

**STEP STANDARD PROVISIONS:
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(This commentary does not form part of the Standard Provisions)

INTRODUCTION TO THE STANDARD PROVISIONS

Any properly drafted will or settlement must contain a large amount of text dealing with routine administrative matters. In the past it has been necessary to set this out in full in each will. STEP has condensed this material into its Standard Provisions.

Use of the Standard Provisions offers many advantages. The final document is much shorter. Drafters and client can concentrate on the beneficial provisions which matter most. The risk of unfortunate omissions is avoided; and the reader familiar with the standard form will save a considerable amount of time.

There is no doubt that the lot of many beneficiaries under short wills would be substantially improved if their wills included the STEP Provisions by incorporation. This led Professor John Adams to describe the publication of the Provisions as "quite the most exciting development for private client draftsmen for several decades;" and Ralph Ray to describe them as "an enormous asset".

How should the Standard Provisions be incorporated?

No difficulty arises if a will or settlement simply incorporates the STEP Provisions in their present form, using the short form set out in clause 1(2) of the Standard Provisions:-

The Standard Provisions of the Society of Trust and Estate Practitioners (1st Edition) shall apply.

However, the Trusts of Land and Appointment of Trustees Act 1996 makes two amendments appropriate:-

- (1) Delete Standard Provision clause 5 (trust for sale). While this clause certainly does no harm, it has now become unnecessary.
- (2) Exclude Section 11 of the TLTA 1996 (which imposes duties of consultation inappropriate to a substantive trust).

The following is therefore suggested as a standard form in the light of the new legislation:-

Administrative provisions

The Standard Provisions of the Society of Trust and Estate Practitioners (1st Edition) shall apply with the deletion of paragraph 5. Section 11 Trust of Land and Appointment of Trustees Act 1996 (consultation with beneficiaries) shall not apply.

When should the Standard Provisions be used?

The Standard Provisions form a comprehensive code of administrative provisions, and are suitable for inclusion in any normal will or settlement.

What should one tell the client?

For clients who do not want a detailed explanation of the Standard Provisions, it is sufficient to say: "This is the standard way of providing the executors with technical and routine provisions they need to administer the estate properly. In particular, this authorises professional executors or trustees to charge for their work."

Procedure for obtaining probate

When it comes to obtaining a grant of probate, it is not necessary to prove the Standard Provisions as well as the Will.¹

Duplication of the Provisions

¹ Practice Direction of the Principal Registry of the Family Division, April 10, 1995; Circular of the Secretary of the Principal Registry, May 17, 1995

The Standard Provisions may be duplicated or published in any manner.

CLAUSE BY CLAUSE COMMENTARY

Clause 1 Introductory

This is self-explanatory.

Clause 2 Interpretation

Clause 2(1) sets out some definitions which are used in the Provisions. It should be noted that "Trustees" includes personal representatives as well as trustees; and "Trust Property" includes property in a deceased's estate as well as property in a settlement.

Clause 2(2) provides that in the event of a conflict between the Provisions and the will or deed in which the Provisions are incorporated, the terms of the will or deed should prevail.

Clause 3 Administrative Provisions

This clause provides the trustees with the powers they should have to manage the trust fund in the best way in the interest of the beneficiaries.

3(1) Investment

This gives the trustees a power of investment slightly wider than that of the Trustee Act 2000. See *Drafting Trusts and Will Trusts* 6th ed., 20.22.

The second sentence is only for the avoidance of doubt. There is no general rule which requires trustees to diversify trust investments. The rule is that trustees must consider the need for diversification. See Trustee Act 2000, s.4(3)(b). Trustees may - if they are satisfied it is appropriate to do so - invest the trust fund in a single asset.

3(2) Management

Trustees should be allowed to manage trust property without restrictions; this is the effect of clause 3(2). The powers conferred by the general law are not quite comprehensive. See *Drafting Trusts and Will Trusts* 6th ed., 20.25.

3(3) Joint Property

Trustees may wish to acquire property jointly with others and this needs express authorisation: *Webb v. Jones* (1888) 36 Ch.D.660. See *Drafting Trusts and Will Trusts* 6th ed. 20.24.

3(4) Income and Capital

This would allow trustees if they thought fit:

- to acquire wasting assets or capital growth assets;
- to pay capital expenses out of income.

The general trust law normally requires trustees to hold a balance between the interests of life tenant and remainderman. That is, trustees should normally invest trust funds so as to produce a reasonable amount of income *and* to protect capital values.²

It is easy to foresee occasions where, for good reasons, trustees would like to increase the income of the life tenant at the expense of the remainderman.³

It seems to the STEP Technical Committee that decisions on this balance are best left to the good sense of the trustees. The trustees

² For exceptions, see *Drafting Trusts & Will Trusts*, 6th ed., para 15-033.

³ Conversely, it may be desired to invest in non-income-producing assets even completely depriving the life tenant of her income. This may be because the life tenant has sufficient income for her needs, or, for instance, the widow may be in state residential accommodation and find that all her trust income is taken to pay the cost of her care.

are in principle persons chosen by the testator, he may be taken to have some faith in them; and in a typical case, the testator's first wish is that his widow should be provided for, in priority to other beneficiaries.

Nevertheless the point has rightly been made that the existence of this power will be contrary to the intention of some testators. A testator may have very firm views that his widow's income should not in any circumstances be increased at the expense of the remainderman. This is particularly likely in circumstances where the remaindermen are not the children of the widow; eg a will trust:

- (1) to the widow for life, remainder to charity; or
- (2) to the widow for life, remainder to children of an earlier marriage of the testator.

In such cases it would be appropriate for the drafter to exclude this paragraph of the STEP Standard Provisions.⁴

It should be noted that this power does not permit income to be accumulated after the expiry of the accumulation period: *Re Rochford* [1965] Ch. 111. This power is permitted in an interest in possession settlement and in an accumulation and maintenance settlement: see *Pearson v. IRC* [1980] S.T.C. 318, *Inglewood v. IRC* [1983] S.T.C. 133. See *Drafting Trusts and Will Trusts* 6th ed., 20.27 ff.

3(5) Accumulated Income

This clause authorises trustees to apply accumulated income as if it were income. This may be necessary to obtain the tax credit under Income and Corporation Taxes Act 1988, s.687. See *Drafting Trusts and Will Trusts* 6th Ed., 20.29.

3(6) Use of Trust Property

This authorises trustees to acquire, in particular, a dwelling-house, for a beneficiary. The powers conferred by the general law are too narrow: see *Drafting Trusts and Will Trusts*, 6th ed., 20.35.

3(7) Application of Trust Property

Trustees will generally have power to transfer trust property to some of the beneficiaries. Where this is the case, the claim allows trustees three alternatives to a simple transfer of trust capital. They may:

- lend money to the beneficiary interest free;
- allow the beneficiary to borrow from a bank on the security of the trust property;
- transfer the trust property to the beneficiary as his income rather than as capital.

(This may offer tax advantages). See *Drafting Trusts and Will Trusts* 6th ed., 20.37.

3(8) Trade

This permits trustees to carry on a trade. See *Drafting Trusts and Will Trusts* 6th ed., 20.40.

3(9) Borrowing

This clause gives the trustees unrestricted power to borrow. The general law gives trustees power to borrow for restricted purposes but not (*inter alia*) for investment purposes: *Re Suensen Taylor* [1974] 1 W.L.R. 1280. See *Drafting Trusts and Will Trusts* 6th ed., 20.41.

3(10) Insurance

This permits trustees to insure trust property but this is now conferred by the general law: s.19 TA 1925 as amended by s.34 TA 2000.

3(11) Delegation

This extends the statutory power. See *Drafting Trusts and Will Trusts*, 6th ed., 20.42.

3(12) Deposit of documents

This slightly extends the statutory power: Trustee Act 2000, ss.16 - 21. See *Drafting Trusts and Will Trusts* 6th ed., 20.43.

3(13) Nominees

This strictly extends the statutory power. See *Drafting Trusts and Will Trusts* 6th ed., 20.43.

⁴ This may be done by the following form: "The Standard Provisions of the Society of Trust and Estate Practitioners (1st Edition) shall apply with the deletion of paragraphs 3(4) and 5."

3(14) Offshore administration

If trustees are to be non-UK resident, for CGT purposes, it is generally necessary to administer the trusts abroad. This clause permits this in terms which echo the statutory provision: Taxation of Chargeable Gains Act 1992, s.69. See *Drafting Trusts and Will Trusts* 6th ed., 27.5.

3(15) Payment of Tax

In the absence of express power, the trustees are only entitled to pay foreign taxes in limited circumstances: *Re Lord Cable* [1977] 1 W.L.R. 7.

3(16) Indemnities

Where the trustees grant appropriate indemnities, they can also:

- reimburse themselves out of the Trust Fund if the indemnity is called upon; and
- secure the indemnity on the Trust Fund: see clause 3(17).

See *Drafting Trusts and Will Trusts* 6th ed., 20.44.

3(17) Security

The general law allows trustees to mortgage trust property for certain purposes only; but if trustees are to be trusted with power to borrow, they should also have power to give security for their borrowing. See *Drafting Trusts and Will Trusts* 6th ed., 20.45.

3(18) Supervision of Company

This requires trustees to take action only if they have knowledge of circumstances which call for enquiry. In the absence of such a provision, it is the duty of trustees to keep a close eye on the running of a trust company: *Bartlett v. Barclays Trust Co. (No.1)* [1980] Ch. 515. See *Drafting Trusts and Will Trusts* 6th ed., 5.29.

3(19) Appropriation

This gives trustees power to arrange a rational division of the trust fund, if it is to be shared out between beneficiaries. The power conferred by the general law is more restricted: Administration of Estates Act 1925, s.41. See *Drafting Trusts and Will Trusts* 6th ed., 20.46.

3(20) Receipt by Charities

This form solves a possible administrative difficulty where trust property is payable to a charitable trust or an unincorporated charitable association. In such cases trustees would otherwise need to investigate who could give them a valid receipt. See *Drafting Trusts and Will Trusts* 6th ed., 20.47.

3(21) Release of Powers

This allows trustees to release their powers. See *Drafting Trusts and Will Trusts* 6th ed., 20.48.

3(22) Ancillary Powers

This fall-back form is intended to prevent a narrow construction of trustees' powers. See *Drafting Trusts and Will Trusts* 6th ed., 20.49.

Clause 4 Powers of Maintenance and Advancement

This provides two standard amendments to sections 31 and 32 of the Trustee Act 1925. The effect is to increase slightly trustees' powers of maintenance and advancement. See *Drafting Trusts and Will Trusts* 6th ed., 10.8 and 15.21.

Clause 5 Trust for Sale

This imposes a trust for sale on land. Its purpose was to prevent the application of the Settled Land Act 1925. Now the Trust of Land and Appointment of Trustees Act 1996 has abolished the SLA 1925 for new settlements, this provision is obsolete. See *Drafting Trusts and Will Trusts* 6th ed., 2.27.

Clause 6 Minors

Where income is to be applied for a child under 18, trustees will often pay the income to a parent on behalf of the child. This clause relieves the trustees of the duty to monitor the parent's use of the money. This will simplify trust administration: the sums involved are usually small. Where the trustees are dealing with trust capital, it remains their duty to ensure that the capital is properly applied.

It might occasionally be convenient to allow an older child to receive funds directly, and this is authorised if the child is 16.

Clause 6(2) allows trustees to retain trust income on behalf of a minor. Instead the income will be paid to the child once his is 18. See *Drafting Trusts and Will Trusts* 6th ed., 20.50.

Clause 7 Disclaimer

This clause authorises partial disclaimer (which the general law would not allow). This may help to take full advantage of section 93 of the Inheritance Act 1984 (disclaimers). See *Drafting Trusts and Will Trusts* 6th ed., 20.53.

Clause 8 Apportionment

This clause excludes the operation of the Apportionment Act 1870, which would otherwise require the trustees to make time-consuming calculations over small amounts of income. See *Drafting Trusts and Will Trusts* 6th ed., 20.54.

Clause 9 Conflicts of Interest

The general rule is that trustees may not enter into any transaction which gives rise to a conflict of interest. This clause relaxes the general rule, but with a safeguard: there must be at least one independent person to watch over the interests of the trust. The qualifications of the independent trustee are set out in clause 9(1)(b). The Fiduciary must disclose the position to the trustees, and the independent trustee must consent: clause 9(2). See *Drafting Trusts and Will Trusts* 6th ed., 5.13.

Clause 9(3)

This deals with the different problem which may arise where a beneficiary is a trustee, and wishes, say, to appoint property to himself. He may do so if there is an independent trustee.

In the rare case where a settlor is both trustee and the principal beneficiary of a settlement, it may be desired to relax this clause.

Clause 10 Powers of Trustees

Clause 10 contains two general provisions relating to trustees' powers:

- trustees' powers may be exercised at their absolute discretion.
- trustees' powers may be exercised from time to time as occasion requires.

This will apply to the powers conferred in the will or settlement as well as to the powers in the Standard Provisions.

These general provisions make it unnecessary to specify whenever trustees are given powers that they may exercise the powers

"at their absolute discretion;"

"as they shall think fit;"

"as they shall in their absolute discretion think fit;"

"at any time or times;" or

"from time to time;"

so a certain amount of verbiage can be avoided in the rest of the will or settlement.

The clause does not allow trustees to exercise their powers improperly: see *Gisborne v. Gisborne* (1877) 2 App. Cas. 300. See *Drafting Trusts and Will Trusts* 6th ed., 6.7 ff.

Clause 11 Trustee Remuneration

This slightly extends the statutory power; see *Drafting Trusts and Will Trusts*, 6th ed., 20.55 ff. The Trustee remuneration was given priority to dispositions in the will or settlement, so as to prevent the executors' remuneration abating jointly with other legacies, but this is now no longer necessary.

Clause 11(2) authorises trustees to charge for work done for a company held by the trust. See *Drafting Trusts and Will Trusts* 6th ed., 20.65.

Clause 12 Liability of Trustees

Trustees are not liable for breach of trust when they have acted honestly and reasonably and ought fairly to be excused: Trustee Act 1925 s.61. This clause relieves trustees from liability for breach of trust in two further circumstances:

- Where the trustee is not a professional trustee (defined in clause 1) and is not guilty of negligence.
- Where the trustees are acting on the Opinion of Counsel.

Wider trustee relieving provisions are sometimes found, which purport to exclude trustees' liability for any act except fraud or wilful default. Such forms raise serious difficulties (in particular there are professional conduct implications where the draftsman's firm is acting as trustee); they should only be used in special circumstances. See *Drafting Trusts and Will Trusts* 6th ed., 5.17 ff.

Clause 13 Appointment and Retirement of Trustees

Clause 13(1) authorises the appointment of foreign trustees: the extent to which this can be done without express authority is unclear.

Clause 13(2) allows a professional trustee (defined in clause 1) to be retired on attaining retirement age. A retirement date is set for virtually every office and employment. However trust law does not impose a retirement date. This clause avoids difficulties which occasionally arise. See *Drafting Trusts and Will Trusts* 6th ed., 5.33 ff.

Clause 14 Protection for Interest in Possession and Accumulation and Maintenance Settlement

This clause ensures (for the avoidance of doubt only) that none of the Standard Provisions will have undesirable tax effects. See *Drafting Trusts and Will Trusts* 6th ed., 18.17. Clause 14(2) is now obsolete following the FA 1998, but its retention does no harm.

FURTHER READING

The Standard Provisions are derived from *Drafting Trusts & Will Trusts* by James Kessler (6th ed., Sweet & Maxwell 2002) which contains a much fuller commentary than is possible here.