

**Drafting Trusts and Will Trust 10th ed:
Third online update**

Table of Contents

Para 6.4 (Professional trustees).....	2
Para 6.24 (Duty to disclose exemption clause to settlor/testator).....	3
Para 11.8 (Power of advancement)	3
Paras 16.2 (Significance of administrative/dispositive distinction) and 16.8 (Power of appropriation)	4
Para 18.9 (Choice of will trusts: overview)	4
para 18.16 (The NRB formula): RSCPA v Sharp.....	4
Will form 6.....	5
Form NRB Appointment 3 (amending NRB trust to IP trust), page 548	5
CD file CD_10_Prec_Admin_Wills (Administrative Provisions for Wills)	6
Appendix 4 (Tax on payment of index lined nil rate sum)	6
Regulation of will-writers and of banks as executors	7

Drafting Trusts and Will Trust 10th ed: Third online update

This is the third online update for the book *Drafting Trusts & Will Trusts 10th edition*.

We seek to state the law as at 27 June 2011.

Para 6.4 (Professional trustees)

The Law Society has issued a Practice Note on the Appointment of a Professional Executor¹ which contains the following guidance for solicitors and law firms²:

“When a client is considering the appointment of an executor, you may promote you or your firm's services as an executor, but you should inform the client that such appointment is not compulsory, and you should take into account the size and complexity of the estate before promoting you or your firm's services instead of a lay executor.

You should inform the client that an executor can be either a:

- a. professional such as you or your firm, or
- b. lay person(s) such as a family member or beneficiary, who has the option of engaging a professional to assist him or her in the administration of the estate.

If you decide to promote your services you should also take into account the client's best interests. For example, if the estate is small or straightforward, it may not be appropriate to encourage the client to appoint you or your firm as the executor.

Before finalising a Will that appoints you or your firm as an executor(s) you should therefore be satisfied that:

- a. the client understands that the executor does not have to be a professional and that a lay person(s) such as a family member or beneficiary can be appointed and that lay

¹ Accessible
www.lawsociety.org.uk/productsandservices/practicenotes/executorships/4906.article.

² The Practice Note (17 March 2011) applies to solicitors and law firms who provide will-writing or probate services or who are retained by or have an economic relationship with a third party selling its own executor services, e.g. a high street bank. It represents the Law Society's view of good practice in this area. Solicitors are not required to follow the guidance but in practice they should do so. See also the Solicitors' Regulation Authority's Question of Ethics guidance (May 2010 issue) on Drafting wills which appoint you or your firm as executor(s), accessible at www.sra.org.uk/solicitors/code-of-conduct/guidance/questionofethics/May-2010.page.

- person(s) have the option of engaging professional help after the client's death, if they require assistance, and
- b. it is not contrary to the client's best interests at the time of drafting the Will to make such an appointment.”

The practice note also states that solicitors and law firms should provide an indication of the likely costs of both carrying out the administration of the estate and acting as an executor. They should inform the client whether the fees quoted are based on an hourly rate and / or percentage of the estate. It should be clear whether the amount quoted is for the work involved in administering the estate or simply for acting as an executor and supervising others doing the necessary work. It should also make clear any trustee fees that may be relevant to the estate.

We consider that the same practice should be adopted where the client is considering appointing a professional trustee for a lifetime trust.

Para 6.24 (Duty to disclose exemption clause to settlor/testator)

On 14 September 2010 the Government announced their acceptance of the Law Commission report (No. 301) on trustee exemption clauses.³ The report recommended that the Government should promote the adoption by professional and regulatory bodies of a model rule of practice relating to the inclusion in trust documents of clauses limiting the liability of trustees. The recommended model rule provides that a paid trustee or drafter proposing to include such a clause should take reasonable steps to ensure that the person creating the trust is aware of the meaning and effect of the clause before the trust is created. Both STEP and the Law Society were consulted prior to the report and adopted its recommendations. The STEP rule and Law Society guidance is discussed in detail in the book. Referring to the fact that model rules had already been widely adopted by leading regulatory and professional bodies, the statement announces that the Government would be promoting further uptake by writing directly to the relevant regulatory and professional bodies to urge them to adopt the recommendations. STEP has since published a set of model trustee exemption clauses.

Para 11.8 (Power of advancement)

The Law Commission have proposed extending the statutory power of advancement (section 32 TA 1925) to the whole, rather than half, of a beneficiary's share in the trust fund: Supplemental Consultation Paper, *Intestacy*

³ Accessible
www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100914/wmstext/100914m0001.htm

and Family Provision Claims on Death: sections 31 and 32 of the Trustee Act 1925, No. 191, 26 May 2011. The paper is accessible at www.justice.gov.uk/lawcommission/docs/cp191_intestacy_supplementary.pdf.

It is standard practice to override the statutory restriction that the power only extends to half, so this reform is to be welcomed.

Paras 16.2 (Significance of administrative/dispositive distinction) and 16.8 (Power of appropriation)

In the introduction of our book we stated that the High Court had decided two wrong cases which we hoped would be corrected on appeal. The first was *RSPCA v Sharp*, which was reversed on appeal in December 2010, discussed below.

The second was *Southgate v Sutton*.⁴ Here the Court of Appeal has also reversed the High Court decision and held that the court can authorise trustees to partition trust property; that was in the circumstances "administration" within s.57(1) Trustee Act 1925.

Para 18.9 (Choice of will trusts: overview)

The text at (3) discussing Will Form 3 should read "Better than will 4" (not: "Better than will 3").

Para 18.16 (The NRB formula): RSCPA v Sharp

As we predicted in para 18.16, the Court of Appeal has reversed the High Court decision in *RSPCA v Sharp*.⁵

This case concerned a NRB gift in a slightly non-standard form. The will gave the residuary estate to a charity subject to two gifts:

1. A NRB gift to individuals: "I give the amount which at my death equals the maximum which I can give to them by this my Will without Inheritance Tax becoming payable in respect of this gift ..." and
2. A gift of land worth £169k to individuals.

⁴ [2011] EWCA Civ 637. The High Court decision was reported under the name *Sutton v England*.

⁵ [2010] EWCA Civ 1474; [2010] STC 553.

The judge misconstrued the NRB gift as a gift of the full statutory NRB (then £300k) without any allowance for the second gift. That is wrong, because (among other reasons) IHT did “become payable” - £112k in amount - and it did so, in part, “in respect of” the NRB gift. So the correct construction was that the will made a gift of the NRB remaining available after allowing for the second gift (£300k-£169k = £131k). The Master of the Rolls (referring to our book) pointed out that the purpose of a NRB gift is normally to avoid paying IHT.

The position would have been clearer if the drafter had used the form in our book, because the maximum amount of cash which could be given without incurring “any liability to IHT” (our wording) could only be the net amount after allowing for any other gifts.

Will form 6

The numbering of the subclauses at 5.4 has gone slightly wrong. The version on the CD is correct.

Form NRB Appointment 3 (amending NRB trust to IP trust), page 548

The printed cl.2 of the book precedent is an amalgam of clauses 2 and 3 with some words missing. The version on the CD is correct. The clauses should read:

2. In exercise of the Power of Appointment the Present Trustees irrevocably appoint that they hold the [Nil Rate Fund] [Untransferable Nil Rate Sum] on the following terms.
3. Subject to the Overriding Powers conferred by the Will, the Trustees shall pay the income of the [Nil Rate Fund] [Untransferable Nil Rate Sum] to [name of spouse/civil partner] during [his/her] life and subject to that the Will shall stand.

We apologise to readers for this error. If a deed were executed using the words of the book precedent clause 2, it would be effective (though ungrammatical).

CD file CD_10_Prec_Admin_Wills (Administrative Provisions for Wills)

Two minor slips have emerged in this file:

Clause 7.3.2: delete the stray “the”:

7.3.2 there is in relation to the Fiduciary an Independent Trustee in respect of whom there is no conflict of interest, and he considers that the transaction arrangement or action is not contrary to the general interest of ~~the~~ this Will or any Settlement made by this Will.

Clause 9.2: Add “or estate(s)” after “trust(s)” so the clause reads:

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 or estates generally or a particular kind of trust or estate, or

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

We apologise for these slips. However no difficulty should arise if the original CD form is used.

Appendix 4 (Tax on payment of index lined nil rate sum)

In *Martin v Triggs*⁶ the index linked element of National Savings Certificates was held to be income and not capital for trust law purposes. Unfortunately the leading case of *Lomax v Peter Dixon* was not cited, and the case must simply be regarded as wrong on that point.

In our book we concluded that there is no tax on the payment of the index linked sum because the index linked element is not interest. The amount of tax at stake in any one case is likely to be small. To avoid cases settling by reason of the costs of defending what is right we offered to act on a pro bono basis if this were challenged in relation to a document drafted in the form in our book. We are now acting in relation to a number of such cases, though none is far enough advanced to be heard very soon.

⁶ [2009] EWHC 1920 (Ch) at [101] – [105].

Regulation of will-writers and of banks as executors

The Legal Services Board Consumer Panel is investigating whether the will-writing industry should be regulated, following concerns over the quality of wills and poor sale practices. Will-writing is not reserved to the legal profession: see para 2.11 (Formal qualifications for the drafter). The consultation was held at the end of last year. Case summaries and submissions are accessible at www.legalservicesconsumerpanel.org.uk/ourwork/will_writing/Willwritingsubmissions.html.

The OFT have announced that “Barclays Bank, HSBC, Lloyds Banking Group and RBS Group have all voluntarily agreed to review and, where necessary, improve the way they sell will-writing and executor services following discussions with the OFT.” (Press Release 23 February 2011). We all know what “voluntarily” means when used by a regulator.

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