



Chapter 10: Wills – Gifts and Key Administrative Clauses

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 **Knowledge check**

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10.1 Introduction

To be able to conduct an effective will instruction meeting, provide the necessary advice and recommendations and prepare a will that meets the client's wishes, it is necessary to understand the **different types of gifts** and **how they operate**. It is also important to understand the **main administrative provisions**.

In this chapter we will look at the information you will need to know as a trainee to be able to **conduct will preparation meetings** and to **prepare wills for your client**.

We will look at the **terminology used in the construction of a will** and consider what **elements should be considered** to make a will fully effective and avoid partial intestacy.

Administrative provisions can seem daunting at first. This chapter will take you through the **provisions that apply on a regular basis** and that a client may well need to discuss with the lawyer in the preparation of their will.



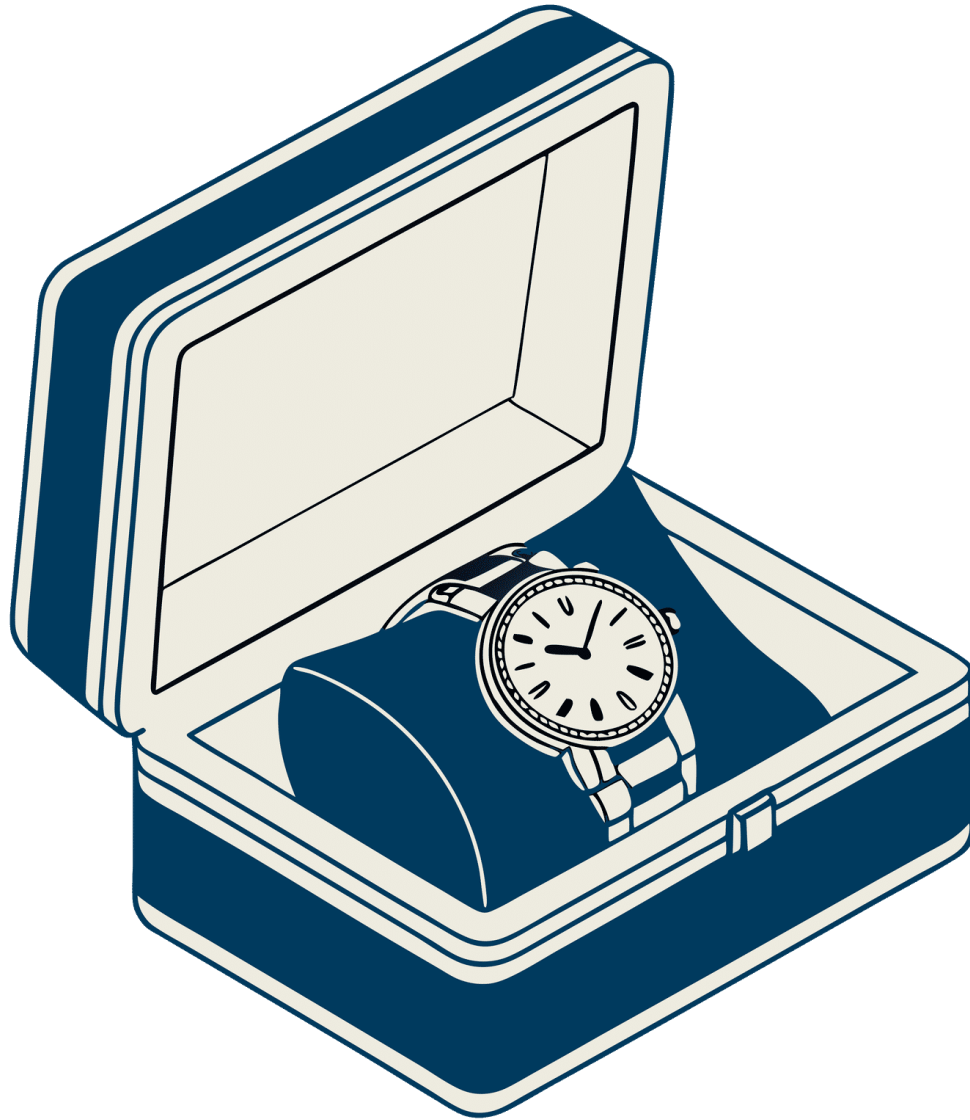
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10.2 Gifts

10.2.1 Types

1. Specific

A specific legacy is defined as a gift of a particular existing item from the assets belonging to the deceased. The necessary elements were set out by Sir George Jessel MR in ***Bothamley v Sherson [1875]***: "*The gift refers to some part of the testator's assets in such a way as to distinguish it from the other assets and indicate that it is to pass to the legatee in specie* [that is, a thing not its cash value]."



As an example:

"My Rolex Submariner watch to my niece Biff Robinson".

A specific gift is often identified by the prefix "**my**"; however, that is not in itself conclusive.

A specific gift which takes effect immediately on the death of the testator carries with it all the income and profits accruing from the date of death and is subject to all liabilities incurred after death. For example, a specific gift of an investment property will carry with it

the costs and expenses of that property together with the rental income from the date of death.

If the subject of the specific gift does not exist at the date of the testator's death the gift will adeem. Using the above example, if at the date of the testator's death there is no Rolex Submariner watch, the gift will adeem and Biff will not receive that testamentary gift.

2. General

A general legacy is one which does not specifically identify the item or object bequeathed as belonging to the testator. The distinction between a general legacy and a specific legacy does not lie in how precise the description of the asset may be.

A gift of *"my Rolex Submariner watch"* is specific, because it refers to an asset belonging to the testator, while a gift of *"a Rolex Submariner watch"* is general, because it does not indicate a particular item in the testator's possession.

A gift of shares or stock is treated as general unless a contrary intention is expressed in the will – for example, where the testator intends the legatee to take the particular identical stock.

If the testator leaves *"my 1,000 ordinary shares in Magic plc to Fred"* this is a **specific legacy**, whereas if the will had read *"I give 1,000 ordinary shares in Magic plc to Fred"*, that does **not** specify any particular shares, and so is a **general legacy**.

If the subject matter does not form part of the assets at death, the general gift operates as a direction to the PRs to purchase the equivalent asset or offer the beneficiary the equivalent in money. This means that the rule on ademption does **not** apply to general legacies. If residue is insufficient to meet all the debts in full, general legacies abate before specific legacies.

3. Demonstrative

This type of legacy is rarely seen in professionally drafted wills. They can feature in homemade wills because of the testator's belief that a will needs to specify where a legacy should come from.

For example:

- *"I give to my nephew Chip Robinson the sum of £1,000 from my account with Lloyds Bank plc"; or*
- *'I give to my nephew Chip Robinson 100 out of my 1,000 shares in National Grid plc'.*

This type of legacy was described by Lord Thurlow in ***Ashburner v Macguire [1786]*** as ***"something of a hybrid"***. The gift is in the nature of a general legacy but points to a specific fund as the primary source.

The gift will be paid from the specified fund if it exists, then the legacy will be paid from the specified fund. However if by the time of the testator's death the fund no longer exists, or there are insufficient funds in the account, the legacy will be paid as a general legacy out of the general assets of the estate.

4. Pecuniary legacies

These are gifts of money; they are usually general but can be specific or demonstrative.

For example:

- *£1,000 to my nephew Kipper Robinson, is general.*

- *£1,000 out of my account at Nationwide Building Society to my nephew Kipper Robinson*, is demonstrative.

The **Administration of Estates Act 1925 (AEA 1925)** defines “**pecuniary legacy**” in **s55(1)(ix)** as including *an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by a testator for the payment of money, including all death duties free from which any devise, bequest or payment is made to take effect.*

5. Residuary legacies

The residue is what remains after the payment of all debts, liabilities, expenses and other legacies.

Gifts of residue are normally stated as percentages so that the whole of the estate is distributed by the will. While residue in will are still drafted in fractions, it is easier to see that 100% of the residue has been accounted for rather than 20/5ths for example.

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10.2.2 Tax

Tax on testamentary gifts can be split into three categories.

1. Income tax —

Income tax – any tax payable on income arising from a specific gift (e.g. rent paid by a tenant of rented property given as a gift) is payable by the beneficiary as a specific gift takes effect immediately the testator dies.

2. Capital gains tax (CGT) —

Capital gains tax (CGT) – while an estate may be liable to pay CGT if it disposes of an asset as part of the administration and that asset has increased in value from the valuation ascertained for probate purposes, a beneficiary of a specific legacy will take the asset at probate value so the assent or transfer of the asset from estate to beneficiary will not trigger CGT.

3. Inheritance tax (IHT) —

Inheritance tax (IHT) – unless there is a contrary intention in the will, IHT is payable from residue, provided there are sufficient funds in residue to pay the IHT.

For example, beneficiaries of chattels and gifts of cash will not bear the IHT attributable to those gifts, unless there is not enough left in residue after payment of the funeral account and costs of the administration. Wills tend to specify a gift as being free of tax to make it clear. If the testator wishes the gift to bear the tax attributable to its value, the gift will be made “subject to tax”.

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10.2.3 Gifts to minors

If a beneficiary is under 18 (a minor) when the testator dies, it is necessary to establish whether the gift vests in the minor or is contingent on the minor attaining a certain age.

Caution is needed here!

Many students fall into the trap of thinking that a gift in a will to a minor, without more, is automatically treated as being contingent on reaching 18. It is **not**.

For example, if a gift is made to Pawel aged six when the testator dies, for example “*I give £20,000 to Pawel*”, his legacy is vested unless the testator has specifically expressed it to be contingent.



The distinction is important, not least because if Pawel dies, the gift forms part of **Pawel's** estate (even if he is still a minor) because it has already vested in him; whereas if the gift is

contingent, his death before satisfying the contingency means it fails and the property passes under any substitutional provision in the will.

If Pawel's legacy is expressed as contingent, for example *"I give £20,000 to Pawel provided that he attains the age of 18 years"*, the property must be held by trustees until he satisfies the contingency.

If it is vested, then trustees are still necessary and must hold the property for Pawel until he is 18 but this is only because until that age he is too young to give the executors a valid receipt for the property. The testator might want to include in the will a minor's receipt clause expressly allowing payment to Pawel's parents or guardian, or even to Pawel himself once he has reached, say, 16.

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10.2.4 Contingent gifts

Gifts that are subject to a contingency (e.g. age) do not vest in the beneficiary until the contingency is reached or fulfilled.



If the beneficiary dies before attaining the age contingency the gift will not pass into the beneficiary's estate.

While the beneficiary has not met the contingency, the gift will be held on trust for that beneficiary until the contingency is met.

If the contingency is age, **ss31 and 32 Trustee Act 1925 (TA 1925)** will apply so the fund can be used to assist the beneficiary before attaining the required age if the trustees wish.

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10.2.5 Age contingency and effect on the RNRB

The residence nil-rate band (RNRB) is available when the residence is inherited by a lineal (direct) descendant, or transferred to a spouse or civil partner.

The gift must be absolute, either by a specific gift or through residue, and the property can be sold and the proceeds transferred to lineal descendants. However, the residence or proceeds from its sale cannot pass into a trust, even if all beneficiaries are lineal descendants, except in respect of the following trusts:

- immediate post-death interest (IPDI);
- disabled person's trust;
- trust for a bereaved minor; or
- 18–25 trust.

If the RNRB is to be preserved, caution must be adopted when creating age contingencies for lineal descendants.

If leaving the estate to children, any age contingency must not exceed 25 so that the trust falls within either a bereaved minor or 18–25 category.

However, if the testator is leaving an estate to a grandchild, even by substitution, any age contingency could see the estate potentially lose the RNRB.

A testator may have to decide between the tax benefits of the RNRB or preventing a grandchild inheriting when too young.

10.2.6 Expenses

As entitlement to a specific legacy passes immediately on death, the costs of transporting and ensuring any specific gifts fall on the beneficiary, not the estate.

If, for example, specific paintings are left to an overseas beneficiary, then unless that beneficiary disclaims the gift, it would be down to that beneficiary to pay for the costs of shipping and insurance.

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10.3 Gifts to the draftsman

10.3.1 Professional conduct

Chartered legal executives are bound by the **CILEX Code of Conduct**. This has nine **Principles**.

The **most important Principle** in relation to gifts to a chartered legal executive in a will is **Principle 7: "Ensure your independence is not compromised."** Clearly there is a significant risk of a conflict of interest if a client wishes to make a gift in a will to a chartered legal executive and this would result in the chartered legal executive's independence being compromised.

Many chartered legal executives are employed in firms regulated by the Solicitors Regulation Authority and are therefore also bound by the **SRA Code of Conduct for Solicitors. para 1.2 SRA Code of Conduct for Solicitors** states that a solicitor should not abuse their position by taking unfair advantage of clients or others.

As a matter of professional conduct, if a testator intends to make a gift to a lawyer, their partner, an employee or to the families of any of them, and the gift is of a significant amount (either in itself or having regard to the size of the testator's estate and to other normal claims upon it), the lawyer must advise the testator to be independently advised (i.e. by a lawyer from another firm). If the testator refuses, the lawyer must refuse to act.

10.3.2 Law Society guidance

A Law Society practice note highlights that preparing a will (or lifetime gift) can be a sensitive area, and may lead to allegations of improper influence if the client leaves property to the person preparing the will or their family (see: [Preparing a will when your client is leaving a gift for you, your family or colleagues | The Law Society](#)).

Neither the **SRA Ethics Guidance on the Drafting and Preparation of Wills** (see: [SRA | Drafting and preparation of wills | Solicitors Regulation Authority](#)) nor the **SRA Standards and Regulations 2019** provide any indication of a monetary amount which might be significant. However, the practice note says practitioners should carefully consider any gift worth more than £500 to determine if it might be regarded as significant in the particular circumstances, and are advised to keep detailed file notes recording the full circumstances.

Additionally, practitioners should assume the following gifts are considered significant:

- anything worth more than one per cent of the client's current estimated net estate;
- anything that might become more valuable at some point, especially after the death of the client;
- anything that provides a benefit to an individual which is more valuable than their relationship to the deceased reasonably justifies.

If the legacy is not considered significant but is just a token gift, there is nothing unprofessional in drawing up the will.

10.3.3 *Wintle v Nye [1959]*

As a matter of law, if a lawyer (or, indeed, a beneficiary) has prepared the will under which they receive a substantial gift, evidence will be required of the testator's knowledge and approval of the contents of the will, so as to remove the suspicion of undue influence (*Wintle v Nye [1959]*). If this is not forthcoming, the gift will fail. This rule does not apply to a will containing a charging clause in favour of the lawyer or their firm, nor where the legacy is of a token amount only.



Consider a situation in which you have been asked to conduct a will instruction interview with an elderly client who needs additional time to discuss their wishes and to understand how you will translate that into their will. The interview that was supposed to take 90 minutes has lasted for three hours. Your client expresses concern about costs and you explain that they are on a fixed fee and that it will take as long as it takes. Having realised the situation, your client goes on to discuss additional default provisions that take another hour. At the end of the meeting your client instructs you to add one final legacy for £10,000 to you because of the time and patience you have shown throughout the day.

How would you handle this? Set out in bullet format the steps you would take and why.

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10.4 Gifts to unincorporated associations

An unincorporated association (e.g. clubs and societies) exists where two or more persons are bound together for one or more common purposes by mutual undertakings, each having mutual duties and obligations, in an organisation whose rules identify in whom control of the organisation and its funds is vested, and which can be joined and left at will (***Conservative & Unionist Central Office v Burrell [1982]***).

The difficulties with such bodies stem from the fact that an unincorporated association is not a legal entity (e.g. a limited company), and therefore cannot be the owner of property or the subject of legal rights and duties.

The following sections detail potential solutions to this issue. However, there is no simple answer that can be applied in every situation. It is therefore important to understand how gifts to unincorporated associations can be achieved and to advise on the options available.

10.4.1 Property is held by trustees

One solution to the difficulty is for the body's property to be held by trustees. If the association is for the promotion of a charitable purpose, the trust will be a valid purpose trust (see 2.5.3).

If the association is for the promotion of a non-charitable purpose, then it will generally be void; gifts to such associations will therefore fail as gifts for non-charitable purposes. Thus, in ***Leahy v Attorney-General for New South Wales [1959]*** T provided that certain property was to be held on trust for “*such orders of nuns of the Catholic Church or the Christian*

Brothers as my executors and trustees shall select". The gift was not valid as a charitable trust because some of the orders were purely contemplative (a religious order where members are devoted to prayer rather than works in the community) and thus not charitable in law. Nor was it valid as a purpose trust.

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10.4.2 Gift to members of an unincorporated association

If the gift can be construed as being in favour of the members of an unincorporated association (even though expressly stated to be for a non-charitable purpose), the gift may be upheld. In ***Re Lipinski's Will Trusts [1976]*** T bequeathed his residuary estate to trustees on trust as to part for the Hull Judeans (Maccabi) Association *"in memory of my late wife to be used solely in the work of constructing the new buildings for the association and/or improvements to the said buildings"*. This was held to be a gift to the members of the association at the date of the gift and valid because there were no problems of perpetuity or uncertainty.

The court in ***Neville Estates v Madden [1962]*** identified three possibilities for the construction (interpretation) of gifts to such associations. In determining which is applicable to the particular case, the constitution and rules of the association will clearly be important.

1. A gift to the present members beneficially – that is, as individual joint tenants with the right of severance – so that, when any member leaves the association or dies, their share can be claimed by the remaining members or, if severed, their estate. This construction is unlikely in the absence of very clear evidence in support.
2. A gift to the present members beneficially, but subject to the contractual rights and liabilities of the members to each other which prevent the possibility of severance, so that, on the member's resignation or death, their rights accrue to the remaining members.

3. A gift where the property in question is not at the free disposal of the members for the time being, but is to be held on trust for the purposes of the association. Such a gift will fail unless the association itself is a charitable body.



Link to Practice

Before drafting a legacy to an unincorporated association the lawyer will need to understand the nature and make-up of the association to properly advise on the best way of achieving the testator's wishes.

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10.5 Charitable gifts

Example

You are assisting in the administration of an estate. The deceased left a homemade will which contains a number of gifts to animal-related charities. You have been asked to obtain up-to-date contact details for the charities, as the will only contains the names of the charities with the amount of the legacy.

You can see that a legacy of £50,000 has been left to “Guide Dogs for Deaf People”.



You realise that there is no UK charity called “Guide Dogs for Deaf People”. There is a charity called “The Guide Dogs for the Blind Association” and another called “Hearing Dogs for Deaf People” but which charity did the deceased intend should receive the legacy?

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10.5.1 Identification

The scenario (at 10.5) is unfortunately not uncommon; during the will instruction the testator gets the name of the charity wrong, possibly using a shortened version or simply mistaking

the proper name for the charity. The mistake is compounded when the name is not checked when drafting the will. The client's instructions are simply accepted without independently verifying the name of the charity.

It is therefore essential that when including a legacy for a registered charity that the details are checked for accuracy.

Ideally, the name, address and registered charity number (RCN) of the charity should be recorded in the will to avoid any confusion about which charity was meant. By way of example:

"I give the sum of £50,000 to The Guide Dogs for the Blind Association of Hillfields, Reading Road, Burghfield Common RG7 3YG (RCN.209617)"

All UK registered charities are registered with the Charity Commission and the charity's proper name, contact address and RCN can be obtained from an online register (see: [About the register of charities](#))

Simple errors are easily identified and rectified by carrying out a quick online search to verify a charity's details in this way.

Additionally, you will want to include provision for change of name or objects, amalgamation or dissolution.



Activity

As an exercise find and write out the full contact details, including the registered number, of three charities using the online register. You may select charities you already support personally. Select one charity for animal welfare, one for mental health issues, and one for any physical disease.

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10.5.2 *Cy-près*

If a private trust fails, the property results go back to the settlor or testator's estate. The question is whether we wish this to happen when it is a gift to a charity that fails. Take the example in the scenario (at 10.5), do you think the testator would want the gift to fail and result back into residue, or for the funds to be applied for the charitable purposes?

While it is possible for a gift to charity to fail, often it can be saved by the *cy-près* doctrine.

The *cy-près* doctrine allows the property to be applied for charitable purposes which resemble the original purpose as nearly as possible. The goal historically has been to carry out the settlor's/testator's intention as nearly as practicable. It operates so as not to sterilise charitable gifts and allows for the continuing promotion of charitable purposes, that is, purposes deemed beneficial to society, in circumstances where they might otherwise fail.

The trustees themselves have **no** power to apply trust property *cy-près*. It may be done only after application to, and direction by, the court or the Charity Commission. Under **s61 Charities Act 2011 (CA 2011)**, trustees have a duty to take steps to apply property *cy-près* where the case permits.

The definition of failure in **s62 CA 2011** is not confined to impossibility and impracticality, but is much broader in scope. *Cy-près* may now be applied in a wider range of circumstances and this reflects the policy goal of improving effectiveness in the deployment

of charitable resources and enabling charity to evolve in modern times. The circumstances in which funds may now be applied *cy-près* extend to the following.

1. Impossibility —

The original purposes, wholly or partly, have been fulfilled, or cannot be carried out, either at all or according to the directions given and to the spirit of the gift.

This gave statutory effect to the pre-existing law and is illustrated by ***Re Dominion Students' Hall Trust [1947]*** where the objects of the charity were stated to be the promotion of the community of interests in the British Empire but restricted the benefits of the charity to students "of European origin" (i.e. white). An application to remove the words "of European origin" was granted. The existence of this racist requirement prevented the achievement of the charity's wider objective of promoting a community of culture, citizenship and tradition among students (both black and white) from all members of the British Commonwealth (the successor body to the British Empire). It was therefore impossible to carry out the trust and a *cy-près* scheme was introduced under which the words "of European origin" were removed.

2. Surplus funds —

The original purposes are satisfied by using only part of the available property.

This is a statutory statement of the principle in ***Re King [1923]*** where a surplus remained from money bequeathed for a stained-glass window in a church. The surplus was directed to be applied *cy-près* for the installation and maintenance of another such window in the same church.

3. Blending —

Where the property given, plus other property applicable for similar purposes, can be more effectively used in conjunction, and to that end can suitably be made applicable to a common purpose, regard being had to the appropriate considerations.

4. Unsuitability —

Where the original purposes were laid down by reference to an area which was, but has since ceased to be, a unit for some other purpose, or by reference to a class of persons or an area which has for any reason ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift.

In ***Peggs v Lamb [1994]***, for example, a charitable trust had been set up for the benefit of the freemen of Huntingdon. The income had increased but the number of freemen had fallen so much that they were no longer considered to be a class suitable for charitable purposes. The class of people was enlarged to benefit the inhabitants more generally so as to keep within the spirit of what the testator had intended.

5. Ineffectiveness —

Where the original purposes, wholly or partly, have, since they were laid down:

- (a) been adequately provided for by other means; or
- (b) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or
- (c) ceased in any other way to provide a suitable and effective method of using the property available, regard being had to the appropriate considerations.

The original purpose was no longer a suitable and effective method of using the property in ***Varsani v Jesani [1998]***. It concerned a charitable trust to promote the faith of a particular Hindu sect through the provision of facilities for community worship. The problem presenting itself was a schism between rival factions which entailed they could no longer worship together. The court acknowledged that prior to 1960, a *cy-près* application would not have been possible, but **s62** relaxed the requirements to be satisfied and a scheme could be approved to divide the property between the groups on this basis.

More than with any other ground, the availability of *cy-près* in instances of **ineffectiveness** illustrates the scope to modify the purposes of charity and to enable charitable trusts to respond to current needs.



Link to Practice

For a recent publicised case on how the court approaches the question of a gift to a charity that

cannot be properly identified from the will, and in respect of one charity absent evidence to the testator's wishes, look at the case of ***Knipe v British Racing Drivers' Sport Charity and others [2020]***.

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10.5.3 Receipt clause

When a will includes gifts to charities, it is helpful to include a receipt clause, discharging the personal representatives (PRs) by the receipt of the person appearing to be the secretary, treasurer or other officer of the institution concerned. This will make it easier when administering the estate; it is common for charities to employ legacy officers to deal with matters relating to gifts from estates.



10.5.4 Taxation purposes

Gifts to charities are exempt from both CGT and IHT without limit.

There is also another possible benefit in leaving property to charity in a will. The **Finance Act 2012** allows a 4 per cent reduction in the rate of tax usually payable on the chargeable part of the estate. This reduced rate of 36 per cent applies if at least 10 per cent of the baseline amount is left to charity. The baseline amount is broadly the amount of the net IHT estate less the nil-rate band/transferable nil-rate band and the value of any property that qualifies for exemption or relief (apart from the charity gift). (See also 6.2.8 for a more detailed look at the reduced IHT rate for charitable giving.)

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10.6 Residuary gifts

It is highly unlikely a person will be able to dispose of their entire estate using only specific and general legacies. Dealing with residue is essential to avoid a partial intestacy. It can also be convenient to use residue to dispose of the majority of an estate.

We will look at points to consider when dealing with residue in a will, as follows.

10.6.1 Provision for payment of debts and legacies

Usually, the testator wants debts and pecuniary legacies paid out of residue. So, there should either be a gift of residue subject to or after payment of debts and legacies, or a gift of residue on an express trust with a direction to pay debts and legacies out of the proceeds of sale before the net amount is then divided amongst the residuary beneficiaries.

The gift of residue will also normally include an express trust for sale with power to postpone sale. Alternatively, a trust to sell or retain is usually included, for the reasons above, whenever successive interests are created or there is the possibility that any beneficiary will either be under 18 or still subject to a contingency when the testator dies.

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10.6.2 Absolute gift

If making a gift to, say, three named beneficiaries in equal shares, it is important to deal with any lapsed shares, for example, by providing for their accrual to surviving beneficiaries and/or by including substitutional gifts, perhaps to the children of the beneficiary whose share has lapsed.

Failure to make such provision results in the lapsed share of residue passing on a partial intestacy. For example, Libby has made a (homemade) will which states *"I give the rest of my estate to my children Biff, Chip and Kipper equally"*. Biff, who has no children, predeceases her mother. As there is no substitutional gift, this would result in a partial intestacy.



In the case of a class gift, the class must be clearly defined and the effect of the class closing rules considered and explained to the testator (see 7.3.1).

Consider including substitutional gifts in favour of the issue of any members of the class who predecease the testator or who survive but die later before satisfying any expressed contingency. The question of lapse in this case will arise only if all members of the class predecease the testator or fail to obtain a vested interest.

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10.6.3 Successive interests

These are usually suggested if the testator wants to control where property goes after the death of the main beneficiary. This intention is best achieved behind a trust, for example, *"residue to my husband for life or until he remarries and remainder to my children"*.



If the life tenant is the surviving spouse/civil partner, the testator may want to ensure the right to occupy the family home. This can be achieved by:

- making a specific gift of the property (so that it does not form part of the residue); or
- creating a trust which includes the property and requires the surviving spouse/civil partner's consent to a sale by the trustees; or
- expressing a wish (not binding) that the trustees should not sell while the spouse/civil partner wishes to remain in occupation.

It is also possible to give restricted rights in a house, such as a right to continue in occupation (either for a specified time or for as long as the occupying beneficiary wishes), but once the beneficiary moves out, the house passes to the ultimate beneficiary. In a full life interest, if the life tenant moves out of the house, the trustees would sell it and invest the proceeds, either in a new house for the life tenant to live in, or in cash investments – the income from which is then paid to the life tenant; the remainderman receives nothing until the life tenant dies.

Whatever type of successive interest is created, provision should always be made to say who eventually becomes absolutely entitled to the property when all other interests have ended.

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10.6.4 Contingent interests

Consider the following two matters.

1. **What is to happen to income pending fulfilment of the contingency? (s31 TA 1925)** will apply in the absence of any direction to the contrary.
2. **What is to happen if the contingency is not satisfied?** In the absence of contrary intention (e.g. a substitutional gift or accruer provision), the capital in a contingent residuary gift passes under the intestacy rules as undisposed of residue.

10.6.5 Substitutional gifts

A gift appointing a substitute beneficiary should the original beneficiary fail to take the gift ought to be considered in relation to any gift, but is especially important in the context of the residuary gift. In the absence of such a provision, a non-residuary gift which fails falls into residue; if a residuary gift fails, there is a partial intestacy.

Consider that the point of dealing with the residue is in part to avoid a partial intestacy. It makes no sense in leaving that possibility open in not considering substitutional gifts.

s33 WA 1837 (see 7.4.3) may affect an automatic substitution if the gift was to the testator's child or remoter issue. However, express provision is desirable even in this case, and essential where the gift is to anyone else.

When drafting a will containing substitutional gifts, it is **best practice** to insert provision that will ensure the substitute will take in any circumstance in which the gift fails; this is to ensure that the substitutional gift is fully effective, not only if the main beneficiary dies but also as a result of something else.



1. Why is it important to ensure that the residue deals with all the undistributed estate?
2. What happens if residue fails to take into account all circumstances?
3. When drafting a residue clause, what can you include to reduce or eliminate the risk of it failing to deal with every eventuality?

CONTINUE

10.7 Survivorship clauses

A survivorship clause should be considered when drafting gifts and are especially important in respect of residuary gifts. The idea is that the primary gift is made contingent on the beneficiary surviving for a specified period, with a substitutional gift taking effect if this does not happen.

In practice, such clauses should not (for tax reasons) require survival for longer than six months, but since distribution cannot begin until the primary beneficiary dies within the period (when the substitutional gift takes effect) or survives to attain a vested interest, it is often for a much shorter period (e.g. 28 days).

10.7.1 s184 Law of Property Act 1925

One reason for including a survivorship clause is to prevent the *commorientes* rule (**s184 Law of Property Act 1925 (LPA 1925)**) applying (see 7.4.2), but that rule only resolves the succession problems if there is no evidence of the order in which the deaths occur.

More importantly, the inclusion of a survivorship clause enables the testator to control the ultimate destination of their estate in the event of the beneficiary dying shortly after them, for example, if the testator and beneficiary die soon after one another in a road accident. It also saves the expense and inconvenience in such circumstances of a double administration of assets passing on two deaths in rapid succession.

CONTINUE

10.7.2 IHT considerations

From an IHT point of view, the inclusion of a survivorship clause can prevent an aggregation of two estates.

Suppose that X and Y are both the victims of a road traffic accident. They are not spouses or civil partners. X dies instantly leaving all their estate of £325,000 to Y. Y dies two days later leaving Z their own estate, also worth £325,000, together with the property inherited two days ago from X.

If there is no survivorship clause in X's will, the IHT on X's death is covered by their available nil-rate band. Y's estate is now worth £650,000 in total and whilst the first £325,000 of that will be covered by Y's available nil-rate band, the balance will be taxed at 40 per cent (£130,000).

If X's will had included a suitable survivorship clause, Y would not inherit X's property because it passes instead to the substitute beneficiary named by X in their will. Y's taxable estate consists of just their own property and so, like X's estate, is covered by their nil-rate band – and no IHT is payable.

If X and Y had both died in a situation where the *commorientes* rule applied, such that in the absence of a survivorship clause, X's estate passes to Y as the younger, then the IHT consequences would not be the same as those where Y was known to have died after X.

For IHT purposes, if the *commorientes* rule applies **s4(2) Inheritance Tax Act 1984** says that X and Y are deemed to die at the same instant. The effect is that when calculating Y's IHT estate, it does not include the value of the property inherited from X through the operation of **s184 LPA 1925**. This is because the IHT estate includes only property to which Y was beneficially entitled immediately before death and so will not include property deemed to pass at the moment of Y's death.

Of course, including a survivorship clause in X's will produces the same result for IHT, but also has the additional benefit that X can control where their property goes by a substitute provision in their own will, rather than it passing eventually to Z as the beneficiary named in Y's will. It also means that X's property is administered just once, whereas if allowed to pass to Y and then on to Z, it has to be administered twice.

No survivorship clause:

	X	Y
Net estate	£325,000	£325,000
Free estate	-£325,000	-£325,000
IHT	0	0
X dies estate to Y	0	£325,000
Y's net estate		£650,000
Free estate		-£325,000
Taxable estate		£325,000
IHT @ 40%		-£130,000
Estate for distribution		£520,000

Survivorship clause included:

	X	Y
Net estate	£325,000	£325,000
Free estate	-£325,000	-£325,000
IHT	0	0
Estate for distribution	£325,000	£325,000



1. In what circumstances is it appropriate to include a survivorship clause?
2. In what situation is it advisable to not include a survivorship clause?
3. What are the potential consequences of failing to include or exclude a survivorship clause in your previous answers?

CONTINUE

10.8 Administrative powers

To facilitate the administration of the estate and any trust arising under the will, consideration should be given to excluding, modifying or extending (as appropriate to the case) the various powers conferred by the general law on PRs and trustees. In particular, the following are important.

10.8.1 Appropriation without consent

PRs have the power to appropriate estate assets to a beneficiary in satisfaction or part satisfaction of any legacy, but with the consent from all beneficiaries.

Consider giving power to appropriate without the consents required by **s41 AEA 1925**. This no longer has the potential to save stamp duty, but may help to facilitate the exercise of the power. If a PR is beneficially entitled under the will, the will should expressly authorise the exercise of the power in the PR's own favour.

10.8.2 Consultation with beneficiaries

As regards the terms automatically included in trusts of land by the **Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996)**, consider excluding:

- (a) **s11**, so relieving trustees from the obligation to consult beneficiaries of full age with an interest in possession when exercising any function in respect of land; and

(b) **ss12 and 13** (so far as possible), so relieving the trustees of the duty to make land available for occupation by beneficiaries unless, of course, this is the main purpose of the trust.

CONTINUE

10.8.3 Receipt clause

Consider the inclusion of a power to accept the receipt of the minor's parent or guardian, or of the minor themselves at, say, 16.

10.8.4 Carrying on the deceased's business

If the deceased is a sole trader, consideration should be given to conferring on the PRs adequate powers to run the business after death, including:

- power to continue to run it for so long as they think fit (e.g. until a sale or during the life of a life tenant);
- power to use assets other than those in use at the date of death (e.g. to allow resort to the residuary estate);
- an express indemnity for the PRs out of the assets of the estate for any losses they incur while running the business.

10.8.5 Investment

If the will creates a trust, PRs and trustees need to invest the trust's assets for those entitled. **s3 TA 2000** contains a general power of investment which allows them to invest as though they themselves were absolutely entitled to the trust assets. Further, **s8** authorises the acquisition of land in the UK for investment or occupation by a beneficiary. Although these provisions are generous, it may still be desirable to express the investment powers and make modifications and additions to what is allowed under **TA 2000**. Express provision might include permission to purchase foreign investments, pursue only an ethical investment policy, retain or purchase non-income-producing investments (such as insurance policies) or exclude the obligation to diversify the trust fund.



CONTINUE

10.8.6 Advancement (s31 and s32 Trustee Act 1925)

It is usual to consider giving the PRs/trustees unfettered discretion as to the use of available income, so reflecting **s31 TA 1925** (see **4.2.3**). If the vesting of capital is to be postponed beyond the age of 18, consider varying the operation of **s31** to continue the power of maintenance out of income until the time of vesting.

Consider modifying **s32 TA 1925** (see **4.2.3**), for example, giving an unfettered discretion (i.e. without having to consider whether it is for the beneficiary's advancement or benefit).

Also consider authorising loans to beneficiaries.

If a life interest is created by the will, a provision allowing advancements/loans to the life tenant may be included. Payments from capital to a life tenant are not authorised under the general law, but may be important, for example, if the surviving spouse/civil partner is given a life interest.



Link to Practice

If considering including provision to allow payments of capital to a life tenant, consider whether it is appropriate to appoint the life tenant as a trustee as this may cause a conflict between the life tenant's position and remaindermen.

CONTINUE

10.8.7 Incorporation of standard administrative provisions

As a shortcut to drafting, some practitioners, rather than setting out administrative powers in the will itself, will incorporate standard administrative clauses, such as those published by the Society of Trust and Estate Practitioners (STEP) which are then incorporated into the will under the principle of incorporation by reference (dealt with in **9.3.4**).

These published conditions are relatively extensive and are useful for the needs of a will, particularly if it creates an ongoing trust where the trustees require powers beyond those implied by statute. However, as with any administrative powers, they should not be included simply as a matter of habit. The extent of such provisions must be understood by the draftsman and the testator advised about their inclusion. Above all, the draftsman must ensure that the provisions are consistent with the testator's wishes and understanding of how the will is going to take effect.

CONTINUE

10.9 Attestation clauses

10.9.1 Standard

An attestation clause is not required by **s9 WA 1837**. **s9(d)(ii)** specifically states that **no** attestation is necessary. If it was, most homemade wills would probably be invalid.

However, including one raises a presumption of due execution. This minimises the risk of problems when applying for probate and, accordingly, the commonly used form (*"Signed by [the Testator] in our joint presence and then by us in his"*) is desirable. These are the fewest words that can be used and therefore less likely to be mis-typed.

In ***Sherrington v Sherrington [2005]*** the Court of Appeal held that the strongest evidence is necessary to rebut the presumption of due execution if a will containing an attestation clause has the appearance of being properly executed.

10.9.2 Special cases

Amendments must be made in special cases, for example, if the testator is blind or illiterate, or the will is to be signed by someone other than the testator.

An attestation clause that reflects the testator's actual circumstances at the time of execution will strengthen the position that any condition was factored into by the lawyer drafting the will.

For example, an attestation clause that records that a testator is blind and that the will was read out to the testator and the testator acknowledged approval and understanding. This will go to supporting the position that the testator knew and understood the will should a dispute be raised that because of blindness the testator did not know the content of the will.



CONTINUE

10.10 STEP administrative provisions

As mentioned in 10.9.1, incorporating the STEP standard provisions (currently 3rd edition) (SSP3) is a simple and effective way to include standard trust provisions into a will by reference rather than setting each provision out in detail.

A copy of SSP3 a copy can be found at: [STEP Standard Provisions, 3rd Edition](#).

STEP applied for a Practice Direction from the Principal Registry of the Family Division (as was granted for the 1st edition), permitting wills incorporating SSP2 by reference to be proved in the normal way, without providing text of the provisions themselves. This was granted on 30 January 2013 and the appropriate Circular has now been issued to notify the Probate Service that the 3rd edition has been lodged with, and accepted by, the Senior District Judge. There is no need to provide a copy of the STEP provisions when admitting a will incorporating them to probate.

The provisions are split into two main sections.

The first section contains the core provisions 1–13

1. Incorporation of STEP Provisions
2. Interpretation
3. Protection for interest in possession trusts

The second section contains the special provisions 13–20

13. Borrowing
14. Delegation
15. Companies

- | | |
|--|---|
| 4. Additional powers | 16. Powers of Maintenance: deferring income entitlement to 25 |
| 5. Minors and beneficiaries without capacity: powers over income | 17. Absolute discretion clause |
| 6. Disclaimer | 18. Appointment and retirement of trustees |
| 7. Apportionment | 19. Powers relating to income and capital |
| 8. Conflicts of interest | 20. Relationships unknown to trustees |
| 9. Trustee remuneration | |
| 10. Professional trustees and trust corporations | |
| 11. Liability of trustees | |
| 12. Subsequent additions of the STEP Standard Provisions | |

It is felt that the core provisions are the least contentious and the special conditions may require additional consideration and explanation to the client.

In the examples below, the standard provisions are included by reference:

1. Just the core provisions:

"The standard provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply."

2. All core and special provisions:

"The standard provisions and all of the special provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply."

3. All core and selected special provisions:

“The standard provisions and the following special provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply:”

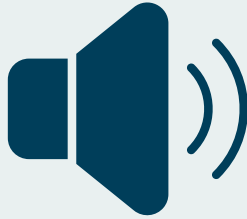
If incorporating SSP3, STEP recommends that you draw your client’s attention to the following provisions:

1. SSP3 Provision 9 allows trustees who act in their professional capacity to be paid for their services. The trustee can be paid for work done in a professional capacity including work, which could have been done by someone who was not a professional.
2. SSP3 Provision 11 limits the liability of trustees where they have acted honestly and with reasonable care. A lay trustee is exonerated, even if negligent, unless he or she is guilty of fraud and as long as there is also a professional trustee. A trustee is not liable for breach of trust when acting on the advice of a barrister of at least five years standing unless certain limiting provisions apply.
3. Special Provision 20 provides that a trustee is not liable for wrongful distribution of trust property where they have no knowledge that some other person has a prior interest or an interest that runs in parallel with that of the beneficiary to whom the trust property has been released.



Link to Practice

If incorporating SSP3, familiarise yourselves with the content and structure. Read the guidance which sets out in more detail the effect of each provision. While SSP3 is a convenient way of including standard trust provisions, consider whether they are necessary, and if incorporating consider to what extent the special provisions should be included.



Law Explained: Vested and contingent gifts to minors

In this recording we review the different effects of vested and contingent gifts to children.



5:35

1x



Audio Transcript

Hello. In this recording I'm going to look at gifts to minors, with specific reference to the difference between a vested and a contingent gift, as this is an area which often causes confusion.

Traditionally, it was always considered that a gift to a child had to be held on trust, simply because a person under the age of 18 was not able to give a valid receipt for the gift and therefore the PRs would potentially be at risk of later claims if they distributed a legacy to a minor. However, under sections 3 and 5 of the Children Act 1989, parents or guardians with parental responsibility are entitled to receive property, including legacies, on behalf of their child, if that child is absolutely entitled (i.e., a vested gift) and so the parent may give a valid receipt. Of course, if no parent is available or they are unwilling to give a good receipt then the PRs may wish to either hold the property on trust themselves or appoint separate trustees to do so.

The fact that, despite the provisions of the Children Act, legacies are often held on trust for minor children gives rise to the incorrect assumption that all legacies to children are contingent. This is not the case. To decide whether a gift is vested or contingent, you need to look at the wording in the will.

If the gift appears to be unconditional, it is a vested gift. Even if the trustees decide to hold the gift on trust until the child reaches 18, it is still legally the child's money, and if the child should unfortunately die before reaching the age of 18, the money would belong to their estate. Contrast this with a

contingent gift, which is one expressed to be subject to a condition which must be fulfilled by the beneficiary before they become entitled to the property. If the child fails to satisfy the condition, or contingency, the gift fails and the property falls into residue.

Consider the following gifts:

"To my son Liam the sum of £10,000". Liam is a baby of 6 months-old at the date of the testator's death – this is a vested gift as there is no condition attached. The PRs can either hand the money to Liam's other parent and get a receipt (if that parent is available and willing), or hold it on trust themselves, or appoint trustees using the power under **section 42** of the **Administration of Estates Act 1925** to do so. In the latter two cases, they would be advised to hold it until he reaches 18. If he dies before that age, the money would belong to his estate.

Suppose the gift was *"to such of my children who shall survive me, and if more than one in equal shares"*. This is a vested class gift – the class closes at the testator's death if there is anyone who answers the description at that time, and includes any living children and any who are *en ventre sa mere*. Again, if any child is under 18, their share could be held on trust for them, but if they die before reaching 18 their share belongs to their estate.

If the gift was *"to my son Liam if he reaches the age of 18"*. This would be a contingent gift – Liam has to satisfy the condition before he becomes entitled. If he does not survive to age 18, the legacy fails and the money goes back into residue. The PRs will have to hold this money on trust, but this time on a "wait and see" basis.

Finally, suppose the gift was *"to such of my children who survive me and reach the age of 18, and if more than one in equal shares"*. This is a contingent class gift. The members of the class will be determined at the date of the testator's death; if any member of the class has at that date already fulfilled the contingency, the class will close, and, if not, it will remain open until someone does so. If any member of the class dies without achieving the contingency, their prospective share goes back into the pot and is redistributed to those who do satisfy the condition. Any member who achieves the contingency but dies before actually receiving their legacy, it is still payable to their estate.

So don't get confused over vested and contingent – just look at the terms of the will. If there's no condition to be satisfied, it's vested, and if there is, it's contingent.



Law in Context

Read the following article by the Chartered Institute of Fundraising: [Legacies](#)

What is the advice about conditional gifts to charities?

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.

Question 1 of 3

Identify which of the following gifts are **general legacies**?

(Select 2 correct answers)

- ☐ My diamond ring
- ☐ £5,000
- ☐ £500 from my current account with HSBC Bank
- ☐ 200 Marks & Spencer shares

SUBMIT



Complete the question above before moving on.

Question 2 of 3

Accepting gifts made by clients in their wills is an area for professional caution! According to the Law Society's practice note, which of the following gifts is likely to be considered **"significant"**?

(Select 2 correct answers)

☐

A china teapot valued at £30, where T's net estate is worth £10,000

☐

£600, where T's net estate is worth £900,000

☐

£250, where T's net estate is worth £18,000

☐

A small landscape painting by T, who was a painter whose work is coming into fashion and increasing in value. T's net estate amounts to £50,000

SUBMIT



Complete the question above before moving on.

Question 3 of 3

When drafting a gift in a will to a registered charity, which of the following would you **not** need to do?

- ☐ Check and include the charity's registered number
- ☐ Make sure the charity's name as given in the will is correct
- ☐ Check and include the charity's registered address
- ☐ Check the charity's objects to make sure it aligns with the testator's wishes
- ☐ Include a provision in case the charity changes its name, amalgamates with another, or ceases to exist

SUBMIT



Complete the question above before moving on.

10.11 Summary

Gifts

- Specific – gift of chattel owned by testator. Usually prefixed by the word “my”. Beneficiary pays the costs of carriage and insurance.
- General – gifts of items of cash but will not adeem if not owned by testator on death. PRs will purchase item for beneficiary.
- Demonstrative – gift is general but points to a specific fund. Gift will not adeem if fund does not exist and will be paid from estate.
- Pecuniary – gifts of cash, normally general but can also be specific or demonstrative.
- Contingent – gifts do not vest in the beneficiary until contingency fulfilled.
- Minors – unless age contingent, gift will vest in minor and paid when they reach 18.
- Residuary – what remains after payment of liabilities, administration and funeral expenses and legacies.

Figure 10.11a



Gifts (Tax)

- CGT – uplift on death; specific gifts taken in specie taken at probate value.
- Income tax – specific gift that generates income will belong to the beneficiary from date of death.
- IHT – specific and general gifts are free of IHT (IHT normally paid out of residue) unless contrary intention expressed in the will.
- RNRB – age contingent, unless trust is an IPDI, disabled person's trust, trust for a bereaved minor or 18–25 trust – then RNRB will be lost.

Figure 10.11b



Gifts to Draftsman

- Consider SRA and CILEx Codes of Conduct – testator must be independently advised.
- Follow Law Society guidance – if gift is significant; guidance suggests over £500, or more than 1% of client's current net estate, or where gift might become more valuable in future.
- *Wintle v Nye [1959]* – where solicitor or beneficiary has prepared a will in which they receive substantial benefit; evidence of knowledge and approval required.

Figure 10.11c



Gifts to Unincorporated Associations (Options)

- Gifts to trustees – use purpose trust if for charitable purposes; if not, then gift will be void.
- Gift to present members beneficially – but members can sever and share claimed by their estate.
- Gift to present members subject to contractual rights prevent severance; rights accrue to the remaining members.
- Present and future members for an indefinite period of time.

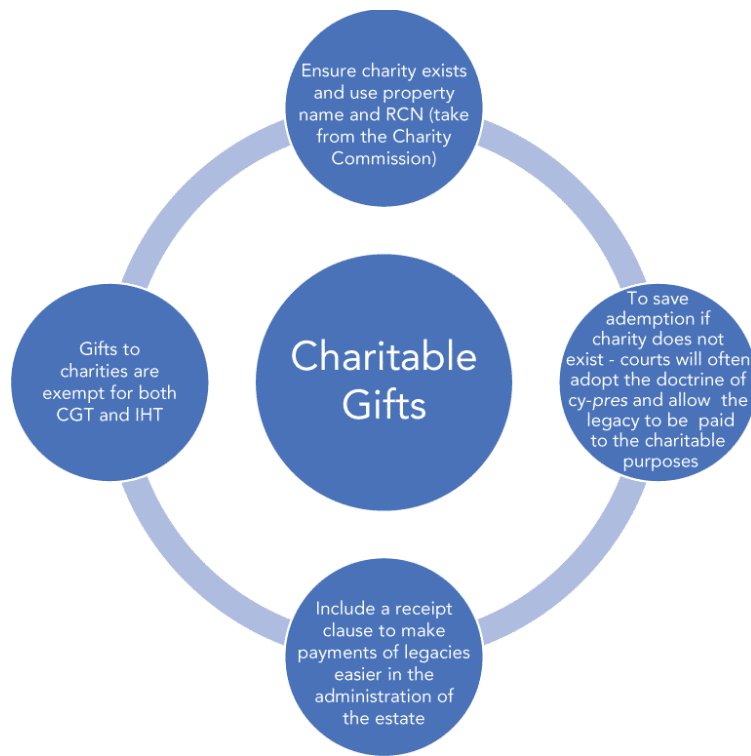
Figure 10.11d



Charitable gifts

- Ensure charity exists and use proper name and RCN (take from the Charity Commission).
- To save ademption if charity does not exist – courts will often adopt the doctrine of *cy-pres* and allow the legacy to be paid to the charitable purposes.
- Include a receipt clause to make payments of legacies easier in the administration of the estate.
- Gifts to charities are exempt for both CGT and IHT.

Figure 10.11e



Residuary gifts

- Used to dispose of remaining estate to avoid a partial intestacy from arising.
- Debts and legacies paid from residue.
- Gifts or residue should contain substitutional gifts to avoid partial intestacy if one of the beneficiaries dies before the testator.
- Successive interests – life interests created always include ultimate beneficiaries.
- Consider survivorship clause to avoid aggregation of estates, and potential IHT exposure on second estate.
- Distribute residue in percentages rather than fractions to ensure residue deals with 100% of the estate.

Figure 10.11f



Administrative provisions

- Appropriation without consent – PR will have power to appropriate assets to a beneficiary in satisfaction or part satisfaction of a legacy without requiring consent from all beneficiaries.
- Consultation with beneficiaries – TLATA 1996 – relieving PRs from obligation to consult with beneficiaries in relation to property.
- Receipt clause – allowing parent or guardian of minor to give a valid receipt when minor reaches 16.
- Carrying on business – allows PR to continue trading business of testator, without being obliged to sell or close.
- Investments – power may go beyond TA 2000 powers of investment and release PRs from obligation to diversify.

- ss 31 and 32 TA 1925 – giving PRs enhanced powers to retain income and apply capital until time of vesting.

Figure 10.11g

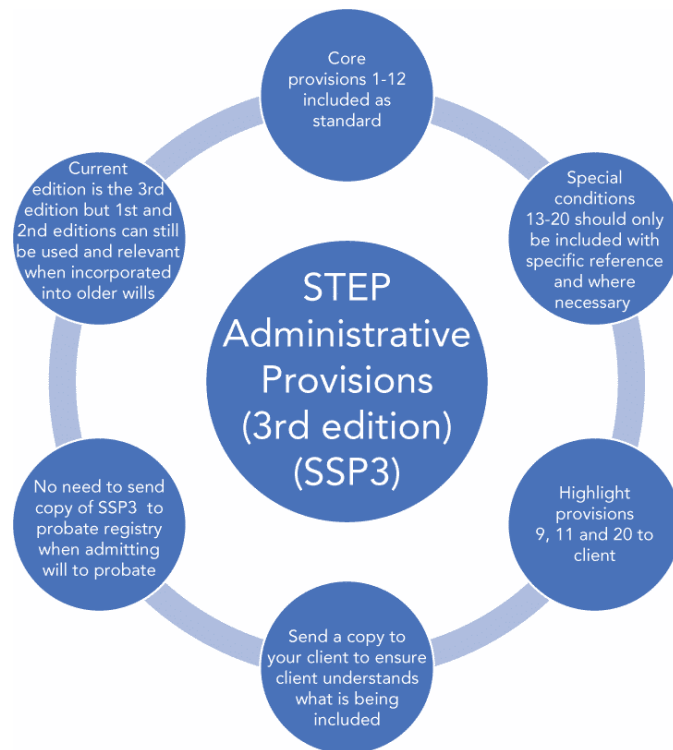


STEP Administrative provisions (3rd edition) (SSP3)

- Core provisions 1–12 included as standard.
- Special conditions 13–20 should only be included with specific reference and where necessary.
- Highlight provisions 9, 11 and 20 to client.
- Send a copy to your client to ensure client understands what is being included.
- No need to send copy of SSP3 to probate registry when admitting will to probate.

- Current edition is the 3rd edition, but 1st and 2nd editions can still be used and relevant when incorporated into older wills.

Figure 10.11h



You have completed Chapter 10.

EXIT