

# SSP2 TOOLKIT

To assist will writers in the use of the  
STEP Standard Provisions (England and Wales)  
2nd Edition

**VERSION 1 – NOVEMBER 2014**  
COMPILED BY STEP MEMBERS AND  
EDITED BY TOBY HARRIS TEP

## ABOUT STEP

STEP is the worldwide professional association for those advising families across generations. We help people understand the issues families face in this area and promote best practice, professional integrity and education to our members.

To find out more about STEP visit [www.step.org](http://www.step.org)

STEP, Artillery House (South),  
11-19 Artillery Row,  
London,  
SW1P 1RT

T: +44 (0) 203 752 3700

E: [step@step.org](mailto:step@step.org)

W: [www.step.org](http://www.step.org)

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## INTRODUCTION TO THIS TOOLKIT

The Second Edition of the STEP Standard Provisions (SSP2) is, I believe, better than the first. That is not merely because SSP2 reflect changes in the law and considerable scholarship by James Kessler QC and his team. The most obvious change, and improvement, is the division of SSP2 into the Standard Provisions and the Special Provisions.

There is anecdotal evidence that this was a step too far for many practitioners, who delayed becoming familiar with the content of each new provision and therefore preferred to carry on using the First Edition, with (perhaps) suitable amendments. So if you, as a reader of this Toolkit, have hitherto been reluctant to use SSP2, I urge you to read this Toolkit and to take advantage of all the hard work undertaken on your behalf.

Put simply, I hope that you will find that the Standard Provisions in SSP2 contain all that many clients need, and that these, being fewer in number than the entirety of the First Edition, will be easier for you to explain to any client who is so diligent as to enquire as to the content of what he or she is about to sign. As the Toolkit explains, you can 'cherry pick' from the Special Provisions anything that you actually need, while avoiding surplusage.

Chapters 8 and 9, for which STEP is greatly indebted to Lesley King, consider the rules for executing wills. These chapters set out detailed consideration of the issues and some of the cases. It serves as a useful reminder to the will writer of the law when getting a will signed, whether in person or sending it by post.

You can incorporate SSP2 in any document that you prepare. It is unlikely that you will wish to share this Toolkit with clients, but you are free to download the text to use for training and other purposes (although please refer to the disclaimer accompanying this Toolkit).

It just remains for me to pay tribute, not only to James and his drafting team, who endured some 13 drafts during the consultation for SSP2, but members of STEP UK Practice Committee who reviewed this Toolkit and made helpful corrections to my original manuscript.

*Toby Harris,  
November 2014*

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## 1. THE SCOPE OF THIS TOOLKIT: WHO IT IS FOR

- 1.1 This Toolkit is written for those without previous experience of using STEP Standard Provisions (SSP). It is not a guide to will writing. For training in that field, readers are directed to the [STEP Advanced Certificate in Will Preparation](#), which is recognised by many to be the 'gold standard' among qualifications in this area.
- 1.2 For comprehensive guidance on drafting wills and trusts, readers may wish to refer to one of two current works, from leaders in the field:
  - J Kessler & L Sartin, *Drafting Trusts and Will Trusts – A Modern Approach, 11th Edition* (London: Sweet and Maxwell, 2012)
  - C Whitehouse & L King, *A Modern Approach to Wills, Administration and Estate Planning (with Precedents), 2nd Edition* (London: Jordans, 2013)
- 1.3 This Toolkit is written for those without previous experience of using STEP Standard Provisions (SSP). It is concerned almost exclusively with the use of SSP2. It is primarily concerned with the use of SSP2 when drafting wills, though many of the comments apply with equal force to the drafting of settlements. However, anyone who advises on the creation of settlements or the preparation of any deed should remember the terms of *Solicitors' Act 1974*, s22, which, subject to some qualifications, prohibits unqualified persons from drafting or preparing 'any instrument of transfer or charge for the purposes of the *Land Registration Act 1925* or drafting or preparing any other instrument relating to real or personal estate, or any legal proceeding'.
- 1.4 The prohibition of persons other than solicitors (and certain other recognised professionals) from preparing deeds is occasionally mentioned in Chancery proceedings but is not universally known. The current practice of submission of documents as email attachments for the recipient to download, print and sign may have lent some uncertainty to the enforcement of s22. I know of no recent case where action was taken to enforce the rule. These 'do not engross' rules apply to settlements but not to wills.
- 1.5 This Toolkit does not mention every one of the provisions in SSP2 because some of them are straightforward enough not to need more detailed explanation than is contained in the Guide for Practitioners. The provisions that are not discussed in detail are listed at the end of Section 6.

## 2. BACKGROUND

- 2.1 The first edition of SSP was published in 1992 and widely welcomed. It was led and mainly drafted by James Kessler QC. It was officially recognised by practice direction of the Principal Registry of the Family Division, 4 April 1995. By virtue of that Direction it is not necessary to prove the actual text of the first edition of the Provisions or to refer to those Provisions in the Oath for Executors. Equally there is no difficulty if an English Grant is resealed in a foreign jurisdiction.
- 2.2 Various developments prompted a redraft at the request of STEP. STEP Technical Committee delegated this to a drafting committee, again led by James Kessler QC, which brought no fewer than 13 drafts to a wider audience. There was consultation among STEP members and interested members of the profession. SSP2 were adopted on 16 April 2011 but not widely published at that time because the Guide for Practitioners was then still in preparation. As with the first edition, application was made for a practice direction to obviate the need to prove the text. A Circular accepting SSP2 was issued by the Senior District Judge of the Family Division on 30 January 2013. Issues continue to arise, despite that consultation. Where relevant, they are mentioned in this Toolkit.

## 3. WHAT SSP2 CONTAIN

### 3.1 These are:

- The Standard Provisions; and
- The Special Provisions;

supplemented by:

- The Guide; and
- This Toolkit.

The 'core' documents are the Provisions themselves. These have been formally adopted by STEP. The subsidiary documents are the Guidance, published with the Provisions but not formally adopted by the Society, and this Toolkit. These have been considered by senior members of the Society but have no legal force and are intended only to assist members, not as formal legal advice. Neither the Society nor any person who has assisted with the preparation of this Toolkit accepts any responsibility, legal or otherwise, for the content of this Toolkit. It is intended that this Toolkit will be updated from time to time as issues arise in the use of SSP2 that should be brought to the notice of members. The date of this edition of the Toolkit appears at the end, before the appendices.

### 3.2 THE STANDARD PROVISIONS

The final form of STEP Standard Provisions 2nd Edition (SSP2) attempts to address an issue that concerned the drafters and the members of the consultation concerning possible misuse of the Provisions. It groups together as SSP2 Provisions 1 to 13, the Standard Provisions which are the core provisions that are the least contentious; while separating out into a second section the Special Provisions numbered 14 to 23, which are either more contentious or require more careful explanation and may therefore not be appropriate in every case.

### 3.3 OUTLINE OF THE STANDARD PROVISIONS

Any will writer who intends to use SSP2 must become familiar with the detail of each provision so as to be able to explain it to the client. These are the titles of the Standard Provisions:

- 1 Incorporation of STEP Provisions
- 2 Interpretation
- 3 Protection for interest in possession trusts: *cf* the *Poppleston* case
- 4 Additional powers
- 5 Powers of maintenance and advancement
- 6 Minors and beneficiaries without capacity: powers over income
- 7 Disclaimer
- 8 Apportionment
- 9 Conflicts of interest
- 10 Trustee remuneration
- 11 Trust corporations
- 12 Liability of trustees
- 13 Subsequent additions of the STEP Standard Provisions

### 3.4 OUTLINE OF THE SPECIAL PROVISIONS

These are the titles of the Special Provisions:

- 14 Borrowing
- 15 Delegation
- 16 Supervision of company
- 17 Powers of Maintenance: deferring income entitlement to 21
- 18 Minors and beneficiaries without capacity: powers over trust capital
- 19 Absolute Discretion clause
- 20 Appointment and retirement of trustees
- 21 Powers relating to income and capital
- 22 Power to appropriate at value at time of death
- 23 Relationships unknown to trustees

### 3.5 DETAILED GUIDANCE

The drafting of SSP2 is so clear that many of the provisions need little technical support. Users can simply use the Standard Provisions with the Guidance. However, some provisions are based on issues in trust law that have challenged the courts and practitioners down the years, so these particular provisions are examined in some detail in Section 6 of this Toolkit.

## 4. GETTING STARTED (WITH POINTS TO LOOK OUT FOR)

- 4.1 This section contains some general comments that will apply to the whole of a will, but which are entirely relevant to administrative provisions such as SSP2. Competent will drafting starts with taking careful instructions. Rushing that process can easily lead to difficulties later, either because the wishes of the client have not been properly understood or not properly implemented.
- 4.2 Some will writers, having taken instructions, simply send the engrossment of the will to the client with instructions as to correct execution. It is hard to see how such will writers have satisfied themselves that the client knows and approves the content of the will that has been prepared. That will be particularly true where SSP2 are used because they are not set out in full in the document. Want of knowledge and approval of the content of the will can, of course, lead to later challenge. The costs of that challenge will usually be considerable. Perhaps those costs should be borne by the will writer for not doing a proper job in the first place.

### HOW GOOD DO WE HAVE TO BE?

- 4.3 We should all be competent; some of us may need to be expert. The general standard of care has been described in *Bolam v Friern Hospital Management Committee* [1957] 1WLR 582:

*‘When you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skills; it is established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.’*

See again, from *Midland Bank v Hett Stubbs & Kemp* [1978] 3AllER 571:

*‘The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession.’*

- 4.4 There may be different standards applied as between one will writer and another but the standard to be applied will be that of the competent will writer. The court will not reduce that standard where a person takes on work that is outside their area of expertise:

*‘A one-man firm cannot expect a lower standard of care to be applied to it merely because it delegates the conduct of its client’s affairs to an unqualified member of its staff, however experienced. If the conduct of that member of staff falls below the standard appropriate for a solicitor, and he does not seek appropriate advice from Counsel, or from a solicitor in the firm when need arises, then the firm cannot complain about a finding of negligence against it.’* *Balaman v Holden & Co* [1999] 149 NLJ898.

Even solicitors should steer clear of will writing if they lack experience:

*‘Whether it is appropriate for someone who is neither a solicitor nor a legal executive qualified in probate matters, but a licensed conveyancer, ever to accept instructions to participate in the drafting of a will and in the supervision of its execution is doubtful at best. But at all events, in my view, where a would-be testator is of advanced age or has been seriously ill or is under some other incapacity, it should always*

*be correct advice that (in addition to the need for ensuring the report and attendance of a doctor) the instructions for the will should be taken, and the execution of the will supervised, by a qualified solicitor with experience of wills. Failure to do so can readily lead to problems which could otherwise be prevented.'*  
*Parsons, Borman and LeI [2002] WTLR 237.*

#### SO HOW CAN WE CONTROL RISK?

4.5 There are two elements. The first is popular with the older generation: gain, and then rely on, experience of dealing with people, listening to them and preparing good wills. That takes time. The second element, in which younger practitioners may be more proficient, is to create and use a clear process with checklists, not slavishly, but used to enhance the process. The advantages of checklists are twofold. From a defensive point of view, the will writer can show, on later challenge, that they have addressed an issue. From a positive perspective, the list can enable the will writer to drive the process safely but fast, as is essential if there is to be any profit. A good process will consider:

- what is being done;
- how;
- why;
- when; and
- who is doing precisely what.

#### APPLYING THESE PRINCIPLES TO SSP2

4.6 The STEP Advanced Certificate in Will Preparation considers the process of will preparation and the taking of instructions in detail. For the purposes of SSP2 the will writer, while gathering and recording the information and instructions, will be assessing the testamentary capacity of the client and the client's general level of understanding of issues. That is particularly relevant to the way the will writer addresses the issue of administrative provisions. Some clients are fascinated by detail and will want to consider and have explained to them every paragraph of a will such that, where SSP2 are incorporated by reference, the client will naturally wish to read the whole of SSP2 before signing the will that incorporates them.

4.7 At the other end of the range are those who have little or no time or enthusiasm for such *minutiae*. This could be for the 'good' reason that the client trusts the will writer to understand their needs and to prepare a document that is entirely appropriate to those needs; or for the less good reason that the client is impatient of legal processes in general and the detail of will writing in particular. The difficulties are well illustrated by the observations of the Judge in *Martin v Triggs Turner Barton* [2009] WTLR1339:

*'On a matter such as this there is plainly scope for misunderstanding. It is a commonplace experience to find that, in the course of a conversational meeting, people do not express themselves as fully as if they were writing letters or reports. It is entirely possible that in a discussion which must have involved reference to a limit or restriction of £100,000 for someone whose attention was not entirely focussed to pick up that it was a restriction of what could be advanced when what was meant was what should be left. Usually, as a conversational meeting progresses such misunderstandings are ironed out – but not always. The misunderstanding was not ironed out here, as it is now beyond dispute that [the solicitor] and [the widow] emerged from the meeting with different impressions of what [the testator] intended.'*

The solicitors were found to be negligent.

## SUGGESTED CHECKLIST FOR SSP2

- 4.8 Each will writer will devise their own checklist that best suits their method of working, but the following table, which relates only to administrative provisions, may be used as a supplement to any existing will instruction form. It does not mention every provision, but is intended as a selection based on managing risk, to be approached on a 'pick and mix' basis as seems most relevant while taking instructions. It is for use only in taking instructions. Once the will has been drafted, different issues may arise to be checked with the client. The reference in square brackets in the left hand column is to a comment within this Toolkit.

Observations on the testator's mental capacity	Dealt with?	Comments
Is the testator: blind; or illiterate; or unable to understand written English?		
Is the testator: deaf; or unable to understand spoken English? N.B. if a translator is used, record name, qualification (if any) and relationship to the testator (if this cannot be avoided)		
<b>Use of Standard Provisions</b>		
Does any previous will incorporate SSP in any form?		
Is this a will for which the Standard Provisions are appropriate?		
Are any of the Standard Provisions inappropriate for this will?		
<b>Standard Provisions checklist</b>		
3 IIP trust protection? [6.1 to 6.3]		
4.8 trading?		
4.16.2 charity changes? [6.4 to 6.13]		
5.1 withholding income?		
5.2 advancing capital?		
6 powers over income?		
9 conflicts of interest? [6.14-6.15]		
10 trustee remuneration? [6.16-6.18]		
11 terms for corporate trustees? [6.19-6.22]		
12 trustee exoneration? [6.23-6.25]		
Will any of the Special Provisions be appropriate to this will?		

CONTINUES OVERLEAF

Special Provisions checklist		
14 Borrowing?		
15 Delegation?		
16 Company non-supervision:		
17 Deferring income to 21?		
18 Powers over trust capital for minors and beneficiaries without capacity?		
19 Absolute discretion?		
20 Appointment and retirement of trustees? [6.23]		
21 Balance between income and capital?		
22 Power of appropriation? [6.27]		
23 Relationships unknown to trustees?		
24 Does the <a href="#">STEP Practice Rule</a> apply here? [6.25]		
25 Would a survivorship clause be appropriate here? [6.30]		

With experience, the practitioner may rely less on the list. There is detailed commentary on each Provision in the Guidance. This Toolkit concentrates on the areas of greatest uncertainty and risk, as identified by practitioners, both in that consultation and after publication of SSP2. We therefore now turn to the questions most often asked about SSP2.

## 5. FREQUENTLY ASKED QUESTIONS

Before dealing with SSP2 in the order in which it is published, this section deals with questions from STEP members that seemed most urgent to address. These are partly adapted from the STEP website, but while the answers below are believed to be correct they are not official STEP policy. More difficult or specialised questions follow in Section 6 of this Toolkit.

### 5.1 FIRST EDITION OR SECOND EDITION?

This issue ranked highest among those raised by members after the publication of SSP2, as follows:

*Does SSP2 supersede the first edition?*

No. The first edition remains in force and there is no plan to withdraw it. It is for the will drafter to choose which edition is to be incorporated into a will or settlement.

*Where an individual has already executed their will, can the executors opt to use SSP1 or SSP2?*

A will can incorporate by reference only a document that was in existence at the date of execution. SSP2 was adopted by STEP on 16 April 2011 but not widely published at that time because the Guide for Practitioners was then still in preparation. It is therefore legally possible for a document dated on or after 16 April 2011 to incorporate SSP2. Which provisions are incorporated depends entirely on the way that the document has been drafted. See in particular SSP2 Provision 1 for the rules for incorporation of SSP2.

*Can I simply carry on using the first edition?*

Yes.

*Must a will executed after 31 October 2011 use SSP2?*

No.

*Can clients be asked when they update their wills whether they want to include the second edition?*

Yes.

*With existing trusts, is variation possible (to replace reference with first to second provisions)?*

The variation would in principle be possible, with the consent of all the beneficiaries and/or that of the court, but it will generally be easier to leave the first edition to continue in effect.

### 5.2 INCORPORATING SSP2

Again, this was a popular topic among members and raised practical issues.

*Can I choose to include the 'core' edition of SSP2 only?*

Yes. (See SSP2 Provision 1.1).

*If I do choose to include only the 'core' provisions am I ignoring the Special Conditions?*

It is hoped that you are not 'ignoring' the Special Conditions; rather that you are making an informed decision not to include any of the Special Conditions, which do not suit the circumstances of every client.

*If I include just the core provisions and ignore the Special Provisions can my clients have access to the Special Provisions at a later date?*

No. The decision must be made at the time of preparing the document.

*Can I include SSP2 including the Special Provisions, providing I make reference to their inclusion in the will?*

Yes. (See SSP2 Provision 1.3).

*Our definition of the STEP Provisions was recently amended in our wills and trusts to include 'any subsequent updates or amendments to the Provisions.' (This was done in anticipation of the new second edition, so it could be used when published). The Provisions cover such amendments at paragraph 13 and I note that trustees require a deed to include any future amendments. We also do not have a 13.3 in our wills or trusts. I was concerned whether our amendments were sufficient automatically to include the Second Edition into our current documents (e.g. those executed before the Provisions were published, but with provision to include any subsequent updates or amendments to the first edition). Should we be worried about this?*

See Answer 2 in paragraph 5.1 above in connection with the date on or after which SSP2 could be incorporated into a document. It is best to incorporate the Second Edition, using the wording set out in SSP2 Provision 2. In the event of a later edition, the parties can adopt the procedure set out in SSP2 Provision 13.

*What if we do not want to incorporate one of the Standard Provisions – for example, the provision about charity name change?*

No problem. As with SSP1, you may incorporate all of the Standard Provisions, or only some of them. Give due thought as to compatibility of your clause with the rest of the document and the provisions (that you wish to retain). Subject to that, you may exclude the operation of one or more of the provisions they take, see SSP2 Provision 2.2, subject to the provisions of the Principal Document (as defined in SSP2 Provision 2.1.5), so in any conflict, the wording of the document in which they are incorporated will take precedence over each of the provisions themselves.

### 5.3 DEPRECIATION

The next issue is simply one of interpretation.

*SSP2 Provision 4.4 talks about 'depreciation of the capital value' of property. Does that mean that if a shareholding goes down the trustees can make good the loss out of income?*

It is considered that the word 'depreciation' is not here applied as being the opposite of appreciation and that the clause is not intended to cover fluctuations in the value of marketable securities. As is implied by the second sentence of SSP2 Provision 4.4, the situation that is here addressed includes making good the gradual and inevitable loss in value of certain assets such as leaseholds.

### 5.4 CHARGING CLAUSE

This question was clear:

*A trustee can be paid under Clause 10, but what if they do not carry out the work personally but get their firm to do it? Can the firm charge?*

Yes, see the Guidance, paragraph 10. It is considered that s29 *Trustee Act 2000* is wide enough to allow charging by a partnership or an LLP.

## 6. THE MOST DIFFICULT PROVISIONS

These provisions may not be difficult in themselves, but may address difficult legal issues or there may be issues affecting their suitability that are not immediately apparent from the wording of the provision. In each case, the will writer should take specific instructions and at execution of the will draw the attention of the client to the clause and to any relevant issues.

### DISABLED BENEFICIARY: EFFECT OF SSP2 PROVISION 3

- 6.1 This concerns a rare but difficult issue where a beneficiary is disabled. *Suppose the trust has a disabled beneficiary at the time it takes effect. Is there any conflict between the Standard Provisions and s89 Inheritance Tax Act 1984 (disabled trusts)?*
- 6.2 The answer is complicated. There can be a conflict. This possibility is noted in *Drafting Trusts and Will Trusts – A Modern Approach*<sup>1</sup>. The issue has been highlighted (though without specific reference to SSP2) in the decision of the Court of Appeal in *Re Poppleston, Barclays Bank Trust Company v HMRC* [2011] EWCA Civ 810, where the Court had to decide the true interpretation of a will written for the benefit of a disabled son. There appeared to be a wide discretion but the will included a clause somewhat similar to SSP2 Provision 3. The court interpreted the will for the benefit of the disabled son loosely and purposively, so as to meet the requirements of s89. It was considering a clause similar to SSP2 Provision 3.
- 6.3 Although the reasoning of the Court of Appeal may seem somewhat strained in favour of the presumed wish of the testatrix to delay the burden of inheritance tax (IHT) on the fund, the decision shows that it is for the drafter in each case to consider whether or not each of SSP2 is needed. It is possible to incorporate the STEP Standard Provisions but to exclude any of them that are not needed in a particular case. It is for the users of SSP2 to decide, on a case-by-case basis, which provisions are appropriate and to adapt SSP2 accordingly.

### CHARITIES: EFFECT OF SSP2 PROVISION 4.16.2

- 6.4 This is a substantial topic and is of particular importance to firms that advise charities. Here we are concerned not with what is good for charities, but with what the client actually wants. As illustrated by *RSPCA v Sharp*, that may not always be easy to determine. Here, we are **not** concerned with the arguments for or against provision for charities, by legacy or by share of residue; nor with the IHT issues, that have become much more complex following the introduction of the 36 per cent rate of IHT by *Finance Act 2012*, Schedule 33 where there are substantial gifts to charity. We are concerned only with the impact of SSP2. The following issue has been raised by a STEP member:

*‘We act for lots of charities and don’t like SSP2 Provision 4.16.2. If a charity changes its name it may lose the legacy, even though that might not be what the testator wanted. We realise that often the trustees will “do the right thing” and the money can go only to charity but we are still concerned.’*

<sup>1</sup> J Kessler & L Sartin, *Drafting Trusts and Will Trusts – A Modern Approach*, 11th Edition (London: Sweet and Maxwell, 2012), Chapter 27

6.5 The short answer is that any testator can exclude any of the provisions. It is for the will writer to take proper instructions and draft the will accordingly. The more detailed answer is that trustees can exercise the power given them by SSP2 Provision 4.16.2 only where the charity

- ceases to exist; or
- changes its name; or
- enters into insolvent liquidation.

When that happens the trustees must have regard to the objects that the client wanted to benefit. The gift can be paid only to another charity, not to other beneficiaries, for example family members.

6.6 STEP members thought that SSP2 Provision 4.16.2 was helpful because the alternative, the cypres doctrine, can be restrictive. Without this clause, a gift to a named charity is not in principle affected by the fact that the charity changes its name, especially where the change is merely modernisation. That is not always the case though, as sometimes the change of name reflects a shift in the emphasis of the charity. The argument from lawyers who represent charities is that the testator would normally wish the gift to pass to the renamed charity. That cannot be assumed and is a point on which the will writer should take specific instructions. The trustees are likely to exercise their discretion in favour of the renamed charity because they must have regard to what the testator wanted.

6.7 A further concern, arising out of frequent probate disputes, is the risk of challenge to charitable gifts by family members and the fear that SSP2 Provision 4.16.2 might fuel the flames. It is hard to see how that would actually arise. Family members have nothing to gain from the exercise of the power because the money must go to charity. A threat by the family, through compliant executors, to exercise their power under this provision unless the charity was willing to accept the proposed terms of settlement, is a possibility.

6.8 However, in those circumstances, and given that litigation might by then already be on foot, there might be grounds for an application to remove the executors. Such applications are expensive but more common now than formerly. In the context of increased probate litigation the discretion of the court to remove executors is becoming more widely known. However, looking at the issue in the round, SSP2 Provision 4.16.2 does more good than harm.

6.9 Clearly, all this can be avoided by taking good and clear instructions. The possibility that SSP2 Provision 4.16.2 might not suit every client is highlighted in the checklist at paragraph 4.7 above. Where a client wishes to benefit a charity, they should be asked what they would like to happen if the charity changes its name.

6.10 The issue was also put in a slightly different way, again by a STEP member.

*'We act for lots of charities and don't like SSP2 Provision 4.16.2. If a charity ceases to exist it may lose the legacy, even though that might not be what the testator wanted. The same could apply on merger of the chosen charity with another. We realise that often the trustees will 'do the right thing' and the money can go only to charity but we are still concerned. There is provision for this in Charities Act 2006 but that takes effect subject to the terms of the will.'*

- 6.11 As noted, any testator can exclude any of the provisions. It is for the will writer to take proper instructions and draft the will accordingly. Where charities merge, they should themselves be aware of the problem and adopt structures to deal with it. Similar issues arise to those mentioned at 5.7 above. The activities and objects, or at least the emphasis, of a charity might no longer reflect something that the client had originally wanted to benefit.
- 6.12 Even without the STEP Provisions, charities may decide to retain the old structures as (almost) dormant charities as a channel for receiving legacies. For example, there could be difficulties for the charity where the English rules as to merger do not apply, or because the will excluded those rules (though perhaps that might be rare). Section 75F *Charities Act 1993*, which is in issue here, applies only to gifts that are governed by English law and made to English law charities. There is similar provision in the *Charities (Northern Ireland) Act 2008*.
- 6.13 For will drafters who are concerned with these issues, there is further material on the website of Charity Direct, for example: [www.charitiesdirect.com/caritasmagazine/charitiesin-danger-of-missing-out-on-legacies-if-they-change-their-name-408.html](http://www.charitiesdirect.com/caritasmagazine/charitiesin-danger-of-missing-out-on-legacies-if-they-change-their-name-408.html) which contains several illustrations of clauses that will override s75F in circumstances where that might not have been foreseen by the client. There are particular difficulties where a gift takes effect after the transfer of property but before the registration of the merger of charities. An unincorporated charity ceases to exist upon transfer of all its property. There is further guidance in Charity Commission's Operational Guidance on the Register of Charity Mergers. All of this, in my view, only goes to support the warning quoted in the second part of paragraph 4.3 above.

#### CONFLICTS OF INTEREST: SSP2 PROVISION 9

- 6.14 Trust law has evolved very strict rules to prevent a person in whom confidence has been placed from profiting from their position as a trustee. In an extreme case this can mean that where knowledge comes to the trustee only in their capacity as such, they must not use that knowledge for transactions, for example share dealing in public companies, for their own benefit. However, these rules can be oppressive in several ways. Where the executors are family members and it is hoped or even intended that family members will succeed to the family business, or manage to go on living in the family home, it is very easy for a technical conflict to arise even though the transaction proposed following a death is one of which the testator would have approved.
- 6.15 SSP2 Provision 9 is designed to manage these situations so that transactions that would otherwise be forbidden by trust law can be entered into, subject to appropriate safeguards. The existence of those safeguards has the effect that this is not an onerous clause, the mere inclusion of which forces the will writer to consider the [STEP Practice Rule](#). Most testators will be happy with the provision once it has been explained to them. However, if the will writer is concerned that the client only just has capacity to make a will it may be prudent as far as possible to simplify the will and to remove as many as possible of the clauses that must otherwise be explained to the testator. In those circumstances the will writer may decide, when incorporating SSP2, specifically to exclude SSP2 Provision 9 and to rely on the general law.

**TRUSTEE REMUNERATION: SSP2 PROVISION 10**

6.16 Remuneration under this provision is limited to what is reasonable and to trustees acting in their professional capacity. See the Guidance: there must be a link between the skill set of the trustee and the work actually done. It is considered, see 5.4 above, that the work may be done personally or by the individual's firm or employee: see s29 *Trustee Act 2000*.

6.17 A trustee acts in a professional capacity if:

- they do the work themselves;
- their business provides the management or administration of trusts; or
- they deal with particular aspects of trust management or administration services.

All their work is covered. Two statutory provisions are relevant here. Under s28(2) *Trustee Act 2000*:

*'The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.'*

Section 29 *Trustee Act 2000* allows a trustee reasonable remuneration if either a trust corporation or someone who is not the trustee of a charitable trust. SSP2 Standard Provision 10 is based on s29 (3) *Trustee Act 2000*, which defines 'reasonable remuneration' as such

*'as is reasonable in the circumstances for the provision of those services to or on behalf of that trust by that trustee and for the purpose of subsection (1) includes, in relation to the provision of services by a trustee who is an authorised institution under the Banking Act 1987 and provides the services in that capacity, the institution's reasonable charges for the provision of such services'.*

6.18 The limitation of charges under this provision to what is reasonable has the effect that this is not an onerous provision or one that, by its mere inclusion in a will, triggers the same duty of disclosure as exoneration or exculpation clauses, described at 6.23 to 6.25 below.

**TRUST CORPORATIONS: SSP2 PROVISION 11**

6.19 Where a trust corporation is included as executor or trustee, the will writer may face difficult issues. On the one hand, trust corporations tend to favour the use of their own charging clauses and terms and conditions if they are to act. The will writer must however remember that their client is the person signing the will, not the trust corporation, even though the introduction to the will instructions may have come through the trust corporation.

6.20 The background to the problem concerns the extent to which a trust corporation may update its terms and conditions to reflect market changes. SSP2 Provision 11.1 sets the baseline, namely that the terms and conditions of the trust corporation as in existence at the date that the will or trust deed is signed are the ones that govern the basis on which the trustee will act. There can be no difficulty with that basic proposition, whereas an argument runs that no will can incorporate by reference a document that, at the date of the will, does not exist.

- 6.21 The problem for trust corporations is that many years, even a generation, can elapse from the writing of a will to its coming into force. A professional trustee, such as a solicitor who was named as an executor, would be able at the time of the death, to indicate the current level of his fees for acting as such. That freedom is not so readily available to the trust corporation that has agreed to work within specified terms and conditions.
- 6.22 SSP2 Provision 11 now reflects discussions between STEP and trust corporations in that, under SSP2 Provision 11.2 there is scope for a trust corporation to use current terms where it is appointed as trustee. This means that, where the will appoints, say, family executors who do not wish to be involved in the long-term business of acting as trustees and who wish to appoint a trust corporation to follow them, it will be possible for up-to-date terms to be used even though they were not in force at the time that the will was made.

#### LIABILITY OF TRUSTEES: SSP2 PROVISION 12

- 6.23 The starting point here is s1 *Trustee Act 2000*, which defines the duty of care as:

*‘such care and skill as is reasonable in the circumstances, having regard in particular*  
*(a) to any special knowledge or experience that he has or holds himself out as having, and*  
*(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.’*

This assessment of the skill of trustees is similar to, but not necessarily the same as, the duty of care of solicitors. Likewise it has nothing directly to do with the level of skill of the will writer discussed at 4.2 above and following. The duty of care of solicitors takes account of various circumstances. One of them was described by J Arnold in a judgment reported at [2011] EWHC410 at paragraph 149, as:

*‘the degree of expertise which the solicitor (or other legal advisor) holds himself out as possessing. Thus in Matrix-Securities Ltd v Theodore Goddard [1998] STC 1 at 27, Lloyd J (as he then was) held that the defendants’ solicitors were to be judged by the standard of competence of firms of solicitors with specialist tax departments, which was a high standard.’*

- 6.24 EXCLUSION OF THE S1 DUTY OF CARE IS BY *TRUSTEE ACT 2000* SCHEDULE 1 PARAGRAPH 7:

*‘The duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply.’*

This exclusion was criticised at the time that the legislation passed through the House of Lords. SSP2 Standard Provision 12 therefore implements paragraph 7 by cutting down the duty in s1. Will writers should note the attitude of STEP to trustee exoneration clauses and trustee exculpation clauses. The duty of STEP members, which may be good practice for others, is set out in its [Practice Rule](#) and is, in a nutshell, to notify the settlor or testator where provisions are included that would limit or exclude the liability of a trustee or executor for negligence.

## 6.25 THE STEP PRACTICE RULE

A STEP member must use reasonable endeavours to ensure that:

- ‘(i) he/she or another shall have notified the settlor of the provision in the instrument or in the original trustee or executor’s terms and conditions relating to the discloseable circumstances; and*
- (ii) they have reasonable grounds for believing that the settlor has given his full and informed acceptance of such provisions prior to his execution or approval of the instrument.’*

The full text of the STEP Practice Rule and of the guidance that accompanies it, are available [here](#).

## THE STEP SPECIAL PROVISIONS

6.26 By their very nature these are provisions that not every client will wish to include in a will. The general rule must therefore be not to include any of them until the will writer has:

- satisfied themselves that the provision is appropriate to the needs of the client; and
- obtained instructions to include the provision;

and when the draft will is submitted for approval, the will writer has:

- drawn the attention of the client to the provision; and, if attending at execution, has
- satisfied themselves that the client has understood it.

6.27 The Guidance to SSP2 should be referred to and is not repeated here, except for particularly difficult points. Where the proposed executors are elderly, SSP2 Provision 20 will be relevant.

## APPROPRIATIONS: SSP2 PROVISION 22

6.28 The background is the rule in *Robinson v Collins* [1975] 1 WLR 309. Where time has elapsed (as it nearly always will have done) from the date of death to the date on which the executors can appropriate an asset to a beneficiary, that appropriation takes place, for administration (but not for tax) purposes at the value at the time of appropriation. Section 41(3) *Administration of Estates Act 1925* allows a personal representative to ascertain the value of property that is to be appropriated and if necessary to employ a valuer. Under s41 the personal representative must act fairly, considering the interests of all beneficiaries. That fairness was examined in *Lloyds Bank v Duker* [1987] 1 WLR 1324 over the allocation of shares in a private company. It proved impossible to allocate the shares *in specie* without creating unfairness, so the court ordered their sale.

6.29 Using SSP2 Provision 22 and applying the rule in *Robinson v Collins* will normally be fair but it can have surprising effects for Capital Gains Tax (CGT). The beneficiary will, for CGT, be treated as acquiring the asset at probate value, not at the value for appropriation. There is also an argument, not tested in court, that there may be an effect for IHT also, as where assets are appropriated in satisfaction of the nil-rate band.

## NO SURVIVORSHIP CLAUSE

6.30 SSP2 deliberately does not include a survivorship clause, as was commonly included in wills before the introduction of the transferable nil-rate band for IHT. Such a clause can, in certain circumstances, actually increase the burden of IHT. An explanation of tax is outside the scope of this Toolkit. Will writers are referred to specialist books on the subject.

## 7. PARTICULAR DRAFTING ISSUES WHERE SSP2 ARE USED

### 7.1 BASIC PRINCIPLES

This Toolkit does not attempt to explain how wills should be drawn. However, there is widespread evidence that many will drafters make errors of principle and of detail when dealing with Standard Provisions, so this section is directed to those problems.

### 7.2 ORDER OF WILL

No order is required by law as to how a will is set out, but custom suggests that administrative provisions appear towards the end of the will after the gift of the residue of the estate.

### 7.3 GENERAL APPROACH

Standard Provisions are designed to save the will writer time and trouble and to avoid routine errors, for example of typing or detail. As was made clear at Section 4, a competent will writer will put in place simple systems or checklists to minimise risk and will decide, when taking instructions:

- whether SSP2 are appropriate, either in whole or in part; and if so:
- either the Standard Provisions alone; or
- the Standard Provisions and some of the Special Provisions; or
- the whole of SSP2.

### 7.4 SIMPLE CHECKLIST

This Toolkit will have shown that quite complicated issues arise from the use of SSP2 but in practice for the will drafter the rules are simple:

- Know what is in SSP2
- Take careful instructions
- Select from SSP2 the clauses that are appropriate for the instructions taken
- Include SSP2 as appropriate in the draft
- Do not duplicate provisions in SSP2.

There are further rules, concerning submission of the draft and attending on execution of the will, which are dealt with at in Sections 8 and 9 respectively.

## 7.5 'PET' CLAUSES

The title here means, not clauses designed to make provision for household pets, but favourite clauses that the drafter has accumulated in years of practice and which he or she always likes to include in every will. As this Toolkit may have shown, SSP2 is comprehensive and is the product of careful thought and discussion among some very talented chancery lawyers, leavened with insights from experienced practitioners up and down the country. It is not every will writer who can do better than the team that was headed by James Kessler QC in drafting SSP2.

Where the will writer has a favourite clause that they routinely include in wills but they also wish to incorporate all or some of SSP2, the rule must be first, to test the particular issue or 'mischief' that the pet clause was intended to address, to see whether precisely that issue has already been dealt with in SSP2. This may seem an arduous, even pointless, exercise and that the extra clause 'will do no harm'. Not so: the inclusion of a clause that duplicates the effect of another proves that the will drafter has not looked at the effect of the whole document. Anyone who has seen the High Court in action, considering the meaning of a clause of a will that is contested, is forced to wonder whether their own routine drafting of wills would survive such level of scrutiny. The old advice 'remember how this letter will sound when it is read out in court' applies to every line of every will that a will drafter prepares. If the pet clause in truth merely duplicates part of SSP2, it should be removed.

## 8. SUBMISSION OF THE DRAFT WILL FOR APPROVAL

### WHY BOTHER?

8.1 It is standard practice among some will-writing firms not to submit a draft for approval but to submit the final document for signing, relying on the instructions that were originally taken. The rationale for this is that, if the final draft is correct, time has been saved and the will can be signed sooner; if not, nothing is lost, the document can be revised and a fresh engrossment sent. A second argument is that many people do not understand the concept of a draft and treat even a document described as a draft as if it were the engrossment, sign it (usually without getting the signature witnessed) and send it back.

8.2 The practice of sending the engrossment for signature, or of calling the client in to witness the will without first submitting a draft, may be appropriate but only if the will writer is entirely satisfied that:

- the instructions taken can be relied on in every detail; and
- there are no ambiguities; and
- the situation is straightforward.

Furthermore, where the will is urgent there may simply be no time to submit a draft.

8.3 On the other hand, without wishing to slow down the process or increase the cost, there are good arguments for the submission of a draft before the final copy. On taking instructions the will writer may often have detected some slight uncertainty of the client as to exactly how the estate is to be distributed. Seeing the proposals on the page may be enough to persuade the client that those initial ideas are not precisely what they want and may help to arrive at a better solution.

8.4 Clients do not always remember everything at first interview. Elderly clients often have second thoughts. Seeing an impressive final document may over-persuade a client into signing, through fear that it will be too much trouble or too costly to amend the document to make it conform to what the client (now) really wants. There may be factors within the family that did not emerge initially and that need to be addressed in the drafting: for example, so-called 'grandchildren' who are neither related by blood nor formally adopted, but have been accepted as such by the family.

8.5 The submission of a draft, with an appropriate covering letter, gives the will writer a second chance of ensuring that the will is what the client wants, with specific reference to difficult areas such as SSP2 Provisions 9, 10 and 12. If a draft is not sent, consider sending the client a letter summarising the will writer's understanding of the instructions given. In *Hawes v Burgess* [2013] EWCA Civ 74 the failure to send either a summary or a draft to the elderly client in advance of the meeting at which execution took place was a factor in the decision of the Court of Appeal that knowledge and approval of the content of the will had not been proved.

## 8.6 HOW MUCH EXPLANATION OF THE STANDARD PROVISIONS SHOULD BE PROVIDED?

James Kessler QC, in *Drafting Trusts and Will Trusts – A Modern Approach*, observed that many clients will probably not want a detailed explanation of the Standard Provisions and will wish only to know that ‘This is a standard way of providing the executors with a number of technical and routine provisions they need to administer the estate properly’.<sup>2</sup>

STEP’s UK Technical Committee considered the Standard Provisions and concluded that no notice was required under the [STEP Practice Rule relating to Trustee Exemption Clauses](#), because the Standard Provisions do not contain any provisions, the effect of which was to limit or exclude liability for negligence.

However, it is certainly necessary to provide an explanation of SSP2 Provision 11 (power for a trustee acting in a professional capacity to charge) and, indeed the issue of charges should have been fully discussed with the client at the time when the client was deciding who to appoint. At that time the will writer should have:

- made clear that there is no obligation to appoint a professional, and
- if the client is considering appointing the will writer, explained the basis on which charges will be calculated and exactly what services they cover.

It may also be appropriate to explain the effect of SSP2 Provision 9 (fiduciaries) and 12 (liability).

- 8.7 If any Special Provisions are included, it is likely to be appropriate to give a brief explanation of the effect, since the Special Provisions cannot be described as ‘standard’. A short checklist follows that will writers may find helpful when preparing the will. If a draft is being sent for approval, this may reduce the risk of omissions. If the will writer is seeing the client with the draft, this is an *aide mémoire* to have handy at interview.

	Yes/No	Action taken
Is every detail in the instructions correctly represented by a provision in the will?		
Has a copy of SSP2 been supplied?		
Does the client now want a copy of SSP2?		
Has any Standard Provision been excluded?		
Have any of the Special Provisions been included?		
If relevant, has an explanation of the power for professional trustees to charge been provided?		
Has an explanation of the position of fiduciaries and liability of trustees been provided?		
Has an explanation of any SSP2 Special Provisions been provided?		
Does any change in instructions suggest that any provisions should be added or taken out?		
Has any other problem arisen?		

<sup>2</sup> J Kessler & L Sartin, *Drafting Trusts and Will Trusts – A Modern Approach*, 11th Edition (London: Sweet and Maxwell, 2012), Chapter 27

## STANDARD PARAGRAPHS FOR LETTER ACCOMPANYING A WILL SENT FOR APPROVAL

- 8.8 While the circumstances of each client may be slightly different, it is important to try to use standard paragraphs in letters to keep the cost of writing wills to a minimum, so that the exercise makes a profit. Standard paragraphs for letters, used intelligently, can help to avoid difficulties. The problem is, of course, that including standard paragraphs can make letters so long that the client tires of reading them. The advantage of a meeting to discuss a draft will is that, if the will writer is taking any notice at all of the reaction of the client to what he or she is saying, it is possible to check that the client does actually understand the will before signing it.

## SUGGESTED PARAGRAPH TO INCLUDE IN A WILL – SIMPLEST SITUATION

- 8.9 Here, subject to the usual disclaimer of liability, is a suggested clause in a letter sending out a draft will:

*'The draft will contains, at clause [ ], a reference to the STEP Standard Provisions (2nd Edition). These Provisions give the executors a number of technical and routine provisions and powers to help them to administer the estate properly. The full text of the STEP Standard Provisions is published on the website of STEP at [www.step.org/step-standard-provisions]. I can supply you with a printed copy of the Provisions [for an additional charge of £ including VAT].'*

## 8.10 LONGER FORM OF EXPLANATION

The above is the bare minimum. A fuller set of suggested paragraphs might read:

*'The will contains at clause [...] reference to the STEP Standard Provisions (2nd Edition) [and [certain of] the Special Provisions]. The full text of the Standard Provisions and of the Special Provisions is available on the STEP website at [...] / is set out in the enclosed document / is also available in hard copy with some guidance notes enclosed / at an additional charge [of £ inclusive of VAT].*

*I would draw your attention in particular to the following Provisions. SSP2 Provision 9, which deals with conflicts of interest, requires the involvement of an independent trustee where there is any conflict of interest between the fiduciary duties of anyone who owes a duty to the trust and their personal interest or duties. An example would be the purchase by a trustee of trust property.*

*SSP2 Provision 11 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.*

*SSP2 Provision 12 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. 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.*

*All of these provisions are considered to be helpful to trustees whilst not being unfair to beneficiaries.*

*The following STEP Special Provisions have been included [list them and explain them briefly].'*

## 9. EXECUTION OF A WILL

### THE DUTY OF THE WILL WRITER

- 9.1 *Esterhuizen v Allied Dunbar Assurance* [1998] 2 FLR 668 imposes a high duty of care on those preparing wills. It suggests that the will writer is required to make an offer of supervised execution. J Longmore described the process of signature and attestation as ‘not completely straight forward’ and added that ‘disaster may ensue if it is not correctly done’. He went on to say that:

*‘Any testator is entitled to expect reasonable assistance without having to ask expressly for it. It is in my judgment not enough just to leave written instructions with the testator. In ordinary circumstances just to leave written instructions and to do no more will not only be contrary to good practice but also in my view negligent.’*

In *Gray v Richards Butler* [2000] WTLR 143 Lloyd J held that a clear letter of instruction was sufficient to discharge the duty owed to the client. He described the solicitor’s instructions as ‘comprehensive’ and said that it was in his opinion necessary ‘to bear in mind the very clear terms of the attestation provisions of the will’.

### 9.2 DISCHARGING THE DUTY

Bearing in mind the conflict between these two cases, it is best practice to offer a client who has approved the draft will an opportunity:

- to come into the solicitor’s office to sign the will and have it attested, or
- to have a home visit at which the solicitor and a member of staff can witness the testator’s signature, or
- to make their own arrangements.

If the will writer does not want to offer a home visit, this limitation must be expressly set out in the original letter of instruction.

### 9.3 THE EXECUTION PROCESS – THE FORM OF THE WILL

It is important to minimise the possibility of any allegation that a will has been tampered with after execution. It is good practice to fasten all pages together securely and insert page numbers, preferably using the ‘page 1 of 6’ format.

If the will is to be signed by someone else on behalf of the testator, use a suitable attestation clause reciting that:

- the will was signed in the presence and by the direction of pages of the testator, and
- that the testator appeared to know and approve the contents of the will

Although a beneficiary who signs on behalf of a testator is not prevented by *Wills Act 1837*, s15 from taking a benefit under the will, it is not good practice for a beneficiary to sign. It is desirable that the person signing on the testator’s behalf is independent, ie neither a beneficiary nor a spouse or civil partner of a beneficiary.

Because suspicions may be aroused where a will is signed by someone other than the testator, it is desirable in such a case that the execution process is supervised by a professional.

#### 9.4 ATTENDANCE IN PERSON TO WITNESS THE SIGNING OF THE WILL

Where a draft of the will has been submitted for approval the task of explaining the document at the time of signing will be less onerous because the will writer has already taken steps to ensure that the client understands the document (and will have evidence on the file of having done so). It will therefore usually be enough for the will writer to remind the client of the earlier letter, check that the client is happy with the content, including the administrative provisions, and get the will signed and witnessed.

It goes without saying that if the will writer does supervise execution, whether in the office or on a home visit, great care must be taken to follow the correct process. For examples of error see *Hill v van Erp* (1977) ALJR 487 where a solicitor who supervised the execution of a will allowed the testator's wife to witness the will and was held liable in negligence for the loss of the wife's entitlement under the will. Also see *Marley v Rawlings* where a husband signed his wife's will while she signed his. The Court of Appeal held (1) that the husband's will was invalid because he had not intended his signature to give effect to the document he signed and (2) as an invalid will it was incapable of rectification ([2012] EWCA Civ 61). Although the Supreme Court ultimately held that the will was properly executed and, therefore, capable of rectification ([2014] UKSC2), it is clearly preferable to check correct execution to avoid dispute. Many practitioners now avoid using the expression 'signed by the testator/testatrix' at the end of the will and use the client's name on the basis that this makes errors less likely.

To avoid error, follow the steps set out in the bullet points contained in 'Suggestions for Signing and Safekeeping of Wills' at Section 9.6.

#### SENDING THE WILL OUT TO THE CLIENT

9.5 Where the client does not wish to visit the will writer to sign the will or to pay a call-out fee for the will writer to visit, give the client the following information in writing:

- an explanation of why it is preferable to execute the will in the presence of a qualified person,
- confirmation that the client has elected not to do so,
- a description of the steps needed for valid execution of a will,
- an offer to inspect the executed will (or a copy of it) to check that it appears to have been properly executed.

9.6 This part of the guide assumes that the will writer has agreed with the client that the client will be responsible for getting the will signed and witnessed. It has been observed that any instructions must be 'accurate and intelligible' though the courts have not considered any specific form of letter. The following paragraphs may be suitable to be included in the letter that sends the will for signing. Where no draft was submitted for approval it will be appropriate to include some of the paragraphs that were suggested at 8.9 or 8.10 above. Subject to the usual disclaimer, the following may be used when sending out the engrossed will for signing.

## SUGGESTIONS FOR SIGNING AND SAFEKEEPING OF WILLS

*'With this letter I am sending you a fair copy of your will ready to sign. It follows the draft that we have discussed and I hope that in all respects it now reflects your wishes. Please read it through just to check you are happy with it.*

*I have explained to you that signing a will and having it witnessed correctly requires care, and I have offered to oversee the execution process. However, you did not think that this was necessary.*

*To be sure that your will is properly signed and witnessed, please follow the steps set out below:*

- *Arrange to have two individuals available to witness your signature on the will.*
- *The witnesses must not be taking any benefit under the will nor a husband or wife or civil partner of a person taking a benefit.*
- *The witnesses may be under 18 but must be able to understand what is happening and must not be blind.*
- *Have both witnesses together with you in the same room when you sign the will with your usual signature.*
- *The witnesses should sign their usual signatures below your signature and write their name address and occupation.*
- *Add the date on which the will is signed and witnessed on the front cover and at the end above the place where you sign.*
- *You and the witnesses must stay in the same room until the whole process is completed.*

*I have set out below an example of how the document might look:*

### EXAMPLE

***In witness*** whereof I have hereunto set my hand this [17th] day of [February] 2012.

***Signed by*** the above named Henry John Snodgrass                      **H John Snodgrass**

*In our joint presence and then by us in his*

Witness Signature 1: **Emily Hooper**

Witness 1 Signature: **Gerald Blythe**

Name: **Emily Hooper**

Name: **Gerald Charles Blythe**

Address: **3 Ranelagh Gardens,  
London SW4 3AX**

Address: **5 Soho Square,  
London W1 6GF**

Occupation: **Media consultant**

Occupation: **Actuary**

*Keep your will in a safe place. This could be a safe at your own home, or a bank (though sometimes banks charge for safekeeping).*

*Make sure that those who will deal with your affairs after your death know where to find your will.*

*I have a duty to ensure so far as I can that the will does get signed properly, and I shall need, to discharge that duty, to see details of the way in which the will has been signed. For my purposes a photocopy of the final page of the will, showing the signatures, is sufficient.*

*If you have any difficulty at all in getting the will signed please telephone me and I will do what I can to help.'*

### 9.7 NEED FOR A MEDICAL OPINION

When taking instructions, will writers should satisfy themselves by asking the client open questions whether or not the client appears to fulfil the test of testamentary capacity as set out in *Banks v Goodfellow* (1870) L.R. 5 QB 549. In case of doubt it is important to obtain a medical opinion.

The testator also needs to have capacity at the time the will is executed, although a lower level of capacity is required at this point. It is sufficient that the testator understands that he is executing the will for which he had previously given instructions (*Parker v Felgate* (1883) 8 PD 171; *Perrins v Holland* [2010] EWCA Civ 840).

If supervising execution, the will writer should record in the attendance note details of the testator's apparent capacity.

### 9.8 CHECKLIST

The following checklist may help to prevent problems.

Did we agree that the client would get the will signed and witnessed?	
<i>If attending in person:</i>	
Was the content of the will, including SSP2, explained either when taking instructions or when sending the draft for approval?	
If not, do that now and tick sheet to confirm.	
If explained, does the client remember?	
Is there any reason to doubt the client's testamentary capacity?	
Is the client happy with the will?	
Do attendance note of seeing client to witness the will.	
<i>If sending the will out for signing:</i>	
Was the content of the will, including SSP2, explained earlier?	
If not, do that in the covering letter.	
Are the will signing instructions 'accurate and intelligible'?	
Has the client returned the will or sent a copy of the signatures?	
If not, send a reminder.	
If the will or a copy has been received, check carefully: do they look right?	
Either way, do an attendance note. Write or telephone to sort out any problems.	

N.B. When dealing with two clients who have asked for similar wills, consider an end note urging the will writer to ensure that each client signs the right will. It is a good idea to send separate letters, even where both know what is in the other will. Although the courts have now successfully addressed this problem, it would be prudent to put procedures in place to prevent the problem from occurring in the first place.