

STEP STANDARD PROVISIONS (ENGLAND AND WALES)

2nd Edition

Written by James Kessler QC TEP

With guidance notes by Toby Harris TEP LLB CTA

INTRODUCTION TO THE SECOND EDITION

The STEP Standard Provisions is a publication for practitioners who draft Wills subject to the law of England and Wales. It sets out clear provisions to include in a Will avoiding technical terms that may confuse the lay reader.

Any properly drafted Will or Settlement must contain a large amount of text dealing with routine administration matters. It had been necessary to set this out in full in each Will until STEP condensed this material into its Standard Provisions, which first published in 1992 and is now in its second edition.

Trust law has changed considerably since the first edition and the updated STEP Standard Provisions reflect this. The most significant amendment is that there is now a choice to incorporate either the 'core' provisions or the fuller form when drafting a document. The second edition also attempts to address an issue that concerned the drafters and consultees: the possible misuse of powers conferred by the Provisions.

The STEP Standard Provisions second edition was led and mainly drafted by James Kessler QC TEP, and the accompanying Guidance notes, which are provided for Will-drafting practitioners who know the first edition and want to know what has changed, were drafted by Toby Harris TEP. The Society is grateful to James and to Toby and to all the consultants for their hard work on behalf of the entire profession.

At the time of publication, STEP is applying for a practice direction from the Principal Registry of the Family Division, as was granted for the first edition, permitting Wills incorporating the STEP Standard Provisions second edition by reference to be proved in the normal way, without providing text of the Provisions themselves.

Jennie Pratt TEP, Chair, STEP England and Wales

PROVISIONS OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS

Second Edition

The text of the 2nd edition of the STEP Standard Provisions is as follows:

1 Incorporation of STEP Provisions

1.1 These provisions (with the exception of the Special Provisions) may be incorporated in a document by the words:-

The standard provisions of the Society of Trust and Estate Practitioners (2nd Edition) shall apply

or in any manner indicating an intention to incorporate them.

1.2 These provisions (including all the Special Provisions) may be incorporated in a document by the words:-

The standard provisions and all of the special provisions of the Society of Trust and Estate Practitioners (2nd Edition) shall apply

or in any manner indicating an intention to incorporate them.

1.3 These provisions (including specified Special Provisions) may be incorporated in a document by the words:-

The standard provisions and the following special provisions of the Society of Trust and Estate Practitioners (2nd Edition) shall apply:

[specify which special provisions apply, as appropriate]

or in any manner indicating an intention to incorporate them.

1.4 The Special Provisions shall not be incorporated in a document only by the words:-

The standard provisions of the Society of Trust and Estate Practitioners (2nd Edition) shall apply

in the absence of the words "Special Provisions" or some other expression of an intention to incorporate them.

2 Interpretation

2.1 In these provisions, unless the context otherwise requires:-

2.1.1 "**Civil Partner**" has the same meaning as in section 1 Civil Partnership Act 2004.

2.1.2 "**Income Beneficiary**", in relation to Trust Property, means a Person to whom income of the Trust Property is payable (as of right or at the discretion of the Trustees).

2.1.3 "**Person**" includes a person anywhere in the world and includes a Trustee.

2.1.4 "**Principal Document**" means the document in which these provisions are incorporated.

2.1.5 "**Special Provisions**" means the provisions in clauses 14–23 of these provisions.

2.1.6 "**Trust**" means any trust created by the Principal Document and an estate of a deceased Person to which the Principal Document relates.

2.1.7 "**Trustees**" means the personal representatives or trustees of the Trust for the time being.

2.1.8 "**Trust Fund**" means the property comprised in the Trust for the time being.

2.1.9 "**Trust Property**" means any property comprised in the Trust Fund.

2.2 These provisions have effect subject to the provisions of the Principal Document.

3 Protection for interest in possession trusts

If the existence of any powers conferred by these provisions would be enough (without their exercise) to prevent a Person from being entitled to an interest in possession (within the meaning of the Inheritance Tax Act 1984) then those powers shall be restricted so far as necessary to avoid that result.

4 Additional powers

The Trustees shall have the following powers:

4.1 Investment

The Trustees may invest Trust Property in any manner as if they were absolutely entitled to it. In particular the Trustees may invest in land in any part of the world and unsecured loans.

4.2 Management

The Trustees may effect any transaction relating to the management or disposition of Trust Property as if they were absolutely entitled to it.

In particular:

- 4.2.1 The Trustees may repair and maintain Trust Property.
- 4.2.2 The Trustees may develop or improve Trust Property.

4.3 Joint property

The Trustees may acquire property jointly with any Person.

4.4 Income and capital

Income may be set aside and invested to answer any liabilities which in the opinion of the Trustees ought to be borne out of income or to meet depreciation of the capital value of any Trust Property. In particular, income may be applied for a leasehold sinking fund policy.

4.5 Accumulated income

The Trustees may apply accumulated income as if it were income arising in the current year.

4.6 Use of Trust Property

- 4.6.1 The Trustees may acquire any interest in property anywhere in the world for occupation or use by an Income Beneficiary.
- 4.6.2 The Trustees may permit an Income Beneficiary to occupy or use Trust Property on such terms as they think fit.
- 4.6.3 This clause does not restrict any right of beneficiaries to occupy land under the Trusts of Land and Appointment of Trustees Act 1996.

4.7 Application of trust capital

- 4.7.1 The Trustees may:
 - (i) lend money which is Trust Property to an Income Beneficiary without security, on such terms as they think fit,
 - (ii) guarantee the debts or obligations of an Income Beneficiary,
 - (iii) charge Trust Property as security for debts or obligations of an Income Beneficiary, or
 - (iv) pay money which is Trust Property to an Income Beneficiary as his income, for the purpose of augmenting his income.
- 4.7.2 Clause 4.7.1 applies only if:
 - (i) the Trustees have power to transfer that Trust Property to that Income Beneficiary absolutely, or
 - (ii) the Trustees have power to do so with the consent of another Person and the Trustees act with the written consent of that Person.

4.8 Trade

The Trustees may carry on a trade, in any part of the world, alone or in partnership.

4.9 Deposit of documents

The Trustees may deposit documents relating to the Trust (including bearer securities) with any Person.

4.10 Nominees

The Trustees may vest Trust Property in any Person as nominee, may authorise the use of sub-nominees, and may place Trust Property in the possession or control of any Person.

4.11 Place of administration

The Trustees may carry on the administration of the Trust anywhere they think fit.

4.12 Payment of tax

The Trustees may pay tax liabilities of the Trust (and interest on such tax) even though such liabilities are not enforceable against the Trustees.

4.13 Indemnities

The Trustees may indemnify any Person for any liability properly chargeable against Trust Property.

4.14 Security

The Trustees may charge Trust Property as security for any liability properly incurred by them as Trustees.

4.15 Appropriation

The Trustees may appropriate Trust Property to any Person or class of Persons in or towards the satisfaction of their interest in the Trust Fund.

4.16 Receipt by charities etc

- 4.16.1 Where Trust Property is to be paid or transferred to a charity or non-charitable association or company, the receipt of the treasurer or appropriate officer of the organisation shall be a complete discharge to the Trustees. A Trustee shall not be liable for making a payment or transfer to any Person who appears to be the treasurer or appropriate officer unless at the time of the distribution the Trustee has knowledge of circumstances which call for enquiry.
- 4.16.2 If any charity ceases to exist, changes its name, or enters into insolvent liquidation, before the time that a gift to the charity takes effect in possession, the gift shall instead be paid to such charity as the Trustees decide having regard to the objects that were intended to benefit.

4.17 Release of powers

The Trustees may by deed release any of their powers wholly or in part so as to bind future trustees.

4.18 Ancillary powers

The Trustees may do anything which is incidental or conducive to the exercise of their functions.

5 Powers of Maintenance and Advancement

Sections 31 and 32 Trustee Act 1925 shall apply with the following modifications.

5.1 The proviso to section 31(1) shall be deleted.

5.2 The words “one half of” in section 32(1)(a) shall be deleted.

6 Minors and beneficiaries without capacity: powers over income

6.1 Where the Trustees may apply income for the benefit of a minor, they may do so by paying the income to the minor’s parent or guardian on behalf of the minor, or to the minor if he has attained the age of 16. A Trustee is under no duty to enquire into the use of the income unless the Trustee has knowledge of circumstances which call for enquiry.

6.2 Where the Trustees may apply income for the benefit of a minor, they may do so by resolving that they hold that income on trust for the minor absolutely and:

6.2.1 The Trustees may apply that income for the benefit of the minor during his minority.

6.2.2 The Trustees shall transfer the residue of that income to the minor on attaining the age of 18.

6.2.3 For investment and other administrative purposes that income shall be treated as Trust Property.

6.3 Where income is payable to a beneficiary who does not have the mental capacity to appoint an attorney under a lasting power of attorney which relates to the property and affairs of the beneficiary, the Trustees may (subject to the directions of the Court or a deputy appointed under the Mental Capacity Act 2005 whose powers include receiving such income) apply that income for the benefit of the beneficiary.

6.4 Where the Trustees may pay or apply income to or for the benefit of a beneficiary who does not have the mental capacity to give a receipt, the Trustees may pay the income to the Person having or appearing to the Trustees to have the care and financial responsibility for such Person. A Trustee is under no duty to enquire into the use of the income unless the Trustee has knowledge of circumstances which call for enquiry.

7 Disclaimer

A Person may disclaim his interest under the Trust wholly or in part.

8 Apportionment

Income and expenditure shall be treated as arising when

payable, and not from day to day, so that no apportionment shall take place.

9 Conflicts of interest

9.1 In this clause:

9.1.1 **“Fiduciary”** means a Person subject to fiduciary duties under the Trust.

9.1.2 **“Independent Trustee”**, in relation to a Person, means a Trustee who is not:

- (i) that Person;
- (ii) a brother, sister, ancestor, descendant or dependant of the Person;
- (iii) a spouse or Civil Partner of (i) or (ii) above; or
- (iv) a company controlled by one or more Persons within (i) (ii) or (iii) above.

9.2 A Fiduciary may:

9.2.1 enter into a transaction with the Trustees, or

9.2.2 be interested in an arrangement in which the Trustees are or might have been interested, or

9.2.3 act (or not act) in any other circumstances even though his fiduciary duty under the Trust conflicts with other duties or with his personal interest.

9.3 Clause 9.2 has effect only in relation to administrative and not dispositive matters, and only applies if:

9.3.1 The Fiduciary first discloses to the Trustees the nature and extent of any material interest conflicting with his fiduciary duties, and

9.3.2 there is in relation to the Fiduciary an Independent Trustee in respect of whom there is no conflict of interest, and he considers that the transaction arrangement or action is not contrary to the general interest of the Trust.

9.4 The powers of the Trustees may be used to benefit a Trustee (to the same extent as if he were not a Trustee) provided that:

9.4.1 There is in relation to that Trustee an Independent Trustee in respect of whom there is no conflict of interest or

9.4.2 The Trustees consist of or include all the trustees originally appointed under the Principal Document.

10 Trustee remuneration

10.1 A Trustee acting in a professional capacity is entitled to receive reasonable remuneration out of the Trust Fund for any services that he provides to or on behalf of the Trust.

10.2 For this purpose, a Trustee acts in a professional capacity if he acts in the course of a profession or business

which consists of or includes the provision of services in connection with:

10.2.1 the management or administration of trusts generally or a particular kind of trust, or

10.2.2 any particular aspect of the management or administration of trusts generally or a particular kind of trust.

10.3 The Trustees may make arrangements to remunerate themselves for work done for a company connected with the Trust Fund.

11 Trust Corporations

11.1 A Trust Corporation appointed by the Principal Document may act as Trustee on the basis of its standard terms as published at the date of the Principal Document.

11.2 On the appointment of a Trust Corporation as Trustee the parties to the appointment may provide that the Trust Corporation may act as Trustee on the basis of its standard terms as published at the date of the appointment (in which case clause 11.1 shall not apply).

11.3 The Trust Corporation is entitled to receive remuneration and other charges in accordance with those terms.

11.4 In the event of a conflict between those terms and these provisions, those terms shall prevail.

11.5 In this clause "Trust Corporation" has the same meaning as in the Trustee Act 1925.

12 Liability of Trustees

12.1 A Trustee shall not be liable for a loss to the Trust Fund unless that loss was caused by his own actual fraud or negligence.

12.2 A Trustee shall not be liable for a loss to the Trust Fund unless that loss or damage was caused by his own actual fraud, provided that:

12.2.1 the Trustee acts as a lay trustee (within the meaning of section 28 Trustee Act 2000); and

12.2.2 there is another trustee who does not act as a lay trustee.

12.3 A Trustee shall not be liable for acting in accordance with the advice of counsel, of at least five years' standing, with respect to the Trust. The Trustees may in particular conduct legal proceedings in accordance with such advice without obtaining a court order. A Trustee may recover from the Trust Fund any expenses where he has acted in accordance with such advice.

12.4 Clause 12.3 does not apply:

12.4.1 in relation to a Trustee who knows or has reasonable cause to suspect that the advice was given in ignorance of material facts;

12.4.2 if proceedings are pending to obtain the decision of the court on the matter;

12.4.3 in relation to a Trustee who has a personal interest in the subject matter of the advice; or

12.4.4 in relation to a Trustee who has committed a breach of trust relating to the subject matter of the advice.

12.5 Clause 12.3 does not prejudice any right of any Person to follow property or income into the hands of any Person, other than a purchaser, who may have received it.

13 Subsequent editions of STEP standard provisions

13.1 Subject to clause 13.2 and 13.3 below, the Trustees may by deed declare that any subsequent edition of the Provisions of the Society of Trust and Estate Practitioners shall apply in place of these provisions wholly or in part.

13.2 If the Special Provisions are not all incorporated into the Principal Document, the Trustees do not have power under this clause to incorporate:

13.2.1 Special Provisions which are not incorporated into the Principal Document, or substantially similar powers or

13.2.2 any other provisions described in the subsequent edition of the standard provisions as Special Provisions.

13.3 The new edition of the Provisions shall have effect subject to the provisions of the Principal Document.

SPECIAL PROVISIONS

14 Borrowing

The Trustees may borrow money for investment or any other purpose. Money borrowed shall be treated as Trust Property.

15 Delegation

A Trustee may delegate in writing any of his functions to any Person. None of the restrictions on delegation in sections 12 to 15 Trustee Act 2000 shall apply. A Trustee shall not be responsible for the default of that Person (even if the delegation was not strictly necessary or expedient) provided that he took reasonable care in his selection and supervision.

16 Supervision of company

A Trustee is under no duty to enquire into the conduct of a company in which the Trustees are interested, unless the Trustee has knowledge of circumstances which call for enquiry.

17 Powers of Maintenance: Deferring income entitlement to 21

17.1 For the purposes of section 31 Trustee Act 1925, a Person shall be treated as attaining the age of majority at the Specified Age, and the references to the age of eighteen years in section 31 shall be treated as references to the Specified Age.

17.2 In this clause the "Specified Age" means the age of 21 or such earlier age (not being less than 18) as the Trustees may by deed specify.

18 Minors and beneficiaries without capacity: powers over trust capital

18.1 Where the Trustees may apply capital for the benefit of a minor, they may do so by paying the capital to the minor's parent or guardian on behalf of the minor, or to the minor if he has attained the age of 16. A Trustee is under no duty to enquire into the use of the capital unless the Trustee has knowledge of circumstances which call for enquiry.

18.2 Where capital is payable to a beneficiary who does not have the mental capacity to appoint an attorney under a lasting power of attorney which relates to the property and affairs of the beneficiary, the Trustees may (subject to the directions of the Court or a deputy appointed under the Mental Capacity Act whose powers include receiving such capital) apply that capital for the benefit of the beneficiary.

18.3 Where the Trustees may pay or apply capital to or for the benefit of a beneficiary who does not have the mental capacity to give a receipt, the Trustees may pay the same to the Person having or appearing to the Trustees to have the care and financial responsibility for such Person. A Trustee is under no duty to enquire into the use of the capital unless the Trustee has knowledge of circumstances which call for enquiry.

19 Absolute discretion clause

The Trustees are not under any duty to consult with any Beneficiaries or to give effect to the wishes of any Beneficiaries. The powers of the Trustees may be exercised:

19.1 at their absolute discretion; and

19.2 from time to time as occasion requires.

20 Appointment and retirement of Trustees

20.1 A Person may be appointed Trustee of the Trust even though he has no connection with the United Kingdom.

20.2 A Trustee may be discharged even though there is neither a trust corporation nor two Persons to act as trustees provided that there remains at least one trustee.

21 Powers relating to income and capital

21.1 The Trustees are under no duty to hold a balance between conflicting interests of Persons interested in Trust Property. In particular:

21.1.1 The Trustees may acquire

- (i) wasting assets and
- (ii) assets which yield little or no income for investment or any other purpose.

21.1.2 The Trustees are under no duty to procure distributions from a company in which they are interested.

21.2 The Trustees may pay taxes and other expenses out of income although they would otherwise be paid out of capital.

22 Power to appropriate at value at time of death

22.1 Where:

22.1.1 these provisions are incorporated into a will,

22.1.2 the Trustees have ascertained the value of Trust Property on the death of the Testator, and

22.1.3 the Property is appropriated under clause 4.15 within three years of that death,

the Trustees may adopt that valuation so that the value for the purposes of the appropriation shall be the value at the date of the death (instead of the value at the date of the appropriation).

22.2 Where clause 22.1 applies to an appropriation, any other valuation which may be required for the purposes of the same exercise of the power of appropriation shall also be the value at the date of the death.

22.3 Valuations made under this clause shall be binding upon all Persons interested under the trust if the Trustees have ascertained those values in accordance with the duty of care set out in section 1(1) Trustee Act 2000.

23 Relationships unknown to Trustees

23.1 The Trustees may distribute Trust Property or income in accordance with the Trust but without having ascertained

that there is no Person who is or may be entitled to any interest therein by virtue of a relationship unknown to the Trustees. A Trustee shall not be liable to such a Person unless at the time of the distribution the Trustee has knowledge of circumstances which call for enquiry.

23.2 This clause does not prejudice any right of any Person to follow property or income into the hands of any Person, other than a purchaser, who may have received it.

GUIDE FOR PRACTITIONERS, TESTATORS AND SETTLORS

to the STEP Standard Provisions 2nd Edition

(These guidance notes do not form part of the STEP Standard Provisions)

The first edition of the STEP Standard Provisions was issued in 1992. It was one of the first projects of the (then) newly formed STEP. Professor John Adams described the provisions as 'quite the most exciting development for private client drafters for several decades'; and Ralph Ray called them as 'an enormous asset'.

Since the publication of the first edition, Trusts law has been changed considerably, in particular by the Trusts of Land and Appointment of *Trustees Act 1996* and the *Trustee Act 2000*.

After extensive consultation, STEP published the second edition of the Standard Provisions in October 2011. Will writers and drafters of Trust Deeds could continue to use the first edition, but it is expected that the second edition of the STEP Standard Provisions will be the usual practice.

These Provisions are subject to the provisions in the Will or Settlement; however, the intention is that the drafter should rely on the complete STEP Standard Provisions rather than a patchwork.

This Guide does not attempt a full explanation of the Provisions. For that, readers are referred to *Drafting Trusts and Will Trusts* by James Kessler QC and Leon Sartin (Sweet & Maxwell). It is intended to assist the experienced drafter who is broadly familiar with the first edition and focuses on what has changed.

The most important change, which will need your attention when drafting or reviewing a document, is that you now have a choice:

- to incorporate the only 'core' provisions of the second edition, or
- to incorporate the fuller form, which includes the 'Special Provisions'.

The Special Provisions are provisions 14 to 23 and can be incorporated only by reference to them.

Clause 1 sets out forms of standard wording to incorporate the provisions.

The second edition includes several additions to the first edition.

Clause 3(10) in the STEP Standard Provisions 1st Edition has been deleted. This clause gave Trustees powers of insurance, which is now unnecessary as the general law has conferred an adequate statutory power of insurance¹.

These notes are intended to assist Practitioners, Settlers and Testators in the use of the STEP Standard Provisions. They are not, and cannot be, a substitute:

- as far as Practitioners are concerned, for careful consideration of the appropriateness, in the circumstances, of each provision; and
- as far as Testators and Settlers are concerned, for reading all the provisions and for seeking further advice on any provision if unsure of its effect.

EXECUTIVE SUMMARY

A Testator or Settlor should be aware of every term of his/her Will or Trust Deed, including those incorporated by reference through the STEP Standard Provisions, but some may feel that they lack the time or interest to consider every provision and wish to leave it to their advisors.

The most important, and possibly contentious, elements of the STEP Standard Provisions, on which even the busiest Testator or Settlor should be informed, are as follows:

- 9 Conflicts of interest
- 10 Trustee remuneration
- 12 Liability of Trustees

Within the STEP Special Provisions, Testators and Settlers should pay particular attention to:

- 21 Powers relating to income and capital

Survivorship clauses

The STEP Standard Provisions do not include a survivorship clause. There may be reasons, in particular affecting the transferable nil rate band, not to include such a clause, and if it is to be included it must be expressed in the Will.

DETAILED GUIDANCE

STEP Standard Provisions (not Special Provisions): 1-13

1 Should you incorporate just the Standard Provisions, or the Special Provisions as well?

This issue is fundamental to approval of the second edition. See the comments above. The default choice is the Standard Provisions (excluding the Special Provisions), i.e. incorporating provisions 1 to 13 only.

2 Definitions

These set out terms that are used in the Provisions.

3 Protection for interest in possession Trusts

This clause prevents accidental loss of IHT advantages, which is particularly important for 'immediate post-death interests' under Wills.

4 Additional Powers

4.1 Investment

This clause confers a wide power of investment. In particular, Trustees may invest in land in any part of the world and in unsecured loans.

Provision 4.1 does not override the standard duties of investment in section 4 *Trustee Act 2000*, which provides:

- (1) In exercising any power of investment, whether arising

under this Part of otherwise, a Trustee must have regard to the standard investment criteria.

(2) A Trustee must from time to time review the investments of the Trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a Trust, are:

- (a) the suitability to the Trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and
- (b) the need for diversification of investments of the Trust, in so far as is appropriate to the circumstances of the Trust.

4.2 Management

Trustees have wide powers in the management of a property as if they owned it for themselves. This gives them power to repair and maintain it, develop or improve it.

4.3 Joint property

This clause confers a useful power to mix Trust Property with non-Trust Property, for example to purchase a house for young Beneficiaries jointly with someone else, for example their guardian(s).

4.4 Income and capital

This provides that income may be set aside and invested to meet any liabilities that, in the opinion of the Trustees, ought to be borne out of income or to replace depreciation of the capital value of any Trust Property. In particular, income may be applied for a leasehold sinking-fund policy (a new power).

A Trustee must decide if and how much income to capitalise. Such consideration is not likely to cause controversy in relation to discretionary Trusts, where a Trustee normally has a discretion to distribute income and/or capital to the Beneficiaries or to accumulate. Trustees may experience more scrutiny in interest in possession Trusts, where a life tenant may feel deprived of Trust income. A Trustee will have to consider the administrative burden of the additional work involved as well as the general duty to maintain the value of the Trust capital (holding a fair balance between life tenant and remainderman).

4.5 Accumulated income

The provision speaks for itself. By virtue of the *Perpetuities and Accumulations Act 2009*, section 13, a power of accumulation may now exist for the entire perpetuity period of 125 years.

4.6 Use of Trust Property

Provision 4.6 gives the Trustees power to acquire any interest in property anywhere in the world for occupation or use by an Income Beneficiary on such terms as they see fit, without any of the restrictions on the rights of the Beneficiaries to occupy land under the *Trust of Land and Appointment of Trustees Act 1996*.

4.7 Application of Trust capital

Only the Trust instrument will determine exactly what powers the Trustees have, as this provision is administrative, not dispositive: 'how' the Trust Fund is used, rather than 'who gets what'. Thus provision 4.7 will apply only if the Trustees have power to transfer capital to an Income Beneficiary. Assuming that the Trustees have the necessary power in the Trust document, they then have wide powers to deal with Trust capital, which includes advancing capital to an Income Beneficiary to augment their income.

4.8 Trade

This provision is the same as in the first edition and gives Trustees the power to carry on trade in any part of the world, whether alone or in partnership.

4.9 Deposit of documents

Trustees continue to have the power to deposit documents relating to the Trust with any person.

4.10 Nominees

The power of Trustees to vest Trust Property in any Person as nominee has been extended to include sub-nominees.

4.11 Place of administration

4.12 Payment of tax

4.13 Indemnities

4.14 Security

These four provisions are self-explanatory and all appeared in the first edition.

4.15 Power of appropriation

The Trustees may appropriate Trust Property to any Person or class of Persons in or towards the satisfaction of their interest in the Trust Fund without the consent of the Beneficiary. This power is wider than the statutory power of appropriation in section 41 *Administration of Estate Act 1925*, under which the consent of the Beneficiary is required.

This is the 'basic' power of appropriation, available in all cases: a fuller power, set out in special provision 22, will be included if the Special Provisions apply.

4.16 Receipt by charities, etc

This provision has been extended to give the Trustees more protection than before, in that a Trustee is not to be liable for making a payment to any person who appears to be the treasurer or appropriate officer unless at the time of the distribution the Trustee has knowledge of circumstances which call for enquiry.

A new provision provides that if any charity ceases to exist, changes its name, or enters into insolvent liquidation, before the time that the gift to the charity takes effect in possession (for example, between the signing of a Will and the death of the Testator), the gift shall instead be paid to such charity as the Trustees decide, having regard to the objects that were intended to benefit.

4.17 Release of powers

This power may be used, for example, to remove a person from benefit under a discretionary Trust and so to exclude him.

4.18 Ancillary powers

This 'catch all' provision allows the Trustees to do what is necessary as part of their duties even where the power is not specifically set out.

5 Powers of maintenance and advancement

Provision 5 modifies sections 31 and 32 *Trustee Act 1925*. The proviso in section 31(1) *Trustee Act 1925* requires Trustees, in exercising their discretion in favour of any minor

Beneficiary, to have regard to any other income available for the minor's maintenance and use a proportionate part of each fund. As this may not be convenient, the proviso has been deleted.

S32(2) *Trustee Act 1925* in its unamended form confers the power of Trustees to advance capital up to one half of the presumptive or vested share or interest of a Beneficiary. This restriction is removed by provision 5.2 so it allows a Trustee to advance the whole, rather than one half. This is in line with general practice.

6 Minors and Beneficiaries without capacity: powers over income

This provision provides that income for the benefit of a minor may be paid to the minor's parent or guardian on behalf of the minor until the minor has reached the age of 16. The Trustees are under no duty to enquire into the use of the income unless they have knowledge of circumstances which call for enquiry. There is a similar power over capital but, being more important and perhaps not always wanted, this appears as special provision 18 below.

The power may also be exercised in a way that may limit dissipation of money, by in effect 'earmarking' funds, holding them as bare Trustee for the young Beneficiary pending coming of age. That may secure the tax advantages of receipt by the young person of income against which the personal allowance may be set, while avoiding youthful excess, with funds actually being released at age 18.

Provision 6.3 further provides that, in the absence of a lasting power of attorney, Trustees may apply any income for the benefit of a Beneficiary who lacks mental capacity at their discretion, subject to the directions of the Court or directions of a deputy appointed under *Mental Capacity Act 2005*.

Any such payments of capital or income can be made to the Person having, or appearing to the Trustees to have, the care and financial responsibility of such Person. There is no duty on the Trustees to enquire into the use of the income or capital unless they have knowledge of circumstances which call for enquiry.

7 Disclaimer

This provision speaks for itself: the ability to disclaim only part of a gift adds flexibility.

8 Apportionment

No apportionment is required of income or of expenditure. This saves costs without creating significant unfairness. This removes the need for detailed, expensive calculations where the administrative cost may exceed the sums in issue. This will facilitate the administration of an estate.

9 Conflicts of interest

Under this provision, an Independent Trustee is needed in situations where there is a conflict of interest between the fiduciary duties of anyone who owes a duty to the Trust and their personal interest or other duties. In relation to administrative matters, and once the conflict has been disclosed to the Trustees, an Independent Trustee is required to consider whether the matter conflicts with the interests of the Trust.

An Independent Trustee is also be required if the powers are used to benefit a Trustee – unless the Trustees are still the Trustees as originally appointed. (The exception is new.)

Provision 9.1.2 excludes certain people from qualifying as an Independent Trustee.

10 Trustee remuneration

This provision has been cut down in the second edition so as to entitle only Trustees acting in their professional capacity to be remunerated for their services. There must now be a link between the skill set of the Trustee and the work actually done.

Provision 10 no longer specifically provides that Trustees can charge for work that does not require professional assistance, as this is now covered by section 28 *Trustee Act 2000* and is therefore superfluous.

The current drafting is based on the statutory provisions in section 29 *Trustee Act 2000* and is sufficient to entitle a Trustee to recover reasonable remuneration for services provided in a professional capacity, or any partnership or LLP of which the Trustee is a member. It is considered that section 29 *Trustee Act 2000* is wide enough to allow a partnership or LLP to charge.

11 Trust Corporations

Where a Trust Corporation is appointed as Trustee, the Trust Corporation may act on the standard terms of engagement of the Trust Corporation as published at the date of the execution of the Will or Settlement.

Provision 11.2 is new and may help where a Trust Corporation is appointed Trustee many years after the Deed was executed that incorporated these Provisions. On the appointment of a Trust Corporation, the Trust Corporation may rely on the standard terms of engagement published on the date of the appointment. The Person making the appointment has the opportunity to review those terms and if not satisfied need not make the appointment.

If there is a conflict between the terms of engagement of the Trust Corporation and the Standard Provisions, the terms of engagement shall prevail.

12 Liability of Trustees

Trustees are not liable for breach of Trust when they have acted honestly and with reasonable care. This clause also relieves a lay Trustee, even if negligent, unless guilty of fraud and as long as there is a professional Trustee. This is consistent with STEP and Law Commission guidance. Thus a lay Trustee may, if they choose, broadly leave the Trust administration to a professional co-Trustee.

It also provides that a Trustee shall not be liable for breach of Trust when acting upon advice from Counsel of at least five years' standing, unless:

- the Trustee knows or suspects that Counsel's instructions were incomplete
- court proceedings are pending on the matter
- the Trustee has a personal interest in the matter, or
- the Trustee committed a breach of Trust in the subject matter of the advice.

A Trustee may distribute Trust Property to a Beneficiary, for as long as they have no knowledge of another Person's prior or concurrent interest.

13 Subsequent editions of STEP Standard Provisions

It is not proposed to bring out new editions of the STEP Standard Provisions often, but at some time a third edition may be needed. The Trustees may by deed incorporate that or any subsequent edition of the STEP Standard Provisions. Any such incorporation will, however, be subject to the provisions in the Principal Document. It is considered, in the light of *re Beatty* [1990] 1 WLR 1503, that later editions may be incorporated in this way.

Most importantly, if the special provisions 14 to 23 (see below) have not been incorporated in the Principal Document, the Trustees cannot incorporate them at a later stage.

STEP Special Provisions: 14-23

14 Borrowing

This clause has been taken from the first edition without amendment, but was felt to be far-reaching and is therefore included in the special provisions. Trustees may borrow money for investment or any other purpose.

15 Delegation

Provision 15, which provides that a Trustee may delegate in writing any of their functions to any Person, includes a provision that none of the restrictions in sections 12 to 15 *Trustee Act 2000* shall apply.

Under the STEP Standard Provisions, there is no obligation to consult with Beneficiaries when deciding to delegate any of their functions. Therefore, a delegate can make decisions without consulting either the delegating Trustee or the Beneficiaries. Normally a Beneficiary should be consulted.

16 Supervision of company

This provision is deemed 'special' because it absolves Trustees from an important duty that they would otherwise have, particularly in relation to unquoted family companies.

17 Powers of maintenance: deferring income entitlement to 21

If section 31 *Trustee Act 1925* applies, a Beneficiary becomes entitled to Trust income at the age of 18. This has been modified: a Beneficiary becomes entitled to Trust income at the Specified Age, which is the age of 21 years or such earlier years as the Trustees by deed specify, for as long as the Specified Age is not less than 18 years. This would allow Trustees to defer entitlement to income to the age of 21.

18 Minors and Beneficiaries without capacity: powers over Trust capital

This provision mirrors standard provision 6 relating to income. It provides that capital held for the benefit of a minor may be paid to the minor's parent or guardian on behalf of the minor until the minor has reached the age of 16. The Trustees are under no duty to enquire into the use of the income or capital unless they have knowledge of circumstances which call for enquiry.

This extends the powers in the first edition in that capital can be paid for the benefit of the minor, rather than income only.

Provision 18.2 further provides that, in the absence of a lasting power of attorney, Trustees may apply any capital for the benefit of a Beneficiary who lacks mental capacity at their discretion, subject to the directions of the Court or directions of a deputy appointed under *Mental Capacity Act 2005*.

Any such payments of capital can be made to the Person having, or appearing to the Trustees to have, the care and financial responsibility of such Person. Again there is no duty on the Trustees to enquire into the use of the income or capital unless they have knowledge of circumstances which call for enquiry.

19 Absolute discretion clause

For the avoidance of doubt, and to disapply *Trust of Land and Appointment of Trustees Act 1996*, section 11, this provision allows Trustees to exercise their discretion freely and without supervision by the Beneficiaries.

20 Appointment and retirement of Trustees

This provision allows the appointment of offshore Trustees.

The first edition referred to a retirement age of 65, but to reflect current thinking, this has been removed in the second edition to allow Trustees to act beyond the age of 65.

Provision 20.2 addresses the situation where a Trustee wishes to retire even though that will leave only one Person left to act. It allows a Trustee to retire in these circumstances, leaving a sole Trustee, not necessarily a Trust Corporation, to continue administering the Trust. It will be for the continuing Trustee to weigh the arguments for and against allowing a retirement in these circumstances, which for a small Trust could save expense.

21 Powers relating to income and capital

This expressly overrides the Trustees' duty to balance the interests of the Beneficiaries. This power, for example, can be used to reduce the income of a life tenant in favour of the remainderman. It also gives the Trustees wider powers of investment in that they can acquire, and retain, wasting assets and assets, which yield little income. They may also acquiesce in management policy, for example of a private company, even though their shareholding may produce no income. Trustees should bear in mind that favouring income interests over capital may in the long run disadvantage both.

22 Power to appropriate at value at time of death

This enables the Trustees to appropriate assets at value at time of death rather than at the time of the appropriation. This is considered to be an administrative power. It may sometimes have tax advantages.

This provision gives Trustees a discretion that should be explained to the client when deciding whether to include this particular special provision. There is protection for Beneficiaries in that the Trustees must take reasonable care when ascertaining values for appropriation.

23 Relationships unknown to Trustees

While Trustees must take care, they may distribute Trust Property on the basis of what they actually know, even though other Beneficiaries may exist by virtue of family connections hidden from, or not disclosed to, the Trustees.

STEP Will writers' Toolkit

STEP is keen to promote the use of the STEP Standard Provisions where they suit the circumstances of the client and provided that the drafter has full knowledge of them and of how to use them. With that in mind, STEP intends to produce a further guide to their use, including a form of letter suitable to send to clients highlighting the most important provisions and setting them out in full. This further guide will comment on certain parts of the Provisions that caused the greatest deliberation in arriving at the agreed form of the second edition.

‘The Standard Provisions are quite the most exciting development for private client drafters for several decades’

Professor John Adams on the first edition

The Society of Trust and Estate Practitioners (STEP) is the worldwide professional body for practitioners in the fields of trusts and estates, executorship and related issues. STEP members help families secure their financial future and protect the interests of vulnerable relatives. With members around the world, STEP promotes the highest professional standards through education and training leading to widely respected professional qualifications.

Further copies available from: Artillery House (South)
11–19 Artillery Row
London SW1P 1RT
United Kingdom

Tel: +44 (0)20 7340 0500
www.step.org

Download a PDF version from **www.step.org/provisions**