

STEP STANDARD PROVISIONS, 3RD EDITION

(England and Wales)

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INTRODUCTION TO THE THIRD EDITION

The *STEP Standard Provisions, 3rd Edition* is a publication for practitioners who draft wills and trust instruments subject to the law of England and Wales. It sets out clear provisions to include in a will avoiding technical terms that may confuse the lay reader.

Any properly drafted will or trust instrument must contain a large amount of text dealing with routine administration matters. It had been necessary to set this out in full in each such document until STEP condensed this material into its *STEP Standard Provisions*, first published in 1992 and which we are delighted to say is now in its third edition.

The provisions are an extremely valuable resource for practitioners, which have helped simplify this area. However, it is clear that with trust and will legislation changing considerably since the publication of the *STEP Standard Provisions, 2nd Edition (SSP2)*, the *STEP Standard Provisions* needed to be updated and modernised. The most significant amendment is the standardisation of the clauses on trust corporations, which have incorporated wording from the terms and conditions of trust corporations.

The *STEP Standard Provisions* should only be used in relation to wills and trusts subject to the law of England and Wales. The incorporation of the *STEP Standard Provisions* in wills and trusts governed by the law of a different jurisdiction brings with it a range of risks. Such risks include (but are not limited to) problems of interpretation where there is a mismatch in terminology, the possibility of substantive conflicts between the provisions and the governing law, and the prospect of administrative difficulties leading to the need for litigation.

When incorporating these provisions into a will or trust, the drafter should note Provision 2(2) of these provisions, which identifies that where there is any inconsistency between these provisions and those of the will or trust, the terms of the will or trust take precedence.

We are delighted to publish this *STEP Standard Provisions, 3rd Edition (SSP3)*. I would like to extend special thanks to the working group who drafted the provisions and to James Kessler KC, who reviewed the draft.

It is important that those incorporating these provisions into a will or trust instrument read and understand them, and can explain their use to the intending testator or settlor. The accompanying guide (on page 11), which is provided for practitioners who know the first and second editions and want to know what has changed, has also been drafted by the group. A more detailed analysis and explanation of the provisions will be found in *Drafting Trusts and Will Trusts: A Modern Approach*, 15th Edition by J Kessler, A Berry, J Davies, M Ranson and C de Beneducci, (Sweet & Maxwell, 2023).

I would like to give my special thanks to everyone in the group, to all those we consulted and to STEP for its hard work on behalf of the entire profession.

Amanda Simmonds TEP,
Chair of the STEP Standard Provisions working group

PROVISIONS OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS

Third Edition

The text of the 3rd Edition of the STEP Standard Provisions is as follows:

1 Incorporation of STEP Provisions

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

The standard provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply

or in any manner indicating an intention to incorporate them.

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

The standard provisions and the following special provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply:

[specify which special provisions apply, as appropriate]

or in any manner indicating an intention to incorporate them.

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

The standard provisions and all of the special provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply

or in any manner indicating an intention to incorporate them.

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

The standard provisions of the Society of Trust and Estate Practitioners (3rd Edition) shall apply

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

2 Interpretation

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

- 2.1.1 **'Civil Partner'** has the same meaning as in section 1 Civil Partnership Act 2004.
- 2.1.2 **'Income Beneficiary'**, in relation to Trust Property, means a Person to whom income of the Trust Property is payable (as of right or at the discretion of the Trustees).
- 2.1.3 **'Lay Trustee'**, has the same meaning as in s.28 Trustee Act 2000
- 2.1.4 **'Person'** includes a person anywhere in the world and includes a Trustee.
- 2.1.5 **'Principal Document'** means the document in which these Provisions are incorporated.
- 2.1.6 **'Standard Provisions'** means the provisions in clauses 1-12 of these Provisions
- 2.1.7 **'Special Provisions'** means the provisions in clauses 13-20 of these Provisions.
- 2.1.8 **'Trust'** means any trust created by the Principal Document and an estate of a deceased Person to which the Principal Document relates.
- 2.1.9 **'Trust Corporation'** has the same meaning as in the Trustee Act 1925.
- 2.1.10 **'Trustees'** means the personal representatives or trustees of the Trust for the time being.
- 2.1.11 **'Trust Fund'** means all the property comprised in the Trust for the time being.

2.1.12 **'Trust Property'** means any property of any nature comprised in the Trust Fund.

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

3 Protection for interest in possession trusts

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

4 Additional powers

The Trustees shall have the following powers:

4.1 **Investment**

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

4.2 **Management**

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

4.2.1 The Trustees may repair and maintain Trust Property.

4.2.2 The Trustees may develop or improve Trust Property.

4.3 **Joint property**

The Trustees may acquire property jointly with any Person.

4.4 **Income and capital**

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

4.5 **Accumulated income**

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

4.6 **Occupation or Use of Trust Property**

4.6.1 The Trustees may acquire any interest in property anywhere in the world for occupation or use by an Income Beneficiary.

4.6.2 The Trustees may permit an Income Beneficiary to occupy or use Trust Property on such terms as they think fit.

4.6.3 This clause does not restrict any right of beneficiaries to occupy land under the Trusts of Land and Appointment of Trustees Act 1996.

4.7 **Application of trust capital**

4.7.1 The Trustees may:

- (i) lend money from the Trust Fund to an Income Beneficiary without security, on such terms as they think fit,
- (ii) guarantee the debts or obligations of an Income Beneficiary,
- (iii) charge the whole or any part of the Trust Fund as security for debts or obligations of an Income Beneficiary, or
- (iv) pay money out of the Trust Fund to an Income Beneficiary as their income, for the purpose of augmenting their income.

4.7.2 Clause 4.7.1 applies only if:

- (i) the Trustees have power to transfer any of the Trust Fund to that Income Beneficiary absolutely, or
- (ii) the Trustees have power to do so with the consent of another Person and the Trustees act with the written consent of that Person.

4.7.3 The Trustees' power under clause 4.7.1 is limited to that part of the Trust Fund in which the Income Beneficiary's interest exists at the time that the power is exercised.

4.8 **Trade**

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

4.9 **Deposit of documents**

The Trustees may deposit documents relating to the Trust with any Person.

4.10 **Nominees**

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

4.11 **Place of administration**

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

4.12 **Payment of tax**

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

4.13 **Indemnities**

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

4.14 **Security**

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

4.15 **Appropriation**

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

4.16 **Receipt by charities etc.**

4.16.1 Where Trust Property is to be paid or transferred to a trust, association, company or other entity whether or not charitable according to the laws of England and Wales the receipt of the treasurer or appropriate officer of that entity shall be a complete discharge to the Trustees who shall not be concerned to see to its application. A Trustee shall not be liable for making a payment or transfer to any Person who appears to be the treasurer or appropriate officer unless at the time of distribution the Trustee has knowledge of circumstances which call for enquiry

4.16.2 If any trust, association, company or other entity which is charitable according to the laws of England and Wales ceases to exist, changes its name, or enters into insolvent liquidation, before the time that a gift to that charitable entity takes effect in possession, the gift shall instead be paid to such charitable entity as the Trustees decide having regard to the objects that were intended to benefit.

4.17 **Release of powers**

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

4.18 **Ancillary powers**

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

5 Minors and beneficiaries without capacity: powers over income and capital

- 5.1 Where the Trustees may apply income or capital for the benefit of a minor they may do so by paying the income or capital to the minor's parent or guardian on behalf of the minor, or to the minor if the minor has attained the age of 16. A Trustee is under no duty to enquire into the use of the income or capital unless the Trustee has knowledge of circumstances, which call for enquiry.
- 5.2 Where the Trustees may apply income for the benefit of a minor, they may do so by resolving that they hold that income on trust for the minor absolutely and:
- 5.2.1 The Trustees may apply that income for the benefit of the minor during the minor's minority.
- 5.2.2 The Trustees shall transfer the residue of that income to the minor on attaining the age of 18.
- 5.2.3 For investment and other administrative purposes, that income shall be treated as Trust Property.
- 5.3 Where a beneficiary lacks mental capacity to give a receipt and does not have an attorney appointed under a registered Enduring Power of Attorney or a registered Lasting Power of Attorney for Property and Financial Affairs, or a deputy appointed under the Mental Capacity Act 2005 whose powers include receiving income or capital from the Trustees, then:
- 5.3.1 Where income or capital is payable to that beneficiary the Trustees may (subject to the directions of the Court where appropriate) apply that income or capital for the benefit of the beneficiary.
- 5.3.2 Where the Trustees may pay or apply income or capital to or for the benefit of that beneficiary the Trustees may pay or apply that income or capital to the Person having or appearing to the

Trustees to have the care of and financial responsibility for the beneficiary. A Trustee is under no duty to enquire into the use of the income or capital unless that Trustee has knowledge of circumstances, which call for enquiry.

6 Disclaimer

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

7 Apportionment

Section 1 Trusts (Capital and Income) Act 2013 shall apply and no other common law, statutory or other rule of apportionment shall apply such that all income shall be treated as arising when payable. All expenditure shall be treated as arising when payable, and not from day to day, so that no apportionment of expenditure shall take place.

8 Conflicts of interest

8.1 In this clause:

8.1.1 **'Fiduciary'** means a Person subject to fiduciary duties under the Trust.

8.1.2 **'Independent Trustee'**, in relation to a Person, means a Trustee who is not:

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

8.2 A Fiduciary may:

- 8.2.1 enter into a transaction with the Trustees, or
- 8.2.2 be interested in an arrangement in which the Trustees are or might have been interested, or
- 8.2.3 act (or not act) in any other circumstances

even though the Fiduciary's fiduciary duty under the Trust conflicts with other duties or with the Fiduciary's personal interest.

8.3 Clause 8.2 has effect only in relation to administrative and not dispositive matters, and only applies if:

8.3.1 The Fiduciary first discloses to the Trustees the nature and extent of any material interest conflicting with the Fiduciary's fiduciary duties,

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

8.3.3 The Fiduciary is not the settlor acting in connection with reserved powers as settlor

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

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

8.4.2 The benefitting Trustee was originally appointed under the Principal Document.

9 Trustee remuneration

9.1 A Trustee who is acting in a professional capacity or is a Trust Corporation is entitled to reimbursement of proper expenses (including expenses incurred in relation to any services rendered by any firm or company associated to that trustee) and to receive reasonable remuneration (in accordance with that professional's normal terms of business or that Trust Corporation's standard terms and conditions for trust business from time to time) out of the Trust Fund for any services that Trustee provides to or on behalf of the Trust.

9.2 For this purpose, a Trustee acts in a professional capacity if the Trustee acts in the course of a profession or business which consists of or includes the provision of services in connection with:

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

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

9.3 A Trustee shall be entitled to reasonable remuneration for acting as a director or an officer of any company connected with the Trust Fund and for any services rendered to such company and may retain that remuneration.

10 Professional Trustees and Trust Corporations

10.1 In addition to the right to remuneration under clause 9, a Trustee who is acting in a professional capacity as defined in clause 9.2, is a Trust Corporation acting, or appointed as Trustee may act as Trustee on the basis of that professional's or that Trust Corporation's standard terms and conditions as published from time to time.

10.2 Those standard terms and conditions shall apply subject to the provisions of the Principal Document and to these provisions.

11 Liability of Trustees

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

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

11.2.1 the Trustee acts as a Lay Trustee and

11.2.2 there is another trustee who does not act as a Lay Trustee.

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

11.4 Clause 11.3 does not apply:

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

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

11.4.3 in relation to a Trustee who has a personal interest in the subject matter of the advice provided that for the purposes of this sub-clause a Lay Trustee does not have a personal interest in the subject matter of the advice merely by reason of being a beneficiary of the Trust;

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

11.5 Clause 11.3 does not prejudice any right of any Person to follow property or income into the hands of any Person, other than a purchaser, who may have received it.

12 Subsequent editions of STEP standard provisions

12.1 Subject to clause, 12.2 and 12.3 below, the Trustees may by deed declare that any subsequent edition of the Provisions of the Society of Trust and Estate Practitioners shall apply in place of these provisions wholly or in part.

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

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

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

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

SPECIAL PROVISIONS

13 Borrowing

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

14 Delegation

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

15 Companies

15.1 Power to promote companies

The Trustees may incorporate any company in any part of the world for any purpose in connection with the Principal Document.

15.2 Powers in relation to companies

15.2.1 The Trustees may enter into any compromise or arrangement in relation to any company in which Trust Property is invested.

15.2.2 The Trustees may enter into any arrangements in relation to the winding up or liquidation of any company in which Trust Property is invested.

15.3 Supervision of companies

The Trustees shall be under no duty to inquire into or be involved in the management of any company in which Trust Property is invested unless they have knowledge of circumstances, which call for inquiry.

16 Powers of Maintenance: Deferring income entitlement to 25

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

16.2 In this clause, 'the Specified Age' means the age of 25 or such earlier age (not being less than 18) as the Trustees may by deed specify.

17 Absolute discretion clause

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

17.1 at their absolute discretion; and

17.2 from time to time as occasion requires.

18 Appointment and retirement of Trustees

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

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

18.3 For the purposes of s.36 Trustee Act 1925, a Person will be deemed incapable of acting as a trustee, or of exercising the power referred to in s.36(1)(b), if:

18.3.1 There is a Court of Protection deputy appointed to manage that Person's property and financial affairs;

18.3.2 All the Trustees or all of the other Trustees, as the case might be, in reliance upon written advice from a

suitably qualified medical practitioner, resolve that the Person is incapable of fulfilling the role in question under the Trust.

18.3.3 For the avoidance of doubt, where the Person is deemed incapable of exercising the power referred to in s.36(1)(b), that power is exercisable as though that Person had died.

19 Powers relating to income and capital

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

19.1.1 The Trustees may acquire

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

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

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

20 Relationships unknown to Trustees

20.1 The Trustees may distribute Trust Property or income in accordance with the Trust but without having ascertained that there is no Person who is or may be entitled to any interest therein by virtue of a relationship unknown to the Trustees. A Trustee shall not be liable to such a Person unless at the time of the distribution the Trustee has knowledge of circumstances, which call for enquiry.

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

GUIDE FOR PRACTITIONERS, TESTATORS AND SETTLORS FOR THE SSP3*

*N.B. These guidance notes do not form part of the STEP Standard Provisions

Disclaimer and copyright

These notes are intended to assist practitioners, settlors and testators in the use of the SSP3. 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 settlors are concerned, for reading all the provisions and for seeking further advice on any provision if unsure of its effect.

The SSP3 and these notes are the joint copyright of STEP and James Kessler KC TEP.

Background

The *STEP Standard Provisions* were first published in 1992 and SSP2 was published in 2011, reflecting changes in the law and practice occurring since 1992. The SSP3 reflects further changes in both the law and practice that have occurred since 2011.

Since they were first published, the *STEP Standard Provisions* have become an important element in the drafting of wills and settlements, with practitioners incorporating them into countless wills and settlements.

Going forward, will writers and drafters of settlements can continue to use either the 1st Edition or the 2nd Edition, but it is expected that the SSP3 will be the usual version used.

Whichever of the provisions are adopted, they 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.

The text of the SSP3 can be found above and on the STEP website (www.step.org)

This guide is intended to assist the experienced drafter who is broadly familiar with the 1st and 2nd Editions by focusing on what has changed from these. It does not attempt a full explanation of the provisions. For that, readers are referred to *Drafting Trusts and Will Trusts*, by James Kessler KC and Charlotte John (Sweet & Maxwell).

Structure of the SSP3

The 2nd Edition introduced additional provisions and also the division into the core Standard Provisions and those that it was considered would not always be appropriate or where particular consideration should be given when incorporating them (the Special Provisions).

Practitioners, settlors and testators should consider carefully the powers to be incorporated and in particular those in the Special Provisions. However, it is recognised that, increasingly, the default choice

tends to be to include both the Standard Provisions and the Special Provisions. Although the SSP3 has been drafted with this in mind, the appropriateness of any Special Provisions to a client's circumstances should always be considered.

The split of Standard and Special Provisions has been retained due to the provision in the SSP2, which allows trustees to adopt the SSP3 in place of the SSP2, but prevents the addition of any Special Provisions if only the SSP2 has been incorporated into the will or settlement.

As with the SSP2, when drafting or reviewing a document, you therefore have a choice:

- to incorporate only the standard 'core' provisions of the SSP3, or
- to incorporate the fuller form, including some, or all, of the 'Special Provisions'.

The Special Provisions are Provisions 13 to 20 and can be incorporated only by reference to them (either individually or en bloc).

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

Scope of the STEP Standard Provisions

The *STEP Standard Provisions* should only be used in relation to wills and settlements subject to the law of England and Wales. The incorporation of the *STEP Standard Provisions* in a will or settlement governed by the law of a different jurisdiction brings with it a range of risks. Such risks include (but are not limited to) problems of interpretation where there is a mismatch in terminology, the possibility of substantive conflicts between the provisions and the governing law, and the prospect of administrative difficulties leading to the need for litigation.

When incorporating these provisions into a will or settlement, the drafter should note Provision 2(2) of these provisions, which identifies that where there is any inconsistency between these provisions and those of the will or settlement, the terms of the will or settlement take precedence.

Deleted Provisions

The following provisions of the SSP2 have been deleted:

- 1) Provision 5 of the SSP2 was removed as the *Inheritance and Trustees Powers Act 2014* s8 amends s31 *Trustee Act 1925*; and s9 amends s32 *Trustee Act 1925* so that the purpose of this provision has been resolved in statute.
- 2) Provision 18 of the SSP2 was removed as a Special Provision and incorporated in Standard Provision 5 of the SSP3. The provision removes doubt as, since the *Children Act 1989* s3(3), the person with parental responsibility can give a good receipt to personal representatives (PRs) and trustees and, it appears, can require the PRs or trustees to account to them for the benefit due to a minor. The power to make payment for an incapacitated adult who is without a formally appointed representative will need careful thought before use but is pragmatic. Inclusion in the Special Provisions was not considered justified.
- 3) Provision 22 of the SSP2 was removed, as the valuation should be made as at the time of the appropriation as a matter of general law. Recognising the frequent default practice of incorporating

both the Standard and the Special Provisions, it was considered that this provision was less suited to inclusion in a general set of powers addressing commonly arising situations. If required in a particular case it would be better added as a bespoke power in the will or settlement after appropriate explanation to the client when deciding whether or not to include it.

Executive Summary

A testator or settlor should be aware of every term of their will or settlement, 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. Those drafting wills and settlements need to have read and ensured that they fully understand the provisions before incorporating them.

The most important, and possibly contentious, elements of the *STEP Standard Provisions*, on which even the busiest testator or settlor should be informed, are the following provisions:

- Provision 8 Conflicts of Interest
- Provision 9 Trustee Remuneration
- Provision 10 Professional Trustees and Trust Corporations
- Provision 11 Liability of Trustees
- Provision 19 Powers relating to income and capital.

DETAILED GUIDANCE

Standard Provisions

All of the Standard Provisions apply in all cases where they are incorporated, unless any particular provision is specifically excluded.

Provision 1: Incorporation of STEP Provisions

Provision 1 sets out forms of standard wording to incorporate the provisions and is unchanged except as to the order of the choices.

This now takes into account the ruling of *OH v Craven* [2016] EWHC 3146 (QB). In this case, the judge was critical of the absolute discretion clause (Provision 19 in SSP2, now Provision 17 in SSP3) as he thought the trustees should consult with the beneficiaries. As Provision 17 is a Special Provision, the drafter should consider whether to incorporate this provision in line with this case.

Provision 2: Interpretation

Provision 2.1: sets out definitions used in these 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 within a Trust.

Provision 2.1.3 and 2.1.9 have been added to include definitions of both Lay Trustees and Trust Corporations. Further definitions have also been included for the provisions, Standard Provisions and Special Provisions.

Provision 2.1.12 (Trust Property) has been clarified.

Provision 2.2: provides that in the event of there being any conflict between these provisions and the terms of the Will or Settlement incorporating these provisions, the terms of the Will or Settlement prevail. For instance, if a settlement states that Trustees may only invest in UK shares, provision 4.1 of these provisions will not apply.

Provision 3: Protection for interest in possession trusts

This provision prevents the accidental loss of the inheritance tax advantages for interest in possession trusts, or deemed interest in possession trusts. This may be particularly relevant where, for example, an 'immediate post-death interest' arises under a will.

Provision 4: Additional powers

This provision provides Trustees with powers to assist them in managing a Trust Fund in the best way in the interests of the beneficiaries.

Provision 4.1: Investment

This provision is unchanged and gives Trustees a wide power of investment, and enables them to invest in land anywhere in the world, and in unsecured loans. It is important that the Trustees invest in a manner appropriate to the circumstances of the Trust; to obtain advice when investing the Trust Fund; and to regularly review the trust investments and ensure they continue to be appropriate to the circumstances of the Trust. In particular, Provision 4.1 does not override the standard duties of investment in s4 *Trustee Act 2000*, which provides:

- (1) *In exercising any power of investment, whether arising under this Part of otherwise, a trustee must have regard to the standard investment criteria*
- (2) *A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied*
- (3) *The standard investment criteria, in relation to a trust, are*

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

Provision 4.2: Management

This provision is unchanged and enables Trustees to manage Trust Property without restriction, as if they owned it for themselves. Where land is held, it also permits Trustees to repair, maintain, develop or improve that land (and any building upon that land).

Provision 4.3: Joint property

This provision is unchanged and confirms that the general investment power in the *Trustee Act 2000* permits Trustees to invest in property together with others. For example, they may join with a beneficiary to buy a house for that beneficiary's occupation with the beneficiary contributing towards the purchase price or for example purchase a house for young beneficiaries jointly with someone else, such as their guardian(s).

Provision 4.4: Income and capital

This provision is unchanged and allows Trustees, should they think appropriate, to purchase wasting assets or assets which provide only a capital return, and to pay capital expenses out of income. Under the provision, income may be set aside and invested to meet any liabilities, which in the opinion of the Trustees ought to be borne out of income or to replace depreciation of the capital value of any trust asset. In particular, income may be applied for a leasehold sinking fund policy.

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 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 remaindermen).

Provision 4.5: Accumulated income

The provision speaks for itself. By virtue of the *Perpetuities and Accumulations Act 2009*, s13 a power of accumulation may now exist for the entire perpetuity period of 125 years. Where income is accumulated under the terms of the Trust, this clause allows the Trustees to distribute that income at a future date.

Provision 4.6: Occupation or use of Trust Property

This provision is unchanged except for clarification in the title. The provision permits Trustees to acquire land or any interest in property anywhere in the world for occupation or use by an Income Beneficiary, subject to any terms imposed by the Trustees, 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*.

Provision 4.6.3 specifically limits the power so as not to interfere with the rights that other beneficiaries might have.

Provision 4.7: Application of trust capital

This power is subject to the Will or Settlement authorising Trustees to give capital monies to an Income Beneficiary, and is limited to that part of the Trust Fund in which the Income Beneficiary's interest exists. Assuming that the Trustees have the necessary power in the Will or Settlement, this provision is a purely administrative provision, which sets out wide powers which allow Trustees to give capital to the Income Beneficiary to augment their income, in addition to transferring Trust Property to them freed from the Trust.

Provision 4.8: Trade

This provision permits Trustees to carry on a trade, or

executors to continue a trade in which the deceased was involved, in either case on their own or together with any other person including in partnership.

Provision 4.9: Deposit of documents

Trustees do not need to keep all the trust documents in their personal possession, but can lodge them with a third party (e.g. a solicitor or accountant) for safekeeping. Reference to bearer bonds has been removed.

Provision 4.10: Nominees

This provision is unchanged and under it, Trustees may arrange for Trust Property to be held in the name of a third party, rather than have it held in their own name(s). This may be beneficial especially if, for example, shares are held in non-paper form.

Provision 4.11: Place of administration

This provision is unchanged and allows the Trustees to administer the Trust from outside of the UK, and will generally apply where the person creating the Trust is resident outside of the UK, or all of the beneficiaries are outside of the UK. Trustees should only consider transferring the administration of a Trust outside of the UK after having taken specific legal and taxation advice.

Provision 4.12: Payment of tax

This provision is unchanged. The payment of foreign taxes cannot normally be enforced in the UK. In some instances, the administration of a Trust can be frustrated if Trust Property is, or beneficiaries are, outside of the UK and the Trust cannot be properly administered unless taxes claimed by a foreign taxing authority are paid. This provision allows the Trustees to pay any such taxes notwithstanding that they are not legally enforceable against the Trustees.

Provision 4.13: Indemnities

This provision is unchanged and permits Trustees to reimburse third parties out of the Trust Fund in respect of any liabilities they incur and which would normally be payable out of the Trust Fund.

Provision 4.14: Security

The general law allows Trustees only a limited power to give security over Trust Property. This provision allows wide authority provided that it is exercised in respect of liabilities incurred by the Trustees in the proper exercise of their powers and duties. In particular, though, it does not enable Trustees to pledge Trust Property as security for a beneficiary's liabilities beyond the scope of clause 4.7.

Provision 4.15: Appropriation

This provision is unchanged and removes the requirement for Trustees to obtain the consent of a beneficiary to Trust Property being appropriated to them in satisfaction of their interest in the Trust Fund. This power is wider than either the Common Law power of appropriation or the statutory power of appropriation in s41 *Administration of Estates Act 1925*, under which the consent of the beneficiary is required.

When exercising the power of appropriation, for the purpose of identifying the value being distributed to individual beneficiaries Trustees are required to value the Trust Property being appropriated as at the date of appropriation.

Provision 4.16: Receipt by charities, etc.

This provision has been widened to ensure that new entities such as Charitable Incorporated Organisations are included.

Provision 4.16.1 simplifies the ability to distribute Trust Property to a charitable entity by providing Trustees may safely accept the receipt of the person describing themselves as the treasurer (or other financial controller) of that charity, unless they know that person is not authorised to receive the Trust Property.

Provision 4.16.2 provides if any charitable entity ceases to exist, changes its name, or enters into insolvent liquidation, before the time that the gift to the charitable entity takes effect in possession (for example between the signing of a will and the death of the testator and, where a trust arises, between the date of the Principal Document and the time when the

charitable entity becomes entitled to receive the gift), the gift shall instead be paid to such charitable entity as the Trustees decide, having regard to the objects that were intended to benefit.

Provision 4.17: Release of powers

This provision is unchanged and allows Trustees to extinguish any of the powers that they have. Such release must be by deed, which helps ensure that Trustees considering the release of powers are properly advised as to the consequences of their proposed action. This power may be used, for example, to remove a person from benefit under a discretionary trust and so to exclude him or her.

Provision 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. This provision is intended to prevent a narrow meaning being given to Trustees' powers, enabling Trustees to do things incidental to the terms of the Trust.

Provision 5 (formerly Provision 6): Minors and beneficiaries without capacity – powers over income and capital

This provision is merely administrative in nature, identifying how income or Trust Property to which a minor or a person lacking mental capacity may be dealt with.

Provision 5.1 identifies those persons who may validly give a receipt for any income or Trust Property due to a minor. It provides that income and 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 funds unless they have knowledge of circumstances, which call for enquiry. Although, since the *Children Act 1989* s3(3), the person with parental responsibility can give a good receipt to PRs and Trustees and, it appears, can require the PRs or Trustees to account to them for the benefit due to a minor. This provision removes doubt.

Provision 5.2 sets out ways in which the Trustees can apply income on behalf of a minor. The provision gives

the Trustees power, which may be exercised so as to 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, whilst avoiding youthful excess, with funds actually being released at age 18.

Provision 5.3 identifies those persons who may validly give a receipt for any income or Trust Property due to a person lacking mental capacity. The clause provides that, in the absence of a registered enduring or lasting power of attorney, or of a deputy appointed under the *Mental Capacity Act 2005*, trustees may themselves apply any income or capital for the benefit of a beneficiary who lacks mental capacity, subject to the directions of the court when appropriate.

In the case of a mentally incapacitated beneficiary, any such payments of capital or income can also be made to the person having, or appearing to the trustees to have, the care and financial responsibility of such person. There is no duty on the trustees to enquire into the use of the income or capital unless they have knowledge of circumstances, which call for enquiry. The power to make payment for an incapacitated adult who is without a formally appointed representative will need careful thought before use but is pragmatic.

Provision 6 (formerly Provision 7): Disclaimer

This provision enables a beneficiary to refuse to accept their interest under a Trust, or a part of their interest without affecting their right to receive the rest of such interest. Where a beneficiary refuses to accept their interest (whether all or just part) the Trustees should consider taking legal advice to confirm that the way in which the beneficiary has refused acceptance is binding and, if so, who will then be entitled to the disclaimed interest. The ability to disclaim only part of a gift adds flexibility.

Provision 7 (formerly Provision 8): Apportionment

This provision removes any residual duty on Trustees to split receipts and expenditure between income and capital. Ensuring that apportionment does not apply

saves costs without creating significant unfairness and 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.

The clause has been amended to specify that s1 *Trusts (Capital and Income) Act 2013*, which has been introduced since the SSP2, shall apply. All income and expenditure is to be treated as arising when payable.

Provision 8 (formerly provision 9): Conflicts of interest

Under this important 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.

This provision sets out the procedure to be followed where there is a conflict between a person's duties to the Trust and their personal interests. Other than where the person in question was one of the Trustees originally appointed, an Independent Trustee is required before any of the trust powers can validly be used to benefit the person in question.

Provision 8.1.2 excludes certain people from qualifying as an Independent Trustee.

Provision 8.3.3 has been added which clarifies that if the Fiduciary is the settlor acting in connection with reserved powers the protection of Provision 8.2 is not available, even if there is an Independent Trustee. If no provisions relating to conflicts of interest are included in the drafting of the reserved powers, the normal common-law restrictions will apply.

Provision 8.4.2 has also been amended so that the requirement is for only the benefitting Trustee to have been originally appointed (rather than the current Trustees include all of the Trustees originally appointed), in order that a Trustee may benefit without an Independent Trustee being needed.

Provision 9 (formerly provision 10): Trustee remuneration

This provision provides for a professional trustee or a Trust Corporation to be paid for acting as Trustee. This includes where services are provided by a partnership or LLP of which the professional trustee is a member

The SSP2 entitled only trustees acting in their professional capacity to be remunerated for their services, with a requirement for a link between the skillset of the trustee and the work actually done. This provision has been significantly extended and now also allows Trust Corporations to charge for their work carried out for the Trust, on the basis of their terms and conditions applying from time to time.

The current drafting is based on the statutory provisions in s29 *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 s29 *Trustee Act 2000* is wide enough to allow a partnership or LLP to charge.

Provision 9.2 defines a professional trustee by setting out the terms under which a Trustee acts in a professional capacity.

Provision 9.3 further provides that any Trustee is entitled to be paid for acting as a director or an officer of any company in which the Trust is invested.

Provision 10 (formerly provision 11): Professional trustees and Trust Corporations

This provision has also been significantly amended, after a review of the terms and conditions of a number of Trust Corporations. This clause is supplemental to Provision 9 and authorises a professional trustee or a Trust Corporation to act as Trustee in accordance with its standard terms and conditions of service as published from time to time and not just those in force when the professional trustee or Trust Corporation is appointed.

Provision 10.2 provides that in the event of there being any conflict between those terms and conditions, these provisions and the terms of the Will or Settlement

incorporating these Provisions, these provisions (subject to clause 2.2 above) and the terms of the Will or Settlement prevail.

Provision 11 (formerly provision 12): Liability of Trustees

Provision 11.1 provides that Trustees are not liable for breach of trust or for any loss to the Trust Fund when they have acted honestly and with reasonable care, unless it can be shown that such loss arose from their own fraud or negligence.

Provision 11.2 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.

Provision 11.3 authorises Trustees to act in accordance with the advice of Counsel of at least five years' standing. This includes the ability to recover from the Trust Fund any expenses incurred when acting on such advice (including the costs of litigation without the need for authority from a court).

However, a Trustee will not obtain the benefit of clause 11.3 if:

- 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.

Provision 12 (formerly provision 13): Subsequent editions of STEP Standard Provisions

This provision allows Trustees to adopt later versions of the *STEP Standard Provisions*, thereby replacing all or some of these provisions.

It is not proposed to bring out frequent new editions of the *STEP Standard Provisions*; however, at some time,

a fourth 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 any of the Special Provisions 13 to 20 (see below) have not been incorporated in the Principal Document, the Trustees cannot incorporate them at a later stage.

DETAILED GUIDANCE

Special Provisions

Special Provisions are not necessarily appropriate for inclusion in all wills and trusts. The clause in the will or settlement incorporating these provisions will identify if any, or all, of the Special Provisions are to apply. If there is no reference to Special Provisions, then none will apply to the terms of the will or settlement in question.

Where Special Provisions are incorporated into the will or settlement, the trustees should consider taking appropriate advice before irrevocably exercising any such powers.

Provision 13 (formerly provision 14): Borrowing

This provision has been included in both the earlier editions, but was felt to be far-reaching and is therefore included in the Special Provisions. This provision allows Trustees to borrow monies for investment or any other trust purpose. When entering into any borrowing arrangement the Trustees will need to be satisfied that the borrowing will benefit the Trust and can be repaid.

Provision 14 (formerly provision 15): Delegation

Provision 14 is unchanged: it provides that a Trustee may delegate in writing any of their functions to any Person, and includes a provision that none of the restrictions in sections 12 to 15 *Trustee Act 2000* shall apply.

This provision allows individual Trustees a wide power to delegate any of their trustee activities, including decision making, to a third party (which could include another Trustee). The Trustee needs to be satisfied that whoever they appoint as their delegate is reasonably competent to deal with any of the matters delegated to them.

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.

Provision 15 (formerly provision 16): Companies

Provision 15.1 has been expanded to include at 15.1 power to incorporate and promote companies. Provision 15.1 allows Trustees to start a company anywhere in the world, provided that it is for the benefit of the Trust.

Provision 15.2 allows Trustees to enter into a range of arrangements in relation to companies in which the Trust is invested, which may include takeovers and the winding up of such companies.

Provision 15.3 relieves Trustees of a duty they would otherwise have to maintain oversight of companies, such as a family company, in which a Trust is invested. Where Trustees have their own nominee acting as a director or other officer of such a company, this provision may not apply. In any event, if the Trustees have knowledge of matters affecting the company that give rise to concerns over the running of the company they may need to take action.

Provision 16 (formerly provision 17): Powers of maintenance: Deferring income entitlement to age 25

If s31 *Trustee Act 1925* applies, a beneficiary becomes entitled to trust income at the age of 18. This was modified in the SSP2 so that a beneficiary becomes entitled to trust income at the latest at the age of 21. In the SSP3, it is modified further and the beneficiary will take at the latest at 25-years old. This would allow Trustees to defer entitlement to income to the age of 25.

This provision provides that where income due to a minor beneficiary is subject to s31 *Trustee Act 1925* (i.e., is to be accumulated or paid to them at the Trustees' discretion), that arrangement will continue until their 25th birthday, rather than ending when they reach their 18th birthday. Trustees are able to change the arrangement, so that the beneficiary becomes entitled to be paid the income before age 25, so long

as it cannot be paid to them before they are 18. If the beneficiary needs to reach an age of less than 25 to become entitled to capital of the Trust Fund, they will also be entitled to the income from that lesser age.

Provision 17 (formerly provision 19): Absolute discretion clause

For the avoidance of doubt, and to disapply *Trust of Land and Appointment of Trustees Act 1996*, s11, this provision allows Trustees to exercise their discretion freely and without supervision by or the need to consult the beneficiaries.

However the case of *OH v Craven* needs to be borne in mind whether inclusion of this Provision is appropriate.

Provision 18 (formerly provision 20): Appointment and retirement of Trustees

As in the SSP2, Provision 18.1 allows the appointment of offshore trustees. Provision 18.2 permits Trustees to retire even if such retirement leaves only one Trustee in place. 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.

Provision 18.3 is a technical provision to enable the removal of a Trustee who lacks mental capacity, or to change Trustees where a person with power to appoint new Trustees lacks mental capacity.

Provision 18.3 has been added to specify for the purposes of s36 *Trustee Act 1925*, the situations which would result in a person being deemed incapable of acting as a trustee, or of exercising the power referred to in s36 (1) (b).

Provision 19 (formerly provision 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 remaindermen. 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 might, ultimately, disadvantage both.

Provision 19.1 permits Trustees to invest and manage the Trust Fund to produce a higher level of income, or greater capital growth than would be normal for a Trust Fund, as they consider appropriate to the underlying purpose of the Trust. This includes the ability to agree to waive the payment of dividends, etc. from a family company.

Provision 19.2 permits Trustees to pay capital expenses, including tax liabilities out of income.

Provision 20 (formerly provision 23): Relationships unknown to Trustees

Although 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.

This provision protects Trustees when making a distribution from a Trust Fund from claims by persons who purport to be beneficiaries and whose existence the Trustees have no knowledge of, or could not have become aware of despite making reasonable enquiries.

The clause now takes into account the ruling of *OH v Craven*, which can be a point of consideration in any given trust scenario.

Note 1: Survivorship clauses

The *STEP Standard Provisions* do not include a survivorship clause in either of the previous editions, nor is there one in the SSP3. There may be reasons to include such a clause for a relatively short time and, if it is to be included, it must be expressed in the will.

Note 2: Supporting Material

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 how to use them. With this in mind, STEP has produced further guidance to their use, including:

- FAQs;
- A toolkit for less experienced practitioners; and
- An overview document that can be shared with clients, setting out a brief summary of each of the provisions.

ABOUT **STEP**

STEP is a global professional body, comprising lawyers, accountants, trustees and other practitioners that help families plan for their futures.

Our mission is to inspire confidence in families planning their assets across generations by setting and upholding high professional standards, informing public policy, promoting education, and connecting practitioners globally to share knowledge and best practice.

Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

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