Other issues or potential problems

Have you promised or indicated that you intend to leave certain property to a specified person / group of people? If so, please give details of this promise or indication:

....

....

....

....

....

Is there somebody who you do not wish to include as a beneficiary who might expect to be included as a beneficiary? If so, please give details:

....

....

....

....

....

Are there any problems which may arise about your Will(s) or in the family generally? Please give details:

....

....

....

....

....

Are there any other points or factors relevant to your estate or your Will which have not been detailed above? Please give details: ....

....

....

....

....

1 This is current annual exemption figure and should be changed if the annual exemption figure changes.

4 Opening and Revocation

4.1 The practice followed in this book is to begin a Will with the name and address of the testator, a statement that all previous Wills are revoked and a statement that the document constitutes the testator's last Will. In this book, the date of the Will appears at the end in the testimonium and attestation clause because it is thought that if it is located there the insertion of the date is less likely to be forgotten[1]. There is, however, nothing improper about inserting the date at the beginning or anywhere else in the Will, although it would be unusual to place the date somewhere other than at the beginning or end of the Will. **Form 4.2** is an example of an opening containing the date of the Will while the other forms presuppose that the date will be inserted at the end of the Will. If the date is inserted in the opening, care should be taken to ensure no alternative date is inserted anywhere else in the Will.

1 Testimonium and attestation clauses containing the date are contained in **chapter 21**.

Identity of the testator

4.2 The full name and address of the testator should be given for clarity. If the testator has used an alias or a different name to his birth name or has changed his name it may be necessary to state this alternative name as well. Where a testator is generally known by his or her birth name and uses this name in formal documents, it is usually unnecessary to state any alternative names in the Will. However, where the alternative name has been used by the testator in official documents such as a marriage certificate or documents of title it is advisable to include reference to the alternative name(s) in the opening. It is not, however, necessary to describe how the name came to be changed, for example, by reciting that it was changed by deed poll or the particular date on which it was changed.

4.3 There are five fairly common situations in which an alternative name may need to be stated:

(1) Where the testator has changed his name by assuming another name, with or without formalities. In these circumstances, it is usually advisable to make reference to his former name.

(2) Where the testator has used two names fairly indiscriminately. In this case, both names should be stated in the Will, because it is likely that some documents of title are in one name and some in the other.

(3) Where the testator has habitually used his forenames in a different order from that in which they were given, for example, George Albert instead of Albert

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George. In these circumstances, it is advisable to recite both names.

(4) Where the testator has never used the full names he was given at birth but has, throughout his life, been known by a different name. If the testator has always used his birth names in official documents and only used his alternative name informally it will not be necessary to include his alternative name but, for the sake of clarity, it would be advisable to do so.

(5) Where the testator has anglicised a foreign name. If the testator holds no assets in his original foreign name there may be no need to refer to such name. However, if some official documents retain the original foreign name then it should be recited as well.

Form 4.3 is an example of an opening which recites the testator's alternative name.

4.4 Some testators will share the same name as other members of their family. This often results from a family tradition of naming the eldest son after their father. Whenever the testator shares the same name as his father, son, grandfather, grandson, brother, uncle or nephew (or the equivalent in the case of a testatrix) care should be given to correctly identify the testator in the Will. In some circumstances, this may be done by giving the address of the testator. However, given the possibility of a son living with his father or vice-versa or the prospect of the testator leaving the home he is currently living in it is better practice to state the date of birth of the testator to help distinguish the testator from other members of the family who share the same name. **Form 4.4** is an example of such an opening.

Revocation by act of the testator

4.5 A Will is revoked by destruction, by the burning, tearing, or otherwise destroying of the Will by the testator or by some other person in his presence and by his direction with the testator having the intention of revoking it[1]. A Will is also revoked by a written declaration of an intention to revoke the Will executed in the same manner as a Will. Executing a new Will does not automatically revoke a previous Will as a Will is only revoked by a subsequent Will to the extent that the later Will is inconsistent with the earlier one. Otherwise it may just be considered to be a codicil of the previous Will. For this reason, and also because the testator may have forgotten having made an earlier Will, it is generally desirable to include an express revocation clause in a new Will.

1 Wills Act 1837 s 20, **appendix 33.9**.

4.6 When the testator has property in foreign jurisdictions and has made a foreign Will disposing of such property it must be clarified whether or not the testator wishes to revoke that foreign Will. Assuming the testator does not want to revoke the foreign Will the revocation clause should be carefully limited to property in this jurisdiction as a broad revocation clause may accidentally revoke the foreign Will. **Form 4.5** is an example of a revocation clause limited to property in the United Kingdom. Foreign issues are discussed further in **chapter 6**.

Revocation by marriage or civil partnership

4.7 A Will is revoked by marriage[1] or by the formation of a civil partnership[2] unless it appears from the Will itself that it was made in expectation of that

marriage or civil partnership and is not to be revoked by it. In order for a Will not to be automatically revoked it must be clear from the Will itself (not merely the surrounding circumstances) that it is not intended to be revoked by marriage or civil partnership. The Will can be of unlimited duration but it is not possible to make a Will in the expectation of marrying or forming a civil partnership with a yet unidentified person. The testator must make the Will expecting to marry a specific person or to form a civil partnership with a specific person for the Will not to be revoked by the occurrence of that event.

The forms used in this book use the phrase 'expecting to marry' or 'expecting to form a civil partnership' but no specific words are needed so long as the Will indicates the expected marriage or civil partnership[3].

1 Wills Act 1837 s 18A, inserted by the Administration of Justice Act 1982 s 18(2) with effect from 1 January 1983 but subsequently substituted by the Law Reform (Succession) Act 1995 s 3 with effect from 1 January 1996. See **appendix 33.6**.

2 Wills Act 1837 s 18C, added by the Civil Partnership Act 2004 s 71, Sch 4 para 2. See **appendix 33.8**.

3 In *Re Langston* [1953] 1 All ER 928, a Will leaving everything 'unto my fiancée Maida Edith Beck' was held to be made in contemplation of marriage because of its reference to fiancée and hence not revoked by the testator's marriage to Ms Beck.

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By decree of divorce or nullity or dissolution of civil partnership

4.8 A Will is not revoked if the testator's marriage or civil partnership is dissolved or annulled. However, unless a contrary intention appears in the Will, if a marriage or civil partnership is dissolved or annulled, gifts to the former spouse or civil partner and the appointment of the spouse or civil partner as executor will be rendered ineffective[1]. In these circumstances, the former spouse or civil partner is treated as if they had died on the date of the divorce or annulment rather than the gift failing or lapsing. The consequence of this is that gifts over remain operative notwithstanding the divorce or annulment. Thus, after a divorce a gift 'to my wife and if she predeceases me to X' will take effect as a valid testamentary gift to X[2].

1 Wills Act 1837 s 18A (marriage) and s 18C (civil partnership). See **appendix 33.6** and **33.8** respectively.

2 Originally s 18A provided that the gift to the former spouse lapsed and therefore, as the gift over was contingent on the wife predeceasing the testator, the gift failed: *Re Sinclair* [1985] Ch 446.

4.9 An example of a Will made in contemplation of divorce or annulment of a marriage or civil partnership is contained at **Form 4.8**.

Conditional revocation

4.10 Revocation may be conditional and if the condition is not satisfied, the Will prior to such revocation remains in force[1]. In general, conditional revocation is inadvisable as it leaves the disposition of the testator's estate in a position of uncertainty. However, it may be of some practical use if the testator wishes to make a Will in contemplation of marriage but does not want that Will to take effect until and unless the marriage takes place. An example of such a Will is contained in **Form 4.7**.

1 *Re Southerden's Estate, Adams v Southerden* [1925] P 177.

FORM 8.15

Appointment of a trust corporation as executors and trustees[1]

1 I appoint [*trust corporation's name*] as my executor and trustee.

2 The conditions on which [*trust corporation's name*] acts as executor last published before the date of this Will shall apply and the said trust corporation shall be remunerated in accordance with the scale of fees current at my death as varied from time to time during the administration of any trust arising under this Will[2].

1 See note at **8.24**. If a trust corporation is appointed, it is advisable to contact the trust corporation before the Will is executed to confirm they are willing to act. The trust corporation may also have a standard appointment clause which they wish to be used which, depending on its contents, may be more appropriate.

2 See note at **8.27** as to why an express charging clause is desirable.

FORM 8.16

Professional charges clause[1]

Any of my Trustees in a profession, including a sole trustee, may charge for work done by him or his firm (whether or not the work is of a professional nature) on the same basis as if he were not one of my trustees but employed to carry out the work on their behalf and a trust corporation may be paid fees according to the scale fees which it charges from time to time[2].

1 The express charging provision would usually be included in the provisions appointing the executor but occasionally it may be more appropriate to include as a separate clause. See **8.31**.

2 See note at **8.27** as to why an express charging clause is desirable.

9 Appointment of Guardians

9.1 In all circumstances where a testator has minor children the testator should be advised to consider appointing a guardian of the children to act after the testator's death. If a guardian is so appointed, then if there is no surviving parent with parental responsibility on the death of the testator, the appointed guardian will be given parental responsibility for the minor children[1]. This is a significant responsibility with parental responsibility defined as 'all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'[2] and accordingly it must be considered carefully.

1 If there is a surviving person with parental responsibility the appointment will take effect on their death.

2 Children Act 1989 s 3(1).

9.2 Those governed by the Law Society Wills and Inheritance Protocol are required to give the testator specified advice regarding the appointment of guardians[1] but all other draftsmen should give similar appropriate advice concerning the appointment of guardians if the testator has minor children. This advice should include the effect of the appointment, the role of a guardian, what happens if no appointment is made, that an appointment can be made by Will or by a separate document and (if applicable) the rights of the child's other parent. The role of a guardian is a very important role and it has significant responsibilities and so the testator should be advised to consider very carefully who they wish to appoint as a guardian.

1 Law Society Wills and Inheritance Protocol, Publication date 3 July 2013, paragraph 11.5.

9.3 It is important to remember that not all parents will have parental responsibility and so not all parents may be able to appoint guardians. If a father and mother are married when the child is born both will have parental responsibility[1]. However, if the father and mother were unmarried only the mother will have automatic parental responsibility. The father can acquire parental responsibility (i) if he marries the mother[2]; (ii) if he becomes registered as the child's father; (iii) if he and the mother make a 'parental responsibility agreement'; or (iv) if the court (on his application) orders that he shall have parental responsibility for the child[3]. Step-parents[4] and second female parents[5] likewise do not automatically have parental responsibility but can acquire it in a similar way to an unmarried father. If the testator desires that his or her children be cared for by an unmarried father, a second female parent or by a step-parent then steps should be taken for the other parent to acquire parental responsibility or, if there is insufficient time to do so, the other person should be appointed as a guardian.

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1 Children Act 1989 s 2(1).
2 A combination of the Children Act 1989 s 2(1) read with the Family Law Reform Act 1987 s 1(2)–(4).
3 Children Act 1989 s 4(1).
4 Children Act 1989 s 4A.
5 Children Act 1989 s 4ZA.

Appointment

9.4 The appointment of guardians and the rights they have are governed by the Children Act 1989. Under the Act a parent[1] with parental responsibility may appoint a guardian by Will or by a document which they date and sign and which provides that the appointment only takes effect on their death. While in many circumstances it will be most appropriate to make the appointment in a Will there will be some occasions where it would be better made in a separate document. This might include situations where time is of the essence and there is a risk that the testator might die before the Will can be executed or where the testator is likely to revoke their Will in the future but will not wish to revoke the appointment of a guardian[2].

1 This does not include a step-parent as they (unlike unmarried fathers or second female parents) cannot become registered as the child's parent.
2 The appointment of a guardian in a Will or codicil is revoked if the Will or codicil is revoked: Children Act 1989 s 6(4).

9.5 It is possible to appoint more than one guardian. It is also possible for both parents to appoint separate guardians but for obvious reasons couples should be advised to consult one another and appoint the same person or persons if possible.

9.6 The appointment of a guardian can either be conditional on the testator being the sole surviving parent[1] or it can be unconditional[2]. If the appointment is unconditional then if on the testator's death there is a surviving parent with parental responsibility the appointment will only take effect on the death of the surviving parent. It will take effect even if the surviving parent appoints a different guardian, in which case both appointees will be guardians. In the case of married couples it is generally better practice for the appointment to be conditional as it allows the survivor to choose the most appropriate person or persons to be appointed without being constrained by the person chosen when the first-to-die passed away. For practical reasons it is also common that the same persons are appointed guardians of all the testator's minor children but circumstances may make this unsuitable. In particular, if there have been children from different relationships it may be appropriate to make different appointments for different children and provision for this is made in **Forms 9.4** and **9.5**.

1 See **Form 9.2**.
2 See **Form 9.1**.

9.7 An appointed guardian may appoint another guardian to act in the case of his or her death[1]. This is a statutory power and therefore there is no requirement to refer to this power in the Will. However, it may be sensible to include reference to this power in the Will if the appointed guardian is likely to be unaware of this power.

1 Children Act 1989 s 5(4).

9.8 The High Court also has an inherent jurisdiction to appoint a guardian but it is much more desirable for the testator to make his or her own appointment rather than relying on the inherent jurisdiction of the High Court.

Revocation

9.9 A signed and dated document revoking the appointment of a guardian will revoke the appointment even if it the appointment is contained in an unrevoked Will or codicil[1]. If the appointment was made in a separate document the appointment is also revoked by destruction of that document[2] while if the appointment was made by Will the revocation of the Will also revokes the appointment[3].

1 Children Act 1989 s 6(2).
2 Children Act 1989 s 6(2), (3).
3 Children Act 1989 s 6(4).

9.10 A later appointment revokes an earlier appointment (including one contained in an unrevoked Will or codicil) unless it is clear that the later appointment was to appoint an additional guardian rather than replace the original guardian. Draftsmen should therefore take considerable care to make this point clear if they are asked to appoint an additional guardian in a later document.

9.11 An appointment of the testator's spouse as a guardian is also automatically revoked by the subsequent dissolution or annulment of the marriage unless a contrary intention appears in the appointment[1]. If the testator seeks to appoint their spouse as guardian the draftsman should clarify this point with the testator and prepare the Will accordingly[2].

1 Children Act 1989 s 6(3A).
2 See **Form 9.3**.

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Other points

9.12 The testator should be advised to obtain the consent of the proposed guardian prior to making a provision appointing them as a guardian. A failure to do so may lead to the guardian disclaiming the guardianship which would be undesirable for all concerned. A guardian can disclaim his appointment by a signed document but this must be made within a reasonable time of the guardian first knowing that the appointment has taken effect[1].

1 Children Act 1989 s 6(5).

9.13 The interrelationship between guardians and trustees means that careful consideration should be made as to whether or not the chosen guardians should also be appointed as trustees of any trust created under the Will. On one hand, the guardians are best placed to know the needs of the children and they have the task of providing for those needs and therefore it may make sense for them to also be trustees. On the other hand, if they are appointed as trustees they can be placed in a conflict of interest if the children are beneficiaries under the trust. As guardians they should act in the children's best interests but as trustees they should be neutral when they judge the conflicting claims of the different beneficiaries. This problem is particularly obvious when the residue is held on discretionary trusts and the children are discretionary beneficiaries. In a case such as this, the most sensible position is sometimes to appoint two professional (or otherwise independent) trustees to act alongside one of the guardians.

12 Specific Gifts of Chattels and Other Personal Property

Need for a gift of chattels

12.1 Where a testator is giving the whole of his estate to his spouse there is no need to include a separate gift of chattels. Where, however, the Will is more complex a separate gift of chattels is desirable to avoid chattels having to be divided between residuary beneficiaries.

12.2 A trust that includes chattels (for example, to hold them for a person's life) should be actively discouraged. Not only is it inconvenient but it raises problems of maintenance, fair wear and tear, insurance, safe-keeping and taking inventories. A trust of chattels most often arises where a testator creates a life interest of the whole of the estate. Where that happens it is preferable for chattels to be excluded from the life interest and to be the subject of an absolute gift. This is particularly so where the life tenant is the testator's widow. Perhaps the one exception is where a right to occupy a house as a residence is given and the testator wishes the contents to remain in the house. Even so, the testator should think hard about whether an absolute gift of the contents is more appropriate. A precedent for this is **Form 11.11**.

Inheritance tax and gifts of chattels

12.3 Inheritance tax on chattels situated in the UK will be borne by residue as a testamentary expense but chattels situated elsewhere will bear their own inheritance tax. As noted in a previous chapter[1], in the ordinary case, the normal direction to pay inheritance tax out of the residue merely makes this clear but where chattels may be out of the UK an express direction is essential. If valuable chattels are to be given subject to inheritance tax an express direction will be required.

1 See **10.5–10.7**.

Gifts of personal chattels

12.4 Gifts of chattels are almost always specific. It should always be made clear in the Will whether the gift is to relate to a particular item owned when the Will is made or to any item which, at death, corresponds to the description given in the Will. In default of a clear direction the Wills Act 1837 s 24[1] provides that a Will 'speaks

from death' unless a contrary intention is expressed. The expression, for example, 'my car' may refer to the car the testator owns at the date of his Will or, by virtue of s 24, the car he owns at death. If there may be ambiguity the matter should be put beyond doubt by the terms of the Will (contrast **Forms 12.1** and **12.2**). Forethought should also be given to the possibility of the testator's owning more than one of the specified chattel (eg two cars) at his death.

1 Wills Act 1837 s 24, see **appendix 33.12**.

12.5 Problems also arise when the subject matter of the gift is one of a number of similar items, for example, a piece of jewellery. Practitioners are well aware of the difficulties which can arise on distribution in giving effect to inadequate descriptions such as 'my dress ring'. It is therefore important to take pains to obtain detailed descriptions of such items, bearing in mind that, even where only one such item exists at the date of the Will, there is the possibility of others being acquired subsequently.

12.6 Where a testator wishes to make a general gift of personal chattels, it is convenient to refer to 'personal chattels as defined by Administration of Estates Act 1925 s 55(1)(x)'[1]. The definition was changed by the Inheritance and Trustees Powers Act 2014 to mean:

> 'tangible movable property, other than any such property which—
> - Consists of money or securities for money, or
> - Was used at the death of the intestate solely or mainly for business purposes, or
> - Was held at the death of the intestate solely as an investment'.

The definition therefore excludes money, securities for money, chattels used solely for business purposes and investments.

1 Administration of Estates Act 1925 s 55, reproduced at **appendix 33.17**.

12.7 Special care should be taken in the case of chattels which have a business use. Once again a good example is a car which the testator may refer to as 'my car' when in fact it belongs to a company. The use of a car for both business and private purposes may prevent its being a 'personal chattel' as defined. If the statutory definition (above) is used it will depend upon whether the car was 'solely or mainly' used for business purposes. If it is not, it will be an open question for the interpretation of the Will. Care should be taken that the gift will achieve the testator's desires.

Collections

12.8 Whether or not a collection of items will fall within the new statutory definition will depend upon whether they are held for investment purposes. That will primarily depend upon whether the testator collected them for pleasure or in order to make money. Given the uncertainty it is preferable for them to be expressly included or excluded. Often the testator has a specific idea of what he wants to do with a particular collection but has no idea what to do with ordinary chattels.

Rights of selection of chattels

12.9 The testator who has little or no idea what to do with ordinary chattels often has some vague desire that friends or relatives should be given a right to select

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mementoes or keepsakes from his possessions. Generally a testator who cannot decide what to do with his own chattels is only saving up trouble for others and so the inclusion of rights of selection should be discouraged where possible. Practitioners will be aware that disputes concerning chattels often arise in the context of litigation concerning the administration of estates and are often the cause of the dispute. However, testators can be quite determined to give a right of selection and so **Forms 12.14–12.18** have been included in this section.

12.10 The possibilities covered by these forms include a gift to trustees subject to various alternative rights of selection[1]; a mere right of selection and distribution with the items not selected falling into residue[2]; a gift of such item as is selected with provision for the resolution of disputes where beneficiaries cannot agree[3]; an absolute gift coupled with a non-binding direction to make a distribution in accordance with a memorandum of wishes[4]; and a gift to children in equal shares subject to division and distribution in specie by trustees[5].

1 See **Form 12.14**.
2 See **Form 12.15**.
3 See **Form 12.16**.
4 See **Form 12.17**.
5 See **Form 12.18**.

12.11 These forms are not exhaustive of the variety of possible schemes of distribution which testators desire. The important thing in each case is to be clear. As with all testamentary dispositions it is important to establish what is given and to whom but there should also be a long-stop date by which rights of selection or powers of distribution must be exercised. The timing may also have inheritance tax consequences: a gift over by a specific legatee in accordance with the testator's wishes within two years of the testator's death will be treated for inheritance tax purposes as having been made by the testator's Will[1] as will a discretionary distribution by trustees within the same period[2].

1 Inheritance Tax Act 1984 s 143 (**appendix 36.6**) and see **Form 12.17**.
2 Inheritance Tax Act 1984 s 144 (**appendix 36.7**) and see **Form 12.14**.

Chattels subject to a charge

12.12 In the case of chattels subject to a charge there are two typical situations: credit sale and hire purchase. With a credit sale, ownership of the chattel is vested in the testator and will pass to the beneficiary under the Will. The amount outstanding under the agreement is a debt which may be payable out of residue unless express provision is made for the beneficiary to discharge it[1]. The ownership of goods held under a hire purchase agreement is not vested in the testator although, where the Consumer Credit Act 1974 applies, the hirer's rights pass on death to the personal representatives who can transfer the rights to the beneficiary. In other cases there is the difficulty that some agreements prohibit a transfer of rights and others even provide for termination of the agreement on the death of the hirer. A gift of 'my personal chattels' will not include any chattels that are subject to a hire purchase agreement or any other agreement under which the testator does not own the goods.

1 See **Forms 12.19** and **12.20**.

12.13 The simple solution is to refer specifically to any goods which the testator holds under a hire purchase or similar agreement and to provide for the outstanding

balance to be paid out of the residue. This is best done in the clause constituting the gift[1]. Whatever the strict legal position, it is likely that the finance company will accept payment in full and transfer ownership. The other possibility is to express the gift in such a way that the beneficiary must, if he wishes to take it, accept it subject to the liability of the hire purchase agreement, whatever that may be[2].

1 See **Form 12.19**.
2 See **Form 12.20**.

Releases and gifts of debts

12.14 Debts are choses in action[1] and so can be given by Will. **Form 12.22** is an example. Where a legatee owes a debt to the estate they must bring such debt into account and will be paid only the net sum (eg a legatee of £500 who owes £250 will receive only £250).Testators often want to release debtors from debts due to them but it is unwise to include a general forgiveness of debts in a Will as this might include debts incurred subsequently and those which the testator does not regard as such: strictly this would include the balance of a current bank account. It is better to identify the debtor and the debt and include a release by way of specific gift. For examples of releases see **Forms 12.23–12.25**.

1 Ie the testator does not have immediate enjoyment of the debt, merely a right to recover it by action.

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Gifts of shares

12.15 A simple gift of shares should be distinguished from a gift of a business or an interest in a business in which the testator is a participant[1]. The simple gift of a holding in a public company as in **Forms 12.26** and **12.27** does not normally require any special inheritance tax consideration and is no different from any other specific gift.

1 For gifts of business interests see **chapter 13**.

12.16 Shares in private limited companies will often have restrictions upon their transfer or sale or else be subject to rights of pre-emption in favour of other shareholders. Clients should be warned of this possibility when attempting to include such shares by way of bequest and encouraged to investigate the company's articles of association.

Gifts of bank accounts

12.17 It is generally inadvisable to make a gift by reference to a particular bank account, for example of 'all my money in my NatWest current account'. First, testators often change accounts without considering the effect of this upon their Wills[1]. Second, the nature of bank accounts means that the balance within the account can be affected by all sorts of things so that the size and nature of the gift will vary according to what monies were in the account at the time of death. To be effective the account balance must belong to the deceased after their death and so must not, for example, be held jointly with some other person. Notwithstanding these warnings because it is a gift many testators wish to give, a precedent for such a gift is at **Form 12.28**.

1 See *Re Dorman* [1994] 1 All ER 804.

FORM 13.12

Appointment of Separate Business Executors[1]

1 I appoint [*name*] of [*address*] and [*name*] of [*address*] as my executors and trustees for all purposes except those relating to the assets given by clause [*insert clause containing gift of business*].

2 I appoint [*name*] of [*address*] and [*name*] of [*address*] as my executors and trustees in relation to the assets given by clause [*insert clause containing gift of business*].

3 Unless the context otherwise requires, in this Will the expression 'my Trustees' means the executors and trustees appointed under sub-clause 1 of this clause and the expression 'my Business Trustees' means the executors and trustees appointed under sub-clause 2 of this clause[2].

1 See note at **13.35–13.36**.
2 Such a definition could also be included in a separate definitions section in the Will but it is thought to be more appropriate here.

14 Charities and Charitable Giving

Introduction

14.1 The charity sector has expanded greatly in recent years and it is now more common than ever for testators to leave gifts, often of very large sums, to charity in their Will. Currently the annual value of bequests to charity in the UK is estimated at somewhere between £1.5 and £2 billion. A draftsman must therefore be able to deal with requests of clients to draft effective Wills containing charitable bequests and must be aware of the potential pitfalls in drafting such Wills. This is especially so given that some charities, mainly because of the importance of legacy income to their total income, have gained a reputation as rather aggressive litigators with the consequence that a poorly drafted charitable provision could well result in litigation.

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14.2 Aside from purely benevolent reasons, charitable giving is also particularly attractive to testators because of its favourable inheritance tax position. All charitable gifts attract no inheritance tax[1] and if gifts amounting to a certain percentage of the testator's net estate are made, a reduced inheritance tax charge may be made against part or all of the testator's estate[2]. This means that the testator concerned with maximising his inheritance tax savings should actively consider making charitable bequests.

1 Inheritance Tax Act 1984 s 23.
2 See note at **14.6–14.11** below.

Whether a gift is charitable

14.3 The question of whether a gift is charitable or not has resulted in substantial legal jurisprudence but in most situations will not be of concern to the draftsman. Most testators simply wish to leave a sum of money or a percentage of their estate to a charity or charities registered with the Charities Commission and if a charity has been registered with the Charities Commission then it is conclusively presumed to be a charity and any gift to it will be charitable[1].

1 Charities Act 2011 s 37.

14.4 It is only where the gift is to somebody other than a registered charity that the draftsman will need to concern himself with whether the gift is charitable or not. The Charities Act 2011 provides a definition of 'charity'[1] and 'charitable purpose'[2]. In order for a purpose to be charitable it must fall within one of the purposes listed

in s 3(1) of the Act[3] and must also be for the public benefit[4]. It is also noted that if the executors or trustees are given an option about whether to apply the gift for charitable or non-charitable purposes (eg a gift for 'charitable or other purposes which my trustees in their sole discretion may select') then it is not a charitable gift even if the trustees do apply the gift for charitable purposes[5]. A full analysis of precisely what gifts are charitable and what are not falls beyond the scope of this book and reference should be made to specialised textbooks if the draftsman cannot easily identify whether an intended gift is or is not a gift for a charitable purpose.

1 Charities Act 2011 s 1.
2 Charities Act 2011 s 2.
3 These purposes are the prevention or relief of poverty; the advancement of education; the advancement of religion; the advancement of health or the saving of lives; the advancement of citizenship or community development; the advancement of the arts, culture, heritage or science; the advancement of amateur sport; the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity; the advancement of environmental protection or improvement; the relief of those in need because of youth, age, ill-health, disability, financial hardship or other disadvantage; the advancement of animal welfare; the promotion of the efficiency of the armed forces of the Crown or of the efficiency of the police, fire and rescue services or ambulance services; or any other purpose which are analogous or within the spirit of any of the recognised charitable purposes.
4 The mere fact that a purpose falls within s 3(1) is not sufficient to make it charitable. It must also be for the public benefit.
5 *Re Chapman, Hales v A-G* [1922] 2 Ch 479.

14.5 The draftsman should also be aware of the provisions of the Equality Act 2010 when advising testators in relation to charitable giving. In most practical situations the question of discrimination will not arise but some testators may wish to restrict gifts in ways which engage the Equality Act. A restriction on a charitable gift by reference to colour will take effect as if the reference to colour was ignored[1] while a restriction on a charitable gift by reference to any other protected characteristic[2] may be permitted if it is a proportionate means of achieving a legitimate aim or to prevent or compensate a disadvantage linked to the protected characteristic[3].

1 Equality Act 2010 s 193(4).
2 These are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation (Equality Act 2010 s 4).
3 Equality Act 2010 s 193.

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Reduced rate of inheritance tax

14.6 In addition to charitable gifts being free from inheritance tax, if a testator leaves a certain percentage of his property to charity (or a registered Community Amateur Sports Club), then his estate may be able to claim a reduced rate of inheritance tax (36%) on the rest of his estate or on a particular component of his estate. The relevant provisions are contained in Schedule 1A of the Inheritance Tax Act 1984. In order to work out whether the reduced rate can apply and over what part of the estate (if any) it applies, a testator's estate is broken down into three components:

- Survivorship – assets which pass by survivorship;
- Trust Assets – assets held in trust which form part of the testator's estate;
- General – all assets that the testator owns outright or as a tenant in common.

14.7 A fourth component (gifts with reservation) can also qualify to pay tax at the reduced rate but only if it is merged with one of the other components.

14.8 If the testator makes from any component a charitable gift of 10% or more of the net estate of that component (as calculated in accordance with the provisions of Schedule 1A) then the chargeable part of that component will only bear inheritance tax at 36%. For example, if a testator has general net assets of £750,000, a nil-rate band of £325,000 and leaves a charitable legacy of £42,500 he will have a chargeable estate of £382,500 but because the charitable gift of £42,500 is 10% of the net estate he will only pay inheritance tax at 36% (£137,700) instead of 40% (£153,000).

14.9 There are also provisions to allow for the merger of components to gain the maximum benefit. This means that if a gift in one component is sufficiently large it can ensure an inheritance tax saving across two or more components.

14.10 It is essential for the draftsman to be aware of the reduced rate of inheritance tax provisions as, if used correctly, they can result in a win-win situation for all concerned. More money can be given to charity, less inheritance tax can be paid and, ultimately, the beneficiaries can receive more money[1]. The draftsman should therefore bear this in mind when advising the testator as to the level of charitable gifts which he or she might wish to make. Helpfully, the HMRC website contains a very useful reduced rate calculator which can be used to calculate the minimum level of gift which must be left to charity in order to qualify for the reduced rate of inheritance tax[2].

1 For example, if the net estate (calculated in accordance with the relevant provisions) is £575,000, a gift to charity of £50,000 (less than 10% of the net estate) would result in inheritance tax of £210,000 being payable and the beneficiaries receiving £315,000 whereas a larger gift to charity of £57,500 (10% of the net estate) would result in inheritance tax of £186,300 being payable and the beneficiaries receiving £331,200 (an extra £16,200). This example is 'Example 2' of the 'Worked Examples' on the HMRC website – http://www.hmrc.gov.uk/inheritancetax/pass-money-property/charity-examples.htm).
2 http://www.hmrc.gov.uk/tools/iht-reduced-rate/index.htm.

14.11 As the value of the testator's estate may fluctuate over time a gift of a fixed sum may require regular amendment in order to ensure that it meets the 10% test. To avoid this, consideration should be given to a formula clause which will ensure that a gift of 10% (subject to maximum or minimum levels if desired) is always left to charity and the reduced rate of inheritance tax is always obtained[1]. If, however, no such clause is used and the gift to charity is insufficient to obtain the reduced rate of inheritance tax (or no gift to charity at all is made) the Will can be varied by the beneficiaries to increase the gift to charity to the required amount.

1 See **Forms 14.1** and **14.2**.

Gifts to charity

14.12 Gifts to charity can take many forms – pecuniary legacies, gifts of personal property, gifts of land, gifts of a share of residue or a gift on a charitable trust. While clauses providing for a gift to a charity are often similar to a gift to an individual they do need certain additions and amendments in order to make the charitable gift both effective and trouble-free.

14.13 One of the practical problems relates to receipt of the gift and finding somebody who can give a proper receipt to the executors or trustees for the gift. This is particularly a problem if the charity is not incorporated as then a gift will take effect as a gift to each member. Express provisions concerning receipts are

20 Declarations

20.1 This section sets out a number of declaratory provisions which often appear at the end of a Will. The draftsman is advised to consult the declarations contained in this chapter as a matter of course at the end of drafting the Will to see if it is appropriate to include any of them in the particular circumstances. These declarations can be grouped together at the end of the Will either as successive clauses or grouped together as a single clause with each declaration used constituting a subclause of it. Where a declaration contained in this chapter is relevant to a particular clause it may be more appropriately included as a subclause of that particular clause rather than in a list of declarations at the end of the Will. Some of the particular declarations in this chapter are self-explanatory and the footnotes provide all the commentary needed. However, it is worth commenting on some of the areas covered by other declarations.

Intermediate income

20.2 When a gift is made under the Will there will almost certainly be a period of time between the date of death and the date the gift is transferred into the hands of the designated beneficiary. This may be a short period or, in the case of a legacy to a minor or a contingent legacy, it may be a considerable period of time. The question then arises whether the beneficiary should receive the income or interest created by the gift which relates to the period before the gift is in the hands of the beneficiary (the intermediate income). The rules relating to the application of intermediate income are complex and rules as to whether it is payable, from when and at what rate change depending on the type of legacy and class of beneficiary. It is therefore usually appropriate to provide that gifts other than those of the residuary estate shall not carry income or interest for one year after death to give the personal representatives time to administer the estate. **Form 20.2** is an example of such a provision. If a particular gift such as an annuity or priority legacy is to take effect from the date of death it should be excluded from this provision. Equally, if the object of a gift is to confer the right to intermediate income for inheritance purposes it should also be excluded from this provision. **Form 20.2** is drafted so as to provide for certain gifts to be excluded from this provision.

Legitimated, illegitimate, adopted and step-children

20.3 Legitimated children (children who were born illegitimate but were subsequently legitimated) are entitled to take any interest under a Will to which

they would have been entitled to take had they been born legitimate[1]. The Family Law Reform Act 1987 ss 1 and 19[2] provides that references to a child or children in a disposition under a Will shall, in the absence of any evidence to the contrary, be presumed to include illegitimate children. Adopted children are also presumed to be treated as the child of the adopter unless the Will expresses a contrary intention[3]. Thus, if the testator wishes to exclude legitimated, illegitimate or adopted children (of himself or anybody else) he must make express provision doing so. **Form 20.10** is an example of a provision excluding such children from benefiting.

1 Legitimacy Act 1976 s 5, See **appendix 33.26**.
2 See **appendix 33.24–33.25**.
3 Adoption and Children Act 2002 s 67, see **appendix 33.28**.

20.4 The position is reversed with regard to step-children who are presumed not to fall within the definition of 'child' or 'children' in a Will and will, generally speaking, not benefit under such a gift. This presumption can be displaced by the circumstances and construction of the Will[1]. If the testator intends to benefit step-children it is therefore highly advisable to include an express declaration of this intention. This declaration can either be to include the entire class of step-children as if they were children of their step-parents[2] or merely to include specified step-children in their relevant class[3].

1 See for example *Upton v Jeans* (1895) 13 R 627.
2 See **Form 20.5**.
3 See **Form 20.6**.

Survivorship, lapse and accrual

20.5 Declarations on survivorship, lapse and accrual concern situations where the intended beneficiary dies before or shortly after the testator. In such a situation many testators may wish to provide for their gift to pass otherwise than in accordance with the default provisions.

20.6 Survivorship clauses require the beneficiary to survive the testator for a set period of time and if the beneficiary does not do so they are treated as predeceasing the testator. They are most often used in relation to residuary gifts and a full discussion of their benefits, risks and inheritance tax consequences is contained in **chapter 16** at **16.4–16.12**.

20.7 Where a Will contains a gift to a testator's child or remoter descendant of the testator and the beneficiary predeceases the testator leaving issue, the default provision is that the gift will take effect as a gift to the descendant beneficiary's issue[1]. This is subject to any contrary provision in the Will. Most testators will be content for this to occur but if the testator does not wish the descendant beneficiary's issue to take the beneficiary's share for whatever reason it will be necessary to include a provision excluding s 33 of the Wills Act 1837 and providing for such a gift to lapse on the death of the descendant beneficiary. This can be in the form of a general declaration[2] but it is usually better to include such a provision as a sub-clause of the clause making the gift to the descendant beneficiary as it will draw attention to such a gift and there is less chance of the provision being applicable to other gifts which the testator did not wish it to be applied to.

1 Wills Act 1837 s 33, see **appendix 33.14**.
2 See **Form 20.8**.

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20.8 The object of an accrual clause is to avoid a partial intestacy where there is a gift to named persons equally or in fixed proportions. If one of the named persons dies before the testator and there is no contingency gift, their share will fall into residue (if it is a legacy) or will fall into intestacy (if it is a residuary gift). Accrual clauses provide that the share of the person predeceasing the testator does not fall into residue / intestacy but rather accrues to the other beneficiaries of the gift. Prima facie an accrual clause refers only to the original share and not to an augmented share which has already benefited from an earlier accrual and so additional words may need to be added to ensure that it also applies to an augmented share. **Form 20.9** contains two examples of suitable accrual clauses.

Satisfaction and ademption

20.9 The doctrines of satisfaction and ademption can operate to reduce the ultimate sum received by the beneficiary. The way these doctrines operate can often be a surprise to the testator and they should be explained to the testator prior to the execution of any Will.

20.10 The doctrine of satisfaction presumes that a legacy to a beneficiary will be in satisfaction or part satisfaction of a debt owed to the beneficiary. This means that if the testator owes the beneficiary £10,000 and leaves him a legacy of £5,000 the beneficiary is only entitled to a total of £10,000. If such satisfaction is not intended by the testator a form excluding the doctrine of satisfaction should be used[1] and the legacy will be in addition to any debt owed to the beneficiary. If the doctrine was excluded in the previous example the beneficiary would receive a total of £15,000 (a debt of £10,000 plus a legacy of £5,000).

1 See **Form 20.10**.

20.11 If a testator gives a legacy or a share of residue to one of his children and then, after making the Will, makes a substantial gift to the same child, the gift may be considered to have been as an advance against the child's testamentary benefit. This may result in the legacy or residuary share being adeemed or partly adeemed by the lifetime gift. In order to prevent such ademption a declaration such as that in **Form 20.11** can be used.

PRECEDENTS

20.12

FORM 20.1

Declaration that legacies are free of inheritance tax and other duties[1]

The legacies [*given by this Will*] [*at clauses* [ ] *to* [ ]] shall be paid free of inheritance tax and other taxes or duties payable as a result of my death.

1 See note at **10.5–10.7**.

FORM 20.2

Intermediate income[1]

1 Gifts made by this Will other than those of my residuary estate [and the gifts specified in subclause 2 below][2] shall not carry income or bear interest until the expiration of one year from my death and until then my Trustees may in their discretion:

1.1 accumulate the income and add it to the capital of my residuary estate;

1.2 apply it in accordance with their statutory or other powers;

1.3 pay it to the beneficiary of the asset from which the income arises.

[2 The gifts contained in [*insert clauses containing gifts which are intended to carry intermediate income*] shall be excluded from this provision][3].

1 See note at **20.2**.
2 These words should be included if there are certain gifts such as an annuity which are intended to carry intermediated income.
3 See footnote 2 above.

FORM 20.3

Declaration of exclusion[1]

No provision is hereby made for [*name*] [for the reasons set out in a letter signed by me and left with this my Will] [because I have given them a number of large lifetime gifts][2].

1 This declaration is used where the testator wishes to explain why a certain person who might otherwise have expected to inherit is excluded from benefit under the Will. It is usually used as a way of attempting to pre-empt an application under the Inheritance (Provision for Family and Dependants) Act 1975. See **chapter 2** at **2.31–2.45**.
2 It is usually inappropriate to set out the reasons in the Will itself as these may be scandalous and refused probate. However, where the reasons are not scandalous they may be set out in the Will.

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gains tax purposes, the recipient acquires the property appointed at its market value at the date of appointment and not at the date of death. There might also be a cash-flow problem during the administration of an estate in which inheritance tax must be paid at an early stage.

23.23 There will often be a strong case for an 'ordinary' discretionary trust[1] even though the discretion may well be exercised within the two-year period. Of course, whatever is appointed to the surviving spouse or civil partner will increase inheritance tax on his or her death whether or not an appointment is made within or outside the two years. Subject to the stance taken by HMRC, the surviving spouse or civil partner should ideally rely on benefits from the discretionary trust and not benefit from an appointment.

1 See **Form 16.18**.

PRECEDENTS

23.24

FORM 23.1

Specific Gift of Agricultural Property – simple form[1]

I GIVE all my share and interest in the farm and business known as [ABC Farm] to those of my children who survive me and attain 25 in equal shares.

1 Great care should always be taken to ensure that the interest in the farm is properly described. Is it held by a partnership, or through a company? See for example *Re Lewis's Will Trusts* [1984] 3 All ER 930 where the testator left a bequest of 'my freehold farms' when he actually owned three quarters of the shares in a company which owned the farm with the result that the gift failed.

FORM 23.2

Specific gift of Business Property together with the balance of the inheritance tax nil-rate band[1]

I GIVE my shares in [X Limited] if they qualify for 100% Business Relief [and the maximum amount which can be given to them under this clause without inheritance tax being payable] to those of my children who survive me and attain 25 in equal shares.

1 This is a form which makes it clear that the property attracting business relief is to form part of the nil rate band gift.

FORM 23.3

Specific Gift of Agricultural or Business Property – by reference to the available relief

I GIVE free of tax to those of my children who survive me and attain 25 in equal shares all of my assets:

(i) That are or would be reduced for the purposes of inheritance tax [by 100%][1] by reason of their meeting the definition of Relevant Business Property in section 105(1) of the Inheritance Tax Act 1984.

(ii) Whose agricultural value would or could be reduced [by 100%][2] by reason of their meeting the definition of Agricultural Property in section 115(2) of the Inheritance Tax Act 1984[3].

1 The words in square brackets would exclude assets that attract only 50% relief, including assets used within the business but not owned by it. To omit it, however, may mean that this gift will attract some taxation. Since it is expressed to be free of tax if the residue is exempt it would therefore have to be grossed up for the purposes of calculating inheritance tax.

2 There are relatively few instances of agricultural property not qualifying for 100% relief. The more limited relief (at 50%) applies in circumstances where the land is let on neither an Agricultural Holding or a Farm Business Tenancy and the owner is not entitled to vacant possession within 12 months. However, the words in square brackets may be desired for the reasons expressed above.

3 Note, as explained above (at **23.5**), it would still be possible for some part of the value of this gift to attract tax because of its non-agricultural value. Therefore, it is possible that some part of this gift could bear tax, with the resulting possibility of grossing up if the reside is exempt. The alternative is to make the gift subject to tax.

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FORM 23.4

Gift to children of inheritance tax nil-rate band[1]

(1) I give the maximum amount which can be given to them under this clause without inheritance tax being payable[2] in equal shares to those of my[3] children who survive me [and attain [25]/[18]].

(2) If any of my children die before me his or her children [who attain 21][4] shall take equally the share which their parent would otherwise have inherited.

1 The use of the nil rate band clause has the advantage of avoiding the need to update the Will to accommodate the changes in banding but it has the disadvantage that any change may increase the amount of the legacy beyond that which the testator would wish and so care should be exercised in using a nil rate band clause instead of the current ceiling for the nil rate or a lesser sum. This is especially so where the size of the testator's estate is such as may not justify automatic increases in the legacy. See **Form 23.5** for a capped nil rate legacy.

2 This clause is intended to use the nil rate band. Where the testator has made no lifetime gifts which bite into the nil rate band, the gift under this clause will be the amount of the nil-rate band at the date of death. Where there have been gifts (including PETs) during the seven years preceding death, the legacy will be the amount of the nil rate band less the total of such gifts. The testator should be advised to consult his solicitor or Will draftsman if, at a later date, he contemplates making lifetime gifts because the consequences may require a review of this Will. Care should also be taken if the estate is likely to include agricultural or business property attracting relief at 100%. If so, the nil rate band gift defined by this clause will include all of that property perhaps leaving nothing in residue.

3 This clause refers expressly to the testator's own children as 'my children'. In circumstances in which the clause is used in one of two Wills for a married couple reference could be made to 'our' children. Where there is only one marriage and it is clear to whom the testator is referring the choice between 'my' and 'our' children will ordinarily pass without comment. Where there is more than one marriage the testator's children will always be included within 'my children'. Illegitimate children and adopted children will be included unless expressly excluded – Family Law Reform Act 1987 ss 1 and 19 and Adoption and Children Act 2002 s 67.

4 A gift at 25 will come within Inheritance Tax Act 1984 s 71D, see note at **22.20**.

FORM 23.5

Capped gift of inheritance tax nil-rate band to children[1]

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(1) I give the maximum which can be given to them under this clause without inheritance tax becoming payable in respect of this gift [or (the sum of £]/[% of my estate]/[% of my Residue]/[£ increased by the percentage by which the latest available figure of the All Items Index of Retail Prices exceeds that last available before today]) if that is less in equal shares to those of my children who survive me [and attain [25]/[18]].

(2) If any of [my[2]] children dies before me, his or her children [who attain 21] shall take equally the share which their parent would otherwise have inherited.

1 See footnotes to the last precedent. The only difference between this form and the preceding form is the restriction on the gift.

2 See **Form 23.4** footnote 3.

FORM 23.6

Gift on discretionary trust of [capped] inheritance tax nil-rate band in favour of spouse and issue[1]

(1) I give the maximum which can be given to them under this clause without inheritance tax becoming payable in respect of this gift [[or the sum of £]/[% of my estate]/[% of my Residue]/[£ increased by the percentage by which the latest available figure of the All Items Index of Retail Prices exceeds that last available before today] if that is less] to my Trustees on the following trusts.

(2) In this clause the expression 'my beneficiaries' shall mean my spouse and my issue.

(3) My Trustees are to hold the assets of this clause or any other assets representing those assets or otherwise added to this trust ('the Trust Fund') for not more than 125 years ('the Trust Period') after my death to:

(a) pay or apply the capital of the Trust Fund for the benefit of whichever of my beneficiaries my Trustees think fit;

(b) pay or apply the income of the Trust Fund for the benefit of whichever of my beneficiaries my Trustees think fit or during the whole of the Trust Period to accumulate such income as is not so applied and to invest that income as an addition to the capital of the Trust Fund;

(c) not later than 125 years after my death to end the trust by distributing the Trust Fund among whichever of my beneficiaries are then alive in equal shares;

(d) if these trusts fail hold the Trust Fund on trust for whichever charity my Trustees think fit.

(3) My Trustees may:

(a) invest or otherwise apply any part of the Trust Fund and vary investments and applications including by making loans [which may be interest-free or at less than a full market rate and may also be linked to the All Items Index of Retail Prices or its replacement] to any beneficiary;

(b) make retentions to meet any taxes for which they may be liable and pay those taxes and any other expenses of the administration of the Trust Fund out of capital or income;

(c) not except under subclause (3)(a) or on a distribution of the Trust Fund exercise their powers under this sub-clause so as to create an immediate post-death interest an interest under Inheritance Tax Act 1984 s 71A or 71D or any other interest in possession for a beneficiary.

1 If this gift is to be capped, the words in square brackets in (3)(a) should be included.

FORM 23.7

Clauses enabling use of a promissory note to satisfy the nil-rate band gift

(1) My Trustees may require [the Discretionary Trustees] to accept from them in full or partial satisfaction of [the Trust Fund] a promise on the part of my [wife]/[husband]/[civil partner] to pay [the Trust Fund] on demand or a charge of any part of my Residue with payment when demanded of all or part of [the Trust Fund].

(2) The promise or charge may include whatever terms my Trustees think fit including terms:

(a) relating to the provision of fixed or floating security;

(b) requiring the payment of interest; and

(c) making the sum payable linked to the All Items Index of Retail Prices or any other index.

(3) [The Discretionary Trustees]:

(a) may refrain from calling in or exercising any rights in relation to any sum the subject of the promise or charge for as long as they think fit;

(b) will not be liable for any loss which may occur through the exercise of any power under this clause if my Trustees are unable to make payment in full or any security given becomes inadequate.

(4) The powers given under this clause are exercisable even though [the Discretionary Trustees] and my Trustees are one and the same provided that my [wife]/[husband]/[civil partner] must not be the only trustee in either case.

FORM 23.8

Residue on life interests to spouse – power for the trustee to terminate within the lifetime of the spouse[1]

(1) I give the residue of my estate after the payment of testamentary, funeral and administration expenses to be held by [and [ ] ("my Residuary Trustees") on the following trusts.

(2) My Residuary Trustees are to hold the residuary estate on trust:

(i) Subject to clause (4) below to pay the income thereof to my wife for her life.

(ii) On the termination of the interests at (i) above in equal shares for such of my children as survive me in equal shares provided that if any child or children should die before me leaving children such share as they would have inherited under this clause shall be divided equally between their children.

(3) Notwithstanding the entitlement of my wife to the income of residue my Residuary Trustees (being not less than two in number or a trust corporation) shall have power at their absolute discretion to:

(i) At any time during the life of my wife by deed revoke all or any part of her entitlement to the income with the effect that the capital over which that entitlement existed shall be held upon the trusts at clause 2(ii).

(ii) Apply for the benefit of any person absolutely or contingently entitled thereto the whole or part of the income from any capital to which he is or may become entitled.

(iii) Apply for the benefit of any beneficiary absolutely or contingently entitled thereto the whole or part of the capital to which he is or may become entitled.

1 See note at **23.17–23.19**.

FORM 23.9

Short Term Discretionary Trusts for the benefit of spouse and issue[1]

(1) I give the residue of my estate after the payment of testamentary, funeral and administration expenses to be held by my Trustees on the following trusts.

(2) In this clause the following expressions shall have the following meanings:

(i) 'my beneficiaries' shall mean my spouse and my issue.

(ii) 'The Trust Period' shall mean the period of 125 years after my death.

(3) My Trustees are to hold the residuary estate on such trusts to or for the benefit of my beneficaries as they shall by deed or deeds appoint at any time within the period of two years after my death (but no sooner than three months after my death)[2].

(4) Such appointment may be in any term or terms whatsoever PROVIDED THAT:

(i) Such appointment must cause the trust to end or the interests in the capital of the Trust Fund to be vested within the Trust Period and shall not permit any further appointment or appointments in breach of this rule.

(ii) No appointment shall prejudice or affect any prior appointment or other payment.

(5) In default of any such appointment the residue of my estate shall be held equally for those of my spouse and my children as survive me in equal shares.

1 See note at **23.21**.
2 An appointment made within three months will not be 'read back' for the purposes of the Inheritance Tax Act 1984 s 144(1).

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mortgages secured on real or leasehold property and any inheritance tax in respect of property passing under this Will or which becomes payable because of my death on any lifetime transfer by me or payable because of my death on property in which I hold a beneficial interest as joint tenant.

8. My Trustees shall hold the residue on trust for such of [my]/[our][6] children as survive me in equal shares.

[*For powers take in clauses 9, 10 and 11 of* ***Form 28.1***]

As Witness my hand this [--] day of [--------] 20[--]. [*Testator's Signature*]

Signed by the Testator in our presence and attested by us in the presence of the Testator and of each other.

[*Signatures, Addresses and Occupation of Witnesses*]

1 This Will makes provision for the unmarried partner by way of a right of residence and a substantial gift. Inheritance tax planning is not a concern for this couple: there will be an inheritance tax charge on the death of the testator and probably on the death of the surviving partner. If they want to minimise inheritance tax and are able to do so they should get married/form a civil partnership.

2 Unless the Will is made in expectation of marriage/civil partnership it will be revoked by any subsequent marriage or civil partnership. If the single adult is in a long-term relationship this point needs to be emphasised and it may be that the single adult wishes to put in such a clause to cater for a future marriage. See note at **4.7**.

3 The question of the parental responsibility of the survivor may need investigation. For example, if the surviving partner does not have parental responsibility, the testator may wish to appoint them. See further **chapter 9**.

4 This express gift is not essential but may be seen as desirable.

5 For a discussion of the grant of rights of residence by Will see **11.19–11.21**.

6 A gift to 'our children' has been held to refer to all children of all marriages of both spouses: *Re Zehr* [1944] 2 DLR 670; but as a matter of construction it may be limited to the children of the marriage, thus excluding children from a previous relationship. Legitimated, illegitimate and adopted children are presumed to inherit under a provision for children unless otherwise indicated but step-children will not. If the testator wishes to alter any of these presumptions express provisions needs to be made. See note at **20.3–20.4** and accompanying forms. It is particularly important, in the context of unmarried couples (where it is possible that only one name appears on a child's birth certificate), to ensure that the beneficiaries are described accurately. Clause 8(2) could be adapted to read '... our children [*name*], [*name*] and [*name*] ...' in order to avoid uncertainty.

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29 Second Marriages or Civil Partnerships

29.1 Where the testator has remarried or formed a new civil partnership and there are children of the first marriage or civil partnership specific difficulties arise. Usually these difficulties come from the testator's desire to provide for his current spouse/civil partner (and their children) but at the same time ensuring that the children from the first marriage are given their 'fair share' of his estate. This can be a particularly difficult area because, while many second spouses/civil partners will have a good relationship with the children from the first marriage, sometimes there can be terrible animosity between the children and the second spouse/civil partner. This increases the risk of litigation if there is any slight ambiguity in the Will. Second marriages are also a fruitful source of litigation under the Inheritance (Provision for Family and Dependants) Act 1975 with both the children of the first marriage and the spouse/civil partner of the second marriage often being applicants.

29.2 The draftsman should also be careful in cases of second marriages to ascertain how the first marriage ended. A marriage which ended with the death of the former spouse may result in the testator being entitled to an enhanced nil rate band on his death[1]. This will depend upon the disposition of the estate of the former spouse (which ought to be investigated while there is still an opportunity to do so). Where the testator is entitled to an enhanced nil rate band adequate provision might be made for the children of the first marriage by means of a nil rate band gift as in **Forms 27.5** or **27.8**. It is, however, up to the personal representatives of the testator to claim the enhanced nil rate band. Enlarging a nil rate band gift at the expense of residue is contrary to the interests of the surviving second spouse and so, in such cases, it would not be wise to appoint the second spouse as one of the executors because of the conflict that would naturally arise.

1 See **chapter 22** at **22.23–22.25** and **chapter 23** at **23.9–23.13**.

PRECEDENTS

29.3

Wills where there is a second marriage or civil partnership

Form 29.1 Will giving legacies to children of first marriage and residue to spouse or civil partner

Form 29.2 Will giving residence to surviving spouse or civil partner with half residue to spouse and half residue to children of first marriage or civil partnership

Form 29.3 Will giving right of residence to surviving spouse or civil partner with half residue to spouse and half residue to children of first marriage

Form 29.4 Will giving right of residence and life interest in residue to surviving spouse or civil partner; remainder to children

Form 29.5 Two-thirds to wife or civil partner; one-third to in-laws

FORM 29.1

Will in favour of testator's second spouse with legacies to children of first marriage[1]

I, [*full name*] of [*home address*] revoke all earlier Wills and declare this to be my last Will.

1. I appoint my [wife]/[husband]/[civil partner] [*name*] to be my [executrix]/[executor] but if my [wife]/[husband]/[civil partner] is unable or unwilling to act or dies before proving my Will I appoint as my executors those of my children who survive me but it is my wish that not more than two of them obtain probate of my Will.
2. I give legacies of £5,000 to each of my[2] children.
3. If my [wife]/[husband]/[civil partner] does not survive me I appoint [*name*] of [*address*] and [*name*] of [*address*] as guardians of any of my children under eighteen[3].
4. If my [wife]/[husband]/[civil partner] survives me[4] I give the rest of my estate to [him]/[her]. If the gift made by this clause fails I give the rest of my estate to those of my[5] children who survive me in equal shares.
5. A gift to any of my children shall lapse if he or she dies before me and the Wills Act 1837 s 33 shall not apply to the provisions of this Will.

As Witness my hand this [--] day of [--------] 20[--]. [*Testator's Signature*]

Signed by the Testator in our presence and attested by us in the presence of the Testator and of each other.

[*Signatures, Addresses and Occupation of Witnesses*]

1 This Will, for the less wealthy testator, makes only limited provision for the children.
2 A gift to 'our children' has been held to refer to all children of all marriages of both spouses: *Re Zehr* [1944] 2 DLR 670; but as a matter of construction it may be limited to the children of the

marriage, thus excluding children from a previous relationship. Where the family relationships include step-children it is more precise to refer to 'my children and step-children'. If the testator does not intend to include step-children or illegitimate children who might subsequently come out of the woodwork the description should be 'my children by my [wife]/[husband]', although if the testator has children by a previous relationship words will then have to be used to include them. In such a case it might be better to name them.
3 Only the survivor should appoint guardians but the question of the parental responsibility of the survivor may need investigation. For example, if the wife/husband/civil partner does not have parental responsibility, they should be appointed as guardian. See further **chapter 9**.
4 The inclusion of a survivorship condition is now likely to be of no effect or even detrimental where the gift is in favour of a surviving spouse because of the transferability of the nil rate band (discussed in **chapter 22** and **chapter 23**). However, if the survivor's Will is not in reciprocal terms or the surviving spouse has an enhanced nil rate band by virtue of a previous marriage there will be some justification for including the survivorship condition. In the previous edition the survivorship condition appears in the following terms:
'If [she]/[he] survives me by [30 days]/[six months] I give the whole of my estate to my [wife]/[husband]/[civil partner] absolutely'.
5 See footnote 2.

FORM 29.2

Will giving residence to surviving spouse with half residue to spouse or civil partner and half residue to children of first marriage or civil partnership

I, [*full name*] of [*home address*] revoke all earlier Wills and declare this to be my last Will.

1. I appoint my [wife]/[husband]/[civil partner] [*name*] and my children [AB] and [CD] as my executors.
2. I appoint as my trustees those of my executors who obtain probate of this Will and in this Will the expression 'my Trustees' means (as the context requires) those of my executors who obtained probate and the trustees for the time being of any trust arising under this Will.
3. If I am the sole surviving parent with parental responsibility for my children then I appoint [*name*] of [*address*] and [*name*] of [*address*] as guardians of any of my children under eighteen[1].
4. If [she]/[he] survives me by [30 days]/[six months] I give to my [wife]/[husband]/[civil partner] the house that constitutes at my death our matrimonial home.
5. My Trustees shall hold the rest of my estate on trust for sale with power to postpone sale to pay executorship expenses and debts including mortgages secured on real or leasehold property and any inheritance tax in respect of property passing under this Will or which becomes payable because of my death on any lifetime transfer by me or payable because of my death on property in which I hold a beneficial interest as joint tenant.
6. My Trustees shall hold the residue ('my residuary estate') on the following trusts:

   (1) As to one half of my residuary estate for my [wife]/[husband]/[civil partner] if [she]/[he] survives me by [30 days]/[six months] but if my [wife]/[husband] does not survive me by [30 days]/[six months] my Trustees shall hold this half of my residuary estate upon the trusts of subclause 6(2) of my Will;

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(2) As to the other half of my residuary estate to those of my children [and stepchildren][2] who survive me in equal shares and if any of them dies before me his or her children shall take the share of my estate which their parent would otherwise have inherited.

7. My Trustees shall have power[3]:

(1) to apply for the benefit of any beneficiary who is has a contingent interest the whole or any part of the income from any capital to which he may become entitled;

(2) during the whole of the period in which a beneficiary has a contingent interest to accumulate such income as is not so applied and to invest that income as an addition to the capital of the share to which that beneficiary is entitled;

(3) to pay or apply for the benefit of any beneficiary who has a contingent interest the whole or any part of the capital to which he may become entitled;

(4) to pay any money to which a beneficiary under eighteen is entitled to his parent or guardian for his benefit or to the beneficiary himself once he has attained sixteen and to rely upon the receipt then given by the parent or guardian or the minor himself.

8. My Trustees shall have the following powers in addition to their powers under the general law:

(1) Power to invest as if they were beneficially entitled and this power includes the right:

(a) to invest in unsecured loans;

(b) to invest in other non-income producing assets including policies of life assurance;

(c) to purchase land anywhere in the world;

(d) to purchase an undivided share in land;

(e) to invest in land for the occupation or enjoyment of any beneficiary.

(2) Power to delegate their powers of investment and management of trust property to an agent (including one of their number) on such terms including terms enabling the agent to charge remuneration, to appoint a substitute, to limit liability and to act in circumstances giving rise to a conflict of interest as my Trustees think fit.

(3) Power to appoint any person (including one of their number or a beneficiary) to act as their nominee and to take such steps as are necessary to vest any property in such person on such terms including terms enabling the agent to charge remuneration, to appoint a substitute, to limit liability and to act in circumstances giving rise to a conflict of interest as my Trustees think fit.

(4) Power to make loans of capital to a beneficiary which may be interest free, repayable on demand or repayable at a rate below the market rate.

(5) Power to borrow money on such terms as they think fit including the giving of security and to use it for any purpose for which the capital of my estate may be used.

(6) Power without the restrictions imposed by the Administration of Estates Act 1925 s 41:

(a) To appropriate to any beneficiary in satisfaction or partial satisfaction of the gift to him any asset forming part of my residuary estate and not subject to a specific gift;

(b) To appropriate as the assets or part of the assets of any trust created by this Will any asset forming part of my residuary estate and not subject to a specific gift.

9. (1) My Trustees shall exercise their powers of investment and carry out their duties as trustees without regard to the statutory duty of care and the Trustee Act 2000 s 1 shall not apply to the trusts of my Will.

(2) My Trustees shall be under no duty to review the acts of agents, nominees and custodians appointed by them and the Trustee Act 2000 s 22 shall not apply to the trusts of my Will.

(3) Section 11 of the Trusts of Land and Appointment of Trustees Act 1996 (consultation with beneficiaries) shall not apply.

(4) In the absence of proof of dishonesty or the wilful commission of an act known to be a breach of trust none of my [lay][4] Trustees shall be liable for any loss or bound to take proceedings against a co-trustee for any breach of trust.

(5) My [lay] Trustees shall be entitled to be indemnified out of the assets of my estate against all liabilities incurred in connection with the bona fide execution of their duties and powers.

As Witness my hand this [--] day of [--------] 20[--]. [*Testator's Signature*]

Signed by the Testator in our presence and attested by us in the presence of the Testator and of each other.

[*Signatures, Addresses and Occupation of Witnesses*]

1 This clause presupposes that the children of the first marriage are adults or that the former spouse is responsible for appointing guardians etc. If it is desired that appointments should be made in respect of the children of both marriages but that different appointments are desired in respect of each class of child then the clause needs to be split so that one set of guardians is appointed in respect of the children of the first marriage and another appointed in respect of children of the second marriage. **Form 9.5** is an example of such a clause.

2 See footnote 2 to **Form 29.2**.

3 This form deserves full powers. Presuming there are no exceptional circumstances the STEP Standard Provisions could be incorporated in place of clauses 7 to 9. See **chapter 19** for a discussion of the most common statutory and other powers and when they might or might not be appropriate.

4 If the limitation is intended to cover both lay and professional trustees then the words in square brackets should be removed. However, for obvious reasons the testator usually only wishes to restrict liability in relation to lay trustees who are much more likely to be friends or family members.

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