown in the will. If a person does not want the children of their own children or other issue to benefit in these circumstances, the lawyer drafting the will must ensure that **s33** is negated.

Distributions **s33** are made **per stirpes** (pronounced "per stir-pays"). This means that each child takes the share of the estate which their parent would have taken if the parent had survived. If a beneficiary left more than one child, those children would take that share equally. If one of those children had also died before the original testator but left children, then those children would take their deceased parent's share.

Example

Keith leaves the residue of his estate to "*my children in equal shares*". He had three children, namely Lee, Mary and Nina.

Lee is still alive; Mary died some years ago, leaving two children, Polly and Quentin. Nina also died before Keith, leaving her children, Russell, Sam and Toby.

The estate is divided into three.

1. Lee takes his share;
2. Mary's share goes to Polly and Quentin; and
3. Nina's share goes to Russell, Sam and Toby.

Note that Polly and Quentin get one-sixth of the estate each (half of Mary's share), but Russell, Sam and Toby only get one-ninth each. The five grandchildren do not get equal shares.

CONTINUE

5.7 Administrative clauses

The **Trustee Act 1925 (TA 1925)** and the **Trustee Act 2000 (TA 2000)** lay down a series of rules about the extent of the powers of executors. Executors are usually referred to as “**trustees**” in wills since they hold estate assets on trust under the terms of the will, but for most practical purposes the distinction between trustees and executors (or other types of personal representative (PR)) can be ignored. In the following sections of this course book, “**trustees**” will be used, but it includes all types of PR.

The difficulty with simply relying on these Acts is that in many cases the rules imposed are bureaucratic and generally too restrictive to reflect the wishes of testators, who, after all, are appointing executors whom they trust. In response to the practical problems which have occurred over the years, lawyers have drafted complex administrative clauses which have been inserted into wills to amend the effects of **TA 1925** and **TA 2000**. Although the wording of these clauses can be painfully legalistic and dense, their legal effect is to make the administration of estates more straightforward.



Activity

The Society of Trust and Estate Practitioners (STEP) publishes a set of clauses which are used by many firms.

You looked at them when you read **Chapter 1**. Look at them again.

These standard provisions can be viewed at:

[STEP Standard Provisions](#) | [STEP](#)

Clients are often horrified to read long wordy administrative clauses in their draft wills, and many firms avoid this reaction by incorporating (including) the STEP Standard Provisions into all their wills with a short phrase such as “***The standard provisions of the Society of Trust and Estate Practitioners (3rd edition) shall apply***”. If such a phrase is included, there is no need to repeat in the will the pages of legal clauses.



The detail of the administrative clauses is outside the scope of this course book, but it is important that you understand what they are in principle and are aware of the STEP provisions.

CONTINUE

5.8 The executor

When taking instructions for the preparation of a will, the testator should consider carefully whom to appoint as their executor(s) to manage their affairs after they are dead. Being an executor can be onerous and is not a mere formality.



Link to Practice

It is good practice to ensure that the person named is willing to act. It is practical for the client to appoint younger rather than older people to be their executors in the expectation that they will outlive the testator. Joint executors should be able and willing to work together and to reach joint decisions.



Link to Practice

All the persons named in the will, whether executors or beneficiaries, must be correctly identified. Full names and addresses are required. Surprisingly, many clients do not have this

information readily available, so busy probate practitioners will often send clients a form, requesting all this practical information, for them to complete before they visit the office to make a will.

Executors are not entitled as of right to payment for their services, but they may recover any expenses incurred in carrying out their duties from the estate.

Most commonly, a spouse and/or a family friend is chosen to be an executor. If someone not in the immediate family circle is appointed, they may be left a legacy for undertaking the task. (This is presumed to be a contingent gift, even if the will does not say so. If the executor does not take up their appointment, they do not get the legacy.)





Link to Practice

Your firm's partners will often be appointed to be the executors. In relation to professional executors, the following points are important:

1. If a law firm is to be appointed as executor, it is advisable to appoint **"the partners or members of the firm as at the date of death"**. Provision should be made for changes of firm name, amalgamations, etc. to ensure that there are available executors at the date of death. (If a specific person is named, that person may be dead, or have left the firm, by the time the testator dies.)
2. If a professional executor is appointed, a charging clause should be inserted in the will, either as part of the executor's appointment clause, or as an administrative clause in the will. The charging clause gives power to the professional executor to charge fees for the work carried out when dealing with the estate after death (it is nothing to do with the charges for preparing the will). Under the **Trustee Act 2000 (TA 2000)** an executor may be paid a reasonable amount for their professional services in administering the estate even if there is no charging clause. Where there is more than one executor, it is a requirement under **s29 TA 2000** that the co-

executor consents in writing. Importantly, **s29** does **not** provide for a sole executor to be paid for their professional services. Although it is likely that practitioners will continue to insert a charging clause to avoid any doubts, it is not technically necessary.

A female executor is called an **executrix**.

CONTINUE

5.8.1 Who can be appointed as an executor?

An executor must be over the age of 18 and must be physically and mentally capable of managing their own affairs. There are very few rules restricting who may be appointed as an executor, and insolvency or a criminal record are not automatic bars to obtaining probate. A person will not be appointed as an executor if they are “**unfit**” to act. In ***Re S's Estate [1968]*** the court held that a woman who was serving a prison sentence for her husband's manslaughter could not act as the executrix of his estate.

If an estate is straightforward, the appointment of one executor may be sufficient, but it is common to appoint two people. If only one executor is appointed and there are children as beneficiaries or a life interest is created under the will, a grant of probate may still be obtained but the court has a power under **s114(4) Senior Courts Act 1981 (SCA 1981)** to appoint an additional PR as an additional safeguard for the beneficiaries' interests. This power is rarely used in practice. The testator can appoint as many executors as they wish, but probate will generally be granted only to four at any one time (**s114(1) SCA 1981**). In the event that only some of the named executors take out the grant of probate, the others will

have “**power reserved**” to them (i.e. they are not applying now, but reserve the right to have a new grant issued including them in the future).

Normally the office of executor is a personal one requiring the executor to carry out their duties personally. Even where, as is often the case, executors (or administrators) instruct lawyers to assist them in the administration of an estate, and to advise them where difficult decisions have to be made, the executors retain overall responsibility for the conduct of the administration.

CONTINUE

5.8.2 Chain of representation

Where an executor in a will survives the testator, obtains a grant of probate (i.e. “proves” the will), but dies before completing the administration of the estate, **s7(1) AEA 1925** creates a **chain of representation** by the automatic transfer of the office of executor on the death of the original executor (often described as “**proving executor to proving executor**”).

This is best explained by way of example:

- 1 Tom appoints Raj and Rafael to be the executors of his estate and subsequently dies.
- 2 During the administration of Tom’s estate, Raj dies.
- 3 Rafael continues as the sole executor of Tom’s estate.
- 4 Rafael has appointed Bill as **his** executor.
- 5 Rafael dies before completing the administration of Tom’s estate.

Bill is now the executor of Rafael's estate **and** Tom's. Note that Bill does **not** need to obtain a new grant for Tom's estate (*Figure 5.8*).

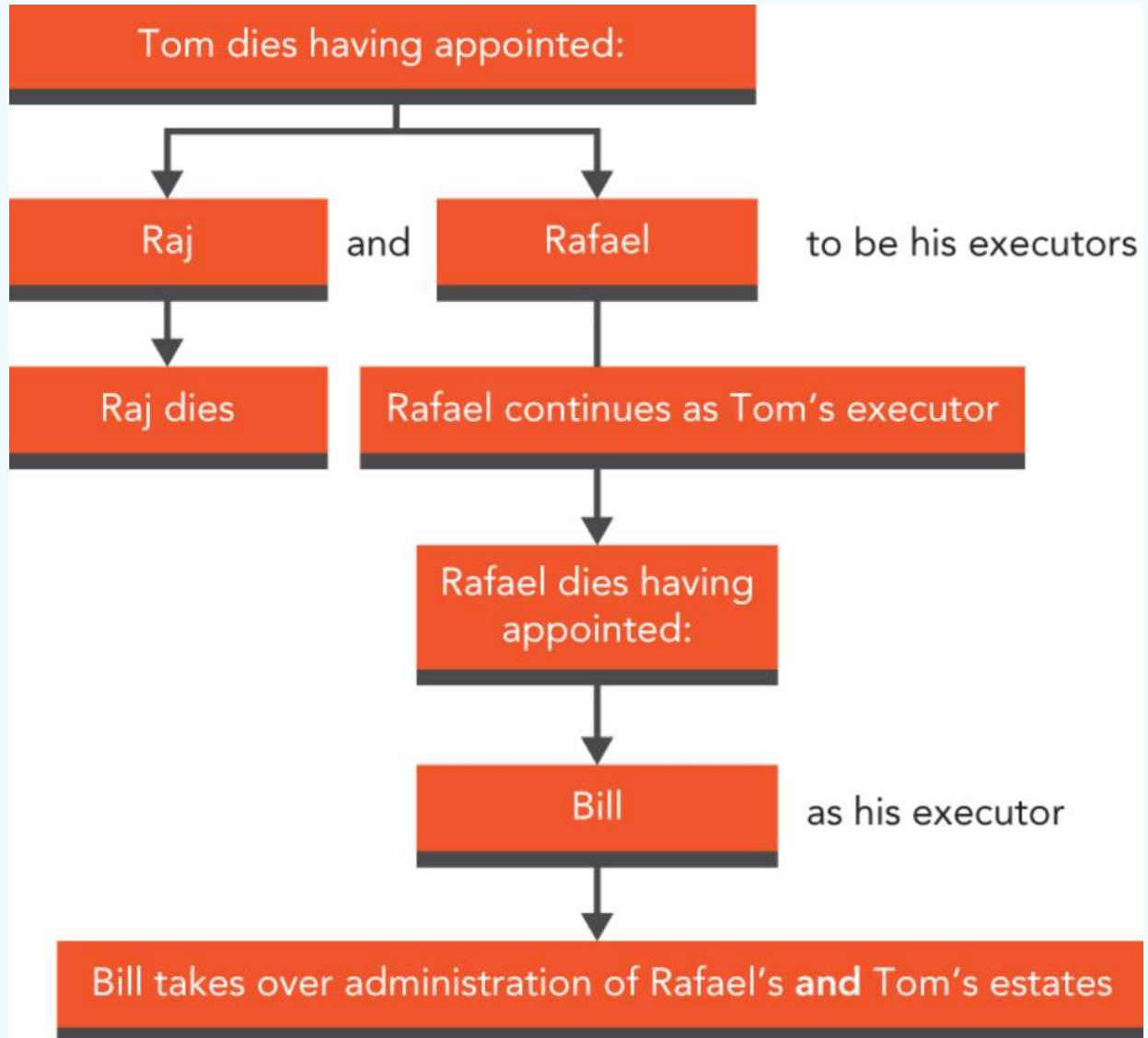


Figure 5.5

An executor in a chain automatically becomes executor of all preceding testators. Here, Bill must accept the executorship of both Tom's **and** Rafael's estates or neither. He cannot choose one or the other. Bill is in the same position as an original executor.

The chain of representation is broken by:

- an executor dying intestate;
- a testator failing to appoint an executor in a will; and
- a sole executor failing to accept the office.

CONTINUE

5.9 Capacity to make a will

5.9.1 Who can make a will?

Anyone over the age of 18, of sound mind and acting voluntarily can make a will. To be valid, the will and its execution must comply with the **WA 1837** and the **AJA 1982**.



5.9.2 Requirements for a valid will

A professional adviser drafting a will must ensure that it is valid. Failure to do this can lead to a negligence claim. ***White v Jones [1995]*** established that a legal adviser owes a duty of care not only to the testator (or testatrix) but also to the beneficiaries.

To be valid:

- the testator must have sufficient mental capacity;
- the testator must have the necessary intention; and
- the proper legal formalities must be met.

If a will does not meet all of these criteria, it will not be valid. The terms of the previous will (or, if none, the intestacy rules) would still apply. We have looked at the formalities, now let's take a closer look at capacity and intention.

CONTINUE

5.9.3 Capacity

Mental capacity can be a very difficult issue for legal advisers when drafting wills. In many cases, of course, the testator will clearly have mental capacity. For other testators, there will be some doubt and legal advisers will need to consider case law and statute.

The leading case on mental capacity is ***Banks v Goodfellow [1870]***. This case set out the three criteria for capacity, which are that testators must be able to understand:

- 1 the nature of the act (i.e. that they are making a will) and its results;
- 2 the extent of their assets (though not necessarily the precise value of everything they own); and
- 3 any moral claims against their estate which they ought to consider (i.e. be aware of the people for whom they are morally bound to provide.
Note that they do not have to provide for those people; they merely have to be able to understand their obligations.)

They should also be free from any “**insane delusions**” which could affect the terms of their will.

(It is fine if they think the earth is flat; it is a problem if they cut a child out of their will because they think, wrongly, that the child is trying to murder them.)



These requirements are expanded by the **Mental Capacity Act 2005 (MCA 2005)**.

It is important to note that **s1(2) MCA 2005** states that a person is presumed to have capacity unless it is established that they do not. **MCA 2005** then goes on to set out the circumstances under which this presumption will **not** apply.

s2(1) MCA 2005 states that a person lacks capacity if:

he is unable to make a decision for himself ... because of an impairment of, or a disturbance in the functioning of, the mind or brain.

Going into more detail of how to assess this inability, s3(1) MCA 2005 states that a person is unable to make a decision for himself:

if he is unable –

- to understand the information relevant to the decision;**
 - to retain that information;**
 - to use or weigh that information as part of the process of making the decision; or**
 - to communicate his decision (whether by talking, using sign language or any other means).**
-

Note that **MCA 2005** defines capacity as “**function-specific**”. This means that a person may have capacity to do some things, but not others.

In ***A, B & C v X, Y & Z [2012]*** an elderly widower announced to his children that he had decided to marry his full-time carer. This did not please the children. He also said he intended to make a new will, benefiting the carer. This did not please the children either.

The children doubted that their father had the necessary mental capacity for these decisions. The matter went to court.

The judge made the following statements:

On marriage: *"There are many people in our society who may be of limited or borderline capacity but whose lives are immensely enriched by marriage. We must be careful not to set the test of capacity to marry too high ... Although I accept that X has suffered a significant decline in executive function, he retains many aspects of his intelligence at a fundamental level ... it is important to have in mind that the requirements of capacity to marry are relatively modest ... Whether any decision he might take to marry is wise or unwise, is simply none of my business".*

On making a will (having considered the conflicting medical evidence): *"There will undoubtedly be times when he does lack testamentary capacity ... It follows that, in my judgement, any will now made by X, if unaccompanied by contemporary medical evidence asserting capacity, may be seriously open to challenge".*

The case provides a practical illustration of the function-specific nature of capacity. **Note** also the reference to the importance of contemporary medical evidence in cases of fluctuating capacity.

In ***Re Ashkettle [2013]*** the testatrix made a will in 1986 leaving her estate equally to her daughter and her two sons; in 1999 she made a new will leaving her entire estate to her daughter. Following her death, the sons claimed that she lacked capacity when the 1999 will was made.

The court heard that, by late 1998, the testatrix had become *“unable to communicate in any meaningful way, though she might have retained a sufficient ‘social façade’ to mask her mental confusion from an incurious person”*. Note the word **“incurious”**.

Unfortunately, the solicitor who prepared the 1999 will had either not made a file or, if he had made one, it was now lost or destroyed. There was therefore no evidence available to the court regarding capacity taken at the time the will was made.

The court stated that *“any view the solicitor might have formed as to the testator’s capacity had to be shown to be based on a proper assessment, and accurate information, or it was worthless”*. He had not, it seems, been “curious” enough, even though, by the time she came to him to make her will, the testatrix was suffering severe difficulties in communicating *“in any meaningful way”*.

The court found that the terms of the will made no sense, and there was no proper support or explanation (such as file notes or medical evidence) for its terms. The will was held invalid, and the 1986 will was to be submitted to probate instead.



Link to Practice

This case highlights the importance of the private client practitioner ensuring that a proper file is opened, maintained and sorted for every will instruction taken. In addition, detailed notes of all meetings, telephone calls and the signing process (if the firm deals with this) should be kept. Attendance notes taken at the time of the event are known as **“contemporaneous”** notes and are often of great importance in private client work as

wills are challenged surprisingly often following the death of a testator.

CONTINUE

5.9.3.1 The relationship between *Banks v Goodfellow* [1870] and MCA 2005

Clearly, the criteria for capacity in **s3(1) MCA 2005** are not identical to those in *Banks v Goodfellow* [1870]. The courts have therefore had to work out which authority (or what combination of elements from the two) they should apply.

In *Scammell v Farmer* [2008] – a case which turned on the testatrix's mental capacity – the judge decided that *Banks v Goodfellow* should be followed. This was because:

- the testatrix had died in 2003, that is, before **MCA 2005** came into force; and
- (in the view of the judge) **MCA 2005** was intended to supplement *Banks v Goodfellow*, not to replace it.

This basic approach has been applied in subsequent cases.

Fischer v Diffley [2013] provides a useful example of the manner in which the courts apply both *Banks v Goodfellow* and **MCA 2005**. In this case the testatrix, who had been in a care home since 2006, made one will in 2009 and then replaced it with another in 2011. Both wills made provision for the defendant, who had also been involved in their preparation. The

validity of both of these wills was disputed by a relative who would have benefited if they had been found to be invalid. The claim was based on lack of capacity.

The court applied the three criteria set down in ***Banks v Goodfellow***, and said that they should be supplemented by **ss1 and 2 MCA 2005**. The test for lack of capacity was function-specific, and was to be applied at the time of the relevant transaction (i.e. when the wills were made).

The court took into account both wills, which the testatrix had written in her own hand: names of relatives were spelled incorrectly, there were many grammatical errors, and there was no clear evidence that the wills reflected the testatrix's wishes. Evidence from the staff at the care home supported the claim that she was suffering from dementia at the time the wills were made.

The court noted also that the testatrix's financial affairs were complicated and that, even if she knew that she was making a will, it was very unlikely that she had the capacity to understand either the extent of her assets, or the claims (of her relatives and others) which she ought to have considered when making the wills. The wills were held to be invalid.

This issue was looked at again in ***Walker v Badmin [2014]*** (also known as ***Re Walker [2014]***). In this case the judge said "[M]y first impression was that ***Banks v Goodfellow*** [and other similar cases] *had indeed been replaced by MCA 2005, but counsel has now persuaded me that this is wrong*".

It is interesting to note that the judge himself was initially unclear on the relationship between these two authorities, and that he changed his view in the light of the arguments made by the barristers during the hearing. Ultimately, he decided that the case law should still prevail, supplemented by the further details of **MCA 2005**.

James v James [2018] was another case in which the testator's testamentary capacity was challenged. Again, the court had to look at both case law and **MCA 2005**.

The judge said that:

"There is nothing in the [2005] Act which explicitly or impliedly provides that one of its purposes is to govern or in any way affect the decision of a court, after his death, as to the validity of a will which has been executed by the testator himself."

In other words, he said that, in essence, **MCA 2005** is not relevant in assessing, after death, whether or not a testator had testamentary capacity at the time the will was made. He also emphasised how long the principles set out in ***Banks v Goodfellow*** had been in place. (He said that they could be traced back some 400 years.) He commented that: *"It is a principle of statutory interpretation that Parliament is assumed not to intend to overrule well-established rules of the common law without clear words [to that effect]."* Since there are no such words in **MCA 2005**, the implication must be that ***Banks v Goodfellow*** remains the main authority for assessing testamentary capacity.

CONTINUE

5.9.4 Practical implications

If the will appears rational and is made in "normal" circumstances, the capacity of the testator (or testatrix) is presumed. The person opposing the will must prove lack of capacity at the time the will was made (as mentioned earlier with reference to **s1(2) MCA 2005**). This was emphasised in ***Ashman v Thomas [2017]***; the judge said "[I]t seems to me that [the person challenging the will] *has not discharged the evidential burden on him ... [Therefore, I find that the challenge fails]*".

A problem may arise if the testator was on the verge of losing mental capacity at the time of making the will. If the testator is very ill or a mental patient, medical advice should be taken by the legal adviser preparing the will. In such cases, written medical evidence should be obtained from a suitably qualified doctor, confirming that the testator has the necessary capacity to make a will.

Note that under **s2(1) MCA 2005** capacity is assessed in relation to the specific matter in hand – for example, making a will – so a generally worded letter from a doctor saying that the patient “*has capacity*” will not be particularly helpful: it would need to refer to **capacity to make a will**. It would also be helpful if the doctor acted as a witness to the will, but this is often difficult to arrange in practice, and is not vital.



Link to Practice

The strong recommendation of the courts, that medical advice should be taken by a legal adviser (commonly referred to as the “**golden rule**”) where capacity is in doubt, was considered further in **Key v Key [2010]**. A solicitor’s failure to arrange for the testator to be medically examined was held to have greatly increased the difficulties in the case. The testator was an 89-year-old widower whose wife had died only a week earlier. The effects of bereavement were likened to those of depression and could therefore lead to loss of capacity. The solicitor’s failure to write an accurate and comprehensive attendance note was also criticised.

In **Charles v Fraser [2010]** the solicitor who drafted the disputed will was criticised. Although he had obtained a consultant psychiatrist's opinion which judged that the testatrix had sufficient capacity, he did not review her earlier will. If he had done so, this would surely have led to further investigations. The earlier will was upheld.

There are some interesting and very pragmatic comments on the golden rule in **Wharton v Bancroft [2011]**. Mr Justice Norris discussed the position of a solicitor faced with preparing a will for a dying man:

“A solicitor so placed cannot simply conjure up a medical attendant. He must obtain his client’s consent to the attendance of and examination by a doctor. He must procure the attendance of a doctor (preferably the testator’s own) who is willing to accept the instruction. He must make arrangement for any relevant payment (securing his client’s agreement). I do not think [the solicitor] is to be criticised for deciding to make his own assessment ... and to get on with the job of drawing a will in contemplation of marriage so that Mr Wharton could marry ... The simple fact is that Mr Wharton was a terminally ill but capable testator”.

- Mr Justice Norris, 2011



Link to Practice

A common problem for probate lawyers is attending clients in hospital or old people's homes to make wills where the situation

may require urgent action.

A solicitor has been held to be negligent for not preparing a will quickly enough before a client died (*Hooper v Fynmores (a Firm) [2001]*). Care must be taken where there is an urgent requirement to draft the will, and it should be borne in mind that care staff will often be unwilling to act as witnesses.

It is essential to make a clear file note of exactly what has been done in these cases. The file will be the only evidence of advice given once a client has died.

If a firm receives a request to prepare an urgent will for someone who is in hospital, a care home or is very ill and the firm is not going to be able to respond quickly, they should decline to act.



Link to Practice

It is also important for the legal adviser to be sure that instructions are taken from the **client** who wants to make the will and **not** from the client's relatives. Many relatives simply want to ensure that the testator (or testatrix) has a valid will.

Some are more unscrupulous and want to pressurise an elderly relative into making an ill-considered will. It is the job of the legal adviser to ensure that this does not happen. To avoid this problem, instructions should be taken in the absence of anyone who may stand to benefit or who may have influence over the testator.

This is one of the classic conflicts of interest which those working in the private client department should always be looking out for.

CONTINUE

5.10 Intention; dealing with a blind or illiterate testator, or where another signs on their behalf

The maker of the will must have the necessary intention to make the will. They must know and approve its contents. This again relates to the testator's (or testatrix's) mental state but it is also inferred from the wording of the will itself.

The testator (or testatrix) must have the necessary knowledge and approval when the will is executed: this is established if they knew of and approved the instructions given for the preparation of the will. In "normal" cases, this should not be a problem.

Intention will not be presumed in the following cases:

1. If the testator is blind or illiterate —

Such people can make a will, but extra steps have to be taken by the legal adviser to show that the testator had the necessary knowledge and approval. The will must be read out (**read over**) to the testator and the signature clause (**attestation clause**) must be adapted to show that this was done before signature.

2. If another signs on behalf of the testator —

Again, the attestation clause must be amended, to state that the will was read out to the testator, and

that the testator understood and approved it.

3. If there are suspicious circumstances —

If a legal adviser prepares a will and the entire estate is left to the adviser, the testator would not be presumed to have the necessary intention. If a client does want to leave a gift in their will to their legal adviser, this is acceptable, but it must usually be a reasonable sum in the context of the value of the entire estate. In practice, it may be better to send the client to another firm to make the will.

In all the above cases, affidavit evidence could also be produced to establish intention in circumstances of doubt.

The fact that a document is intended to be a will is usually clear from the document itself. The first sentence is often:

**“This is the last will and testament of me [full name inserted]
...”**

CONTINUE

5.11 Revocation of wills

The testator (or testatrix) always has the power to revoke (i.e. undo) a will before death while they are of sound mind. A testator who becomes of unsound mind loses their capacity to revoke a will until legal capacity is regained. Since the terms of a will do not come into effect until the testator's death, people have the freedom to alter their will as their circumstances change.

A will may be revoked by:

- marriage or civil partnership;
- another will or codicil;
- destruction; and
- a properly executed declaration by the testator.

Note that revocation by marriage or civil partnership is **automatic**, whether the testator wants it to happen or not.

The other methods of revocation are all voluntary and are governed by **s20 WA 1837**.

5.11.1 Revocation by marriage or civil partnership

s18 WA 1837 provides that a will is revoked by a later marriage (including a same-sex marriage under the **Marriage (Same Sex Couples) Act 2013**) or civil partnership. This means that if a person marries or enters into a civil partnership after having made a valid will, that will immediately become ineffective.

This applies even if the person whom the testator (or testatrix) has married or entered into a civil partnership with is the only person mentioned in the will.



Revocation occurs automatically, irrespective of the testator's (or testatrix's) knowledge or wishes, because marriage and civil partnership are such fundamental changes to testators' (or testatrices') lives that they acquire new financial responsibilities. A legal adviser should ask a testator (or testatrix) whether they are likely to be marrying or entering into a civil partnership in the near future to avoid the effect of this rule.

This rule is avoided if the will is made "**in expectation of marriage**" (sometimes referred to as "**contemplation of marriage**") under **s18(3) WA 1837**. The will must state that the testator (or testatrix) expects to be married to a named person and that they do not intend their will to be revoked by the marriage to that named person. Similarly, if a will is made "**in expectation of a civil partnership**" with a particular person where the testator (or testatrix) states that they do not intend their will to be revoked by the civil partnership, revocation will not occur when that particular civil partnership takes place (**s18B(3) WA 1837**).

A general intention to marry (or form a civil partnership) in the will is not sufficient. In ***Sallis v Jones [1936]*** the testator said that "*this will is made in contemplation of marriage*". It was held that this was not explicit enough, and the will was not saved from revocation by a later marriage.

The **Marriage and Civil Partnership (Minimum Age) Act 2022** came into force on 27 February 2023 and has the effect that young persons aged 16 and 17 will no longer be able to marry or enter into a civil partnership from this date under any circumstances, even with parental consent. The Act has been introduced in an effort to protect young people from forced marriage.

The anticipated effect on the common law of the change to the minimum age of marriage means that marriages of children aged under 18 that take place abroad will no longer be legally recognised in England and Wales if either party is domiciled in England and Wales. This will not affect the validity of any marriages or civil partnerships entered before the Act comes into force.

5.11.2 Effects of divorce or dissolution of a civil partnership

A gift made to a spouse or civil partner in a will fails if the marriage or civil partnership subsequently ends in divorce, nullity or dissolution, although this does not amount to revocation of the will because the other provisions remain in effect.



s18A WA 1837 provides that where the testator's (or testatrix's) marriage is dissolved or annulled after they have made their will, any appointment of their former spouse as executor or trustee takes effect as if the former spouse had died when the marriage was dissolved or annulled. Any property given under the will to

the former spouse passes as if the former spouse had died on the date of the divorce or decree of nullity.

Similar provisions apply under **s18C WA 1837** where the testator has appointed their civil partner as executor or trustee, or has given property under the will to their civil partner and the civil partnership has subsequently been dissolved.

These sections apply unless the will says otherwise.

Consequently, any gift to a former spouse or civil partner will be treated as if the former spouse or civil partner had died before the testator. The former spouse or civil partner's gift will then pass to the other beneficiaries in accordance with the terms of the will.

A former spouse or civil partner may make an application for financial provision under the **Inheritance (Provision for Family and Dependants) Act 1975**. This is a statute which allows someone who has been maintained by the deceased prior to death to make a claim for provision out of the estate. These applications are outside the scope of this course book.

A decree of judicial separation does not end a marriage and so has no effect on the will and the spouse can take any benefit from the will.

CONTINUE

5.11.3 Revocation by another will or codicil

A later will which contains an express revocation clause will revoke an earlier dated will. A will drawn up by a legal professional should always contain such a clause. A negligence claim may result if it does not.

The wording is usually contained at the beginning of the will as follows:

“This is the last will and testament of me [insert full name] and I hereby revoke all wills and testamentary dispositions made by me”.

A later will also revokes an earlier will to the extent that it is inconsistent with it, even if the later will does not contain a revocation clause. It follows that a later will which appoints executors and contains a gift of the residuary estate would automatically revoke any earlier will, with or without a revocation clause.

The reference in the revocation clause to other “**testamentary dispositions**” ensures that earlier codicils are also revoked. The nature of a codicil was considered earlier. A codicil may amend or add to the terms of a will and may revoke parts of an earlier will.

For example, Mr Amjad Khan has a valid will and simply wants to add his daughter as an executor to act with his son, whom he appointed in his will. The codicil is a simple document and may read as in **Figure 5.11**.

This codicil is made by me Amjad Khan [address] and is supplemental to my will dated [] ("my will").

1. In clause 2 of my will I appointed my son, Arman Khan, to be my sole executor.
2. I now wish to appoint my daughter, Suri Khan, to act as an executrix in addition to my son.
3. In all other respects I confirm my will.

As witness my hand this _____ day of 20 ____

Signed by the above named
Amjad Khan in our presence
and then by us in the
presence of him and of
each other }

Figure 5.11

Note that the codicil must comply with all the formalities for the preparation and signing of the will itself.

CONTINUE

5.11.4 Revocation by destruction

1

s20 WA 1837 defines destruction as *burning, tearing or otherwise destroying the same*. The testator must **intend** to revoke the will and can

destroy it themselves or can direct another to do it for them in their presence.

2

If a client telephones and asks for an existing will to be destroyed and a new one drawn up, as in ***Re Kremer [1965]***, this is not an effective revocation because the will is not destroyed in the presence of the testator. Instead, the will should be sent to the testator so that they can destroy it themselves.

3

If a will is destroyed accidentally, it is not effectively revoked. The same applies if the will is destroyed while the testator is drunk or mentally unsound, because the testator does not have true intent. One practical point arises – **how can a will that has been accidentally destroyed be proved at the Probate Registry?**

4

The answer depends on whether there is any evidence as to the contents of the original will available to the PRs. A copy of the will may suffice together with affidavits in support. The Probate Registry is very strict about the evidence that it will accept, so obtaining probate in such circumstances is likely to be slower and more expensive.

5

The Probate Registry will also raise queries if a will is produced which looks as though the testator has tried to damage it or destroy it – for example, if it has burn marks on it. An affidavit of plight and condition will be required to explain how the will came to be in its present state.

6

The vital importance of the testator intending to destroy the will is illustrated by ***Cheese v Lovejoy [1877]***. The testator made his will. He later drew his pen through some lines of his will and wrote on the back of it “*All these are revoked*”. He then threw the will into a heap of waste paper in the presence of his maid. The maid retrieved the will.

The court held that the testator’s acts were not enough to revoke the will on the ground of lack of intent, and James LJ said:

“All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying: there must be the two”

This case has been criticised. The court accepted the view that because the testator's acts had not actually "injured" the will, there was no destruction. It is likely, however, that the testator **thought** that he had destroyed the will. No change to this area of the law has been recommended, primarily because such cases are thought to be rare, but **it is important for a testator to ensure that he totally destroys the will to be sure of revocation by destruction.**

7

If a will's last known location was in the possession of the testator, and following their death it cannot be found, then there is a presumption that it was destroyed by the testator with the intention of revoking it. However – this is only a presumption, and it can be rebutted by contrary evidence.

CONTINUE

5.11.5 Revocation by a properly executed declaration by the testator

1

s20 WA 1837 provides that a will may be revoked by *some writing* so long as it declares an *intention to revoke* the will. The writing must be signed in accordance with the same formalities required to make a valid will – that is, it must be signed in the presence of witnesses.

2

In ***Re Spracklan's Estate [1938]*** the testatrix dictated a letter while she was seriously ill, which was executed in the same way as a will. It instructed her bank manager to "*destroy the will already made out*" which was deposited at his bank. The court held that the will was revoked by this letter.

CONTINUE

5.12 The forfeiture rule

The forfeiture rule, which is based on the common law rule that a person should not benefit from their crime, provides that a person who unlawfully kills another cannot benefit from that person's death (*Re Giles (Deceased)* [1972]).

Under **s2(1) Forfeiture Act 1982 (FA 1982)** the courts can waive the rule, either partially or completely, if the interests of justice are served by granting relief. **FA 1982** may be used if the applicant has been convicted of voluntary manslaughter on the grounds of loss of control or diminished responsibility, as in *Re K (Deceased)* [1985], where relief was given to an abused wife who killed her husband. **FA 1982** may also be applied if an applicant has been found “*not guilty by reason of insanity*” in relation to the killing. Application for the rule against forfeiture to be waived must be made within three months of the conviction.

The law regarding forfeiture was examined in *Re Amos (Deceased); Amos v Mancini and Others* [2020]. Mrs Amos was convicted of causing the death of her husband by careless driving; the question for the court was whether she should therefore lose her entitlement to his share of their family home which was held as joint tenants, and his gift to her under his will. The court held that this form of “**unlawful killing**” was subject to the forfeiture rule, but applied the court's discretion to grant relief so that Mrs Amos was not deprived of her late husband's assets.

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

1. Which of the following are requirements for executing a will under **s9 WA 1837**?
(Select 2 correct answers)

- ☐ a. The testator must sign the will
- ☐ b. The testator or someone in his presence and by his direction must sign the will
- ☐ c. Both witnesses must sign the will in the presence of each other and the testator
- ☐ d. Each witness must sign the will in the presence of the testator

SUBMIT



Complete the content above before moving on.

2. If a beneficiary witnesses a will and there is only one other witness, what will be the effect on the will?

- ☐ a. The will will be invalid
- ☐ b. The will will be valid in its entirety
- ☐ c. The gift to the beneficiary will fail but the rest of the will will be valid

SUBMIT



Complete the content above before moving on.

3. What is the effect of dissolution of a civil partnership where the deceased's ex-civil partner was appointed as executor?

- ☐ a. The appointment of the ex-civil partner as executor will be treated as if he or she had predeceased the deceased
- ☐ b. The entire will will be revoked

SUBMIT



Complete the content above before moving on.

5.13 Chapter summary

5.13.1 Making a will summary

1

Reasons for making a will include:

- (a) to avoid intestacy;
- (b) certainty;
- (c) to be able to choose executors;
- (d) to ease the administration of the estate; and
- (e) tax planning.

2

Anyone over 18 of sound mind acting voluntarily can make a will; the rule is relaxed for “**privileged wills**”.

3

For a will to be valid, the testator (or testatrix) must have sufficient mental capacity and intention, and the proper legal formalities must be met.

4

Formalities under **s9 WA 1837** require that the will must be:

- (a) in writing;
- (b) signed by the testator (or testatrix); and
- (c) signed in the presence of at least two witnesses.

5

Witnesses must be competent and not be a beneficiary or spouse of a beneficiary, otherwise the benefit is lost.

6

A person cannot benefit from their own crime, but **FA 1982** allows total or partial relief from this rule.

7

The testator (or testatrix) can always revoke (i.e. cancel) their will.

Revocation can take place by:

- (a) marriage or civil partnership;
- (b) another will or codicil;
- (c) destruction; and
- (d) declaration.

5.13.2 Gifts summary

1

Gifts in wills may be specific, general, pecuniary or demonstrative. Gifts to children may be vested or contingent.

2

The part of the estate that is left after all debts and gifts are paid is known as the residuary legacy or residue. This is often the largest portion of an estate.

3

The distinction between the different types of gift is important because the type of gift determines which should be paid in the event that the estate does not have enough assets to pay all debts and legacies. This is known as abatement.

4

Ademption means that a specific gift will fail if it is not part of the testator's estate on death.

Executors summary

Generally, anyone can be appointed as an executor or executrix – this is the person who gathers in the assets, pays the debts and distributes the estate.

If there is a will but no executor appointed and/or able and willing to act, a grant of probate with will annexed is obtained by the administrator(s). The order of entitlement is contained in **r20 NCPR 1987**.

You have completed Chapter 5.

EXIT