

STEP STANDARD PROVISIONS (ENGLAND AND WALES)

2nd Edition

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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 or 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 that 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/her.

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 that 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 that 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 that 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 that 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.

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