Law Society Wills and Inheritance Protocol

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INTRODUCTION

The Law Society Wills and Inheritance Protocol (the Protocol) has been created to support the provision of will drafting, probate and estate administration services by its members. The impetus for creation of the Protocol has been the development of the Law Society’s Wills and Inheritance Quality Scheme (WIQS).

The adoption of the Protocol, in so far as it is appropriate to the matter and in the best interests of the client, is mandatory for members of the WIQS and voluntary for all other members of the Law Society.

The Protocol aims to raise standards of client care and service by:

- setting out the Law Society’s ‘preferred practice’ in will drafting, probate and estate administration;
- improving communication between practices, clients and beneficiaries;
- increasing transparency and therefore understanding of the will drafting, probate and estate administration processes; and
- encouraging practices to agree time frames and service levels with clients.

Adopting the Protocol will help a practice to:

- further distinguish itself from unregulated providers;
- demonstrate to clients and others its high standards of practice and client service;
- meet legal requirements;
- achieve and demonstrate compliance with its regulator’s outcomes;
- provide a consistent high quality service; and
- recognise and reduce risks that may lead to negligence claims.

The Protocol contains general obligations, obligations specific to the provision of a particular service (Parts A–E); and obligations for a practice to have certain policies (Parts F–H).

The general obligations are, for the most part, designed to apply to provision of all the services covered by the Protocol, i.e. will drafting, probate and estate administration. As the Protocol and the WIQS intend to set standards in client service, the general obligations focus on this area and, where appropriate, draw upon existing standards and good practice.

The policies are intended to cover areas which are considered to commonly give rise to risks, errors and inconsistency in the course of providing will drafting, probate and estate administration services.

The Protocol does not prescribe the format and content of a policy in detail, but instead specifies certain points which must be addressed by a practice in a particular policy. A practice therefore has the flexibility to draft new policies or amend existing policies to deal with the requirements of the Protocol.

Carefully considered, regularly reviewed written policies which are communicated to all relevant partners and staff will help a practice to comply with legal and regulatory duties, achieve professional conduct outcomes and, if the practice is a member of the WIQS, to meet the Core Practice Management Standards.
No policy can cover every variable, so inevitably there will be cases where circumstances require the person providing the service to depart from the policy. However, a well considered policy will help the practice to anticipate problems, reduce risk and deliver a consistent, high quality service.

The Protocol will only reach its full potential if members of solicitors’ practices share their experience of using it and their views on how it may be improved. Please direct any comments on the use and content of the Protocol to wiqs@lawsociety.org.uk.
DEFINED TERMS

Client

includes potential client where the context admits.

Estate administration (also administration of the estate) means the process of transferring the assets of a deceased person to those entitled. Unless there is agreement to the contrary the process will normally include:

(a) ascertaining the assets and liabilities of the deceased;
(b) calculating taxes due;
(c) obtaining a grant of representation;
(d) collecting the assets of the deceased;
(e) paying debts, taxes and administration expenses;
(f) selling assets, if necessary, to realise cash for the purposes of the administration;
(g) transferring the assets to those entitled;
(h) producing estate accounts showing income and capital separately;
(i) providing statements of income and income tax paid to beneficiaries with an income entitlement.

Guardian

means a guardian (other than a guardian of the estate of a child) appointed in accordance with the provisions of the Children Act 1989, s.5.

Minor

means a person aged under 18.

Parental responsibility

has the meaning given to it in the Children Act 1989, s.3.

Practice

means a practice authorised and regulated by the Solicitors Regulation Authority (SRA), including: any SRA authorised and regulated partnership, company, sole practitioner, limited liability partnership, legal disciplinary partnership, and alternative business structure which offers services to:

(a) draft wills; or
(b) obtain a grant of representation; or
(c) deal with any aspect of estate administration.

Will drafter

means the person preparing a will and, where the context permits, includes the person taking instructions for the will, if different.

Will drafting

means the process of ascertaining a client’s wishes in relation to the assets that will pass on the client’s death and the production of a will carrying out those wishes effectively.
Unless there is agreement to the contrary the process will normally include:

(a) obtaining information on the assets, liabilities, family and dependants of the client;
(b) advice on any lifetime steps necessary to allow the will to take effect, e.g. severance of a beneficial joint tenancy;
(c) an explanation of the way in which inheritance tax is likely to impact on the client’s estate;
(d) a brief explanation of the fact that the Inheritance (Provision for Family and Dependents) Act 1975 allows certain family members and dependants to apply to the court if they consider that reasonable financial provision has not been made for them on death and a general consideration of whether the proposed dispositions of the estate might fail to make reasonable provision for potential applicants;
(e) advice on the correct execution of the will and, where the will is returned to the will drafter after execution, a check that the will appears to have been correctly executed; and
(f) advice on the need to review a will periodically and after significant life events and a warning, where appropriate, of the effects of marriage and divorce and the formation and dissolution of a UK civil partnership.

**UK civil partnership** means a civil partnership within the meaning of the Civil Partnership Act 2004, s.1.
GENERAL OBLIGATIONS

Client communication

OB.1 Treat all clients with dignity and respect, in a manner which is sensitive to the circumstances.

OB.2 Practices which are members of the WIQS will give clients a copy of the WIQS Client Service Charter or direct the client to where the Charter can be viewed online.

OB.3 At the outset, give clients an explanation of the issues raised, the options for dealing with them, the processes involved, and a likely time frame for the matter.

OB.4 At the outset, give clients in writing the name and status of the person responsible for dealing with the matter and the name and status of the person responsible for the overall supervision of the matter.

OB.5 At the outset, agree an appropriate level of service with the client, including the means and frequency of communications.

OB.6 Respond promptly to clients’ reasonable requests for information about the matter. Practices which are members of the WIQS will, unless otherwise agreed with the client:

(a) acknowledge all communications from clients within 48 hours of receipt; and
(b) if substantive points raised cannot be dealt with within that period, provide a time frame for doing so.

OB.7 Ensure that clients are informed as to the progress of the matter. Practices which are members of the WIQS will, unless otherwise agreed with the client, provide a progress report every 28 days when dealing with the administration of an estate.

OB.8 Carry out tasks in a timely manner.

OB.9 Where something is to be addressed by different means or a process is changed and this will directly affect the client, notify the client as soon as possible.

OB.10 If the person responsible for dealing with the matter or the person with responsibility for its overall supervision changes, inform the client in writing of the new person’s name and status as soon as possible.

OB.11 Inform clients as soon as possible of any delays or changes to the time frame originally given and give a full explanation as to the nature of and reasons for any delay. This includes any delay caused by issues at the practice, e.g. illness of staff members.
OB.12 Communicate with clients in a form which is appropriate to their needs and circumstances.

OB.13 Communicate with clients in plain English using clear, understandable language, avoiding legal terminology unless necessary and, where it is used, providing sufficient explanation to allow clients to understand unfamiliar words and concepts.

Costs

OB.14 At the outset, give clients a clear explanation of the costs and how the practice charges for the service in question, including whether there will be a charge for an initial consultation.

OB.15 At the outset, give clients a clear explanation of any referral fee arrangements which could affect the client’s matter.

OB.16 Explain in full how the practice charges for its services, whether it be by fixed costs, hourly rate or any other method of charging and, if unable to give an exact figure, give clients clear and realistic estimates of the likely costs.

OB.17 If the method of charging is changed, inform the client immediately and give an explanation as to why the charges have been changed.

OB.18 If it becomes evident during the course of the client’s matter that the costs are likely to exceed the estimate originally given, inform the client immediately and give a breakdown of costs and an explanation of why they have increased.

Vulnerable clients

OB.19 Consider whether clients may be vulnerable, for example, due to disability, learning difficulties, mental health, infirmity and illness, age, bereavement and emotional distress.

OB.20 Be aware of the potential for financial abuse of clients and understand your role in both preventing it and taking action to protect clients who have been financially abused.

OB.21 Take particular care to ensure that vulnerable clients fully understand the services they require and that they are able to make informed decisions.

OB.22 Take particular care not to put any pressure on vulnerable clients when selling or promoting services.

Sales practices

OB.23 Ensure that publicity is fair and well balanced.

OB.24 Ensure that the practice’s publicity material:
(a) does not make misleading claims as to the advantages that can be gained by making a will;
(b) does not advertise basic wills at a very low price with the intention that clients will then be pressured to buy more complex wills and further services which are not in their best interests;
(c) does not make unjustifiable or misleading statements about the skill and/or charging structures of other types of provider of legal services.

OB.25 Ensure that clients are not intimidated or pressured by the practice to give instructions for a service.

OB.26 Be pro-active in offering services which are in a client’s best interests, explaining the benefits and risks so that the client can make an informed choice as to the services he/she requires.

OB.27 Ensure that publicity material complies with statutory requirements and that you have regard to voluntary codes and to the Law Society’s Publicising Solicitors’ Charges Practice Note.

Quality

OB.28 Only accept instructions from a client if the practice has suitable levels of expertise to deliver the service and ensure the quality of service.

OB.29 Ensure that:
(a) work is allocated to those who have the expertise to deal with it appropriately;
(b) there is a system of supervision in place which is robust enough to identify issues of quality; and
(c) there is a clear process requiring anyone who finds that work allocated to them is beyond their expertise to alert the person supervising them so that alternative arrangements can be made.

OB.30 Encourage client feedback by appropriate means, e.g. a short survey/feedback form.

OB.31 Have in place a system for reviewing feedback on a regular basis and identifying necessary modifications of processes.

Practice policies

OB.32 Practices will have the policies, set out in Parts F, G and H below, appropriate to the service provided to mitigate risks to the client and to the practice.
PART A WILL DRAFTING

1 ARRANGEMENTS FOR TAKING INSTRUCTIONS

1.1 Identify and deal appropriately with visual, communication and mobility problems in accordance with the practice’s policy for clients with a disability (see GP.1 in Part F below).

1.2 To help avoid any later suggestion of undue influence, explain to the client why it is preferable to take instructions in the absence of potential beneficiaries and persons who may exert undue influence. If the client chooses to have such a person with him/her, record the advice given and the client's response and preserve as part of the will file.

1.3 When taking instructions from the client with another person present, be alert to the possibility of undue influence and the added difficulty of assessing mental capacity when another person provides information. Do not continue to act if there is evidence that the client is subject to undue influence.

1.4 Where language and/or disability make it impossible to communicate directly with the client, arrange for an interpreter or person trained in communication skills to attend the interview so that instructions can be taken independently of a potential beneficiary.

1.5 Joint instructions

1.5.1 If married couples, or civil partners, or cohabitees, or close friends wish to attend the interview together to give joint instructions for their wills, at or before the interview:

(a) check that each client is willing to give instructions in the presence of the other, given that sensitive matters have to be discussed, record the enquiry and client’s response and preserve as part of the will file;

(b) explain to each client that if a conflict of interests arises the will drafter will not be able to continue to act for both (or all) clients and may have to cease acting for all clients;

(c) explain to each client that the will drafter will not accept instructions to make subsequent significant changes to the will of one client without the knowledge of the other client(s) (unless the other lacks mental capacity).

1.6 Earlier wills

1.6.1 Ascertain whether the practice has made an earlier will for the client and, if so, retrieve the will file from storage and read the earlier will.
1.6.2 If the client has made an earlier will which is not stored by the practice, ask the client to bring the earlier will, or a copy, if the original is not available.

1.6.3 Where another practice has prepared an earlier will for the client and is storing the original will, ask for the client’s permission to request that the other practice supplies the original earlier will.

1.6.4 Discuss with the client the reasons for changes from any earlier wills.

1.7 Contracts made ‘off premises’

1.7.1 Where a contract for the drafting of a will is made:

(a) during a visit to the client’s home or home of another person or workplace; or
(b) during a visit to a hospital or residential home where the client is staying; or
(c) during an excursion organised by the practice; or
(d) after an offer made by the client during such a visit or excursion;

comply with the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008 (the Regulations).

1.7.2 To comply with the Regulations the person selling the service:

(a) must give to the client a written notice of the client’s right to cancel the contract within seven days;
(b) where, as will usually be the case with will drafting instructions, a delay of seven days is not in the client’s best interests, ask the client to provide written instructions to start work within the cooling-off period;
(c) explain to the client that the contract can be cancelled before the end of the cancellation period even though work has commenced, but the client may have to pay for any work that was carried out on his/her behalf before cancellation in accordance with the reasonable requirements of the agreement.

1.7.3 Where a visit or excursion follows the making of a contract, be aware that the Regulations will apply if the contract is subsequently varied during such a visit or excursion.

Notes:

(i) Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008 (SI 2008/1816).
(ii) See the Law Society’s Cancellation of Contracts Practice Note.
2 TAKING INSTRUCTIONS

2.1 Urgent instructions

2.1.1 Inevitably some wills have to be prepared as a matter of urgency, for example, where a client is nearing death or wishes to make a will very quickly. In such cases the will drafter should:

(a) comply with the practice’s policy on urgent instructions (see WP.4 in Part G below); and
(b) decide whether it is in the best interests of the client to ignore certain obligations of the Protocol in order to produce a will within the required time frame.

2.1.2 The will drafter must:

(a) assess the client’s capacity to give instructions as set out at obligation 2.7 below;
(b) check that the client is not subject to undue influence; and
(c) produce a will that effectively carries out the client’s testamentary wishes.

2.2 Attendance notes

2.2.1 Use a template document to record notes of the interview in accordance with the practice’s policy on attendance notes (see WP.6 in Part G below).

2.2.2 In the attendance note, make a detailed and contemporaneous record of:

(a) the domicile of the client and any spouse or civil partner;
(b) the assets of the client including those which do not pass by will;
(c) the liabilities of the client and whether these are secured;
(d) the names of the client’s family and dependants;
(e) any advice given;
(f) the client’s testamentary wishes;
(g) the will drafter’s assessment of the client’s testamentary capacity, the questions asked to establish it and the client’s responses;
(h) whether there was anything to suggest possible undue influence; and

wherever appropriate, record the actual words used by the client.

2.2.3 In the case of elderly or ill clients where, although it appears there may be time to prepare a draft, a sudden loss of capacity is possible, consider whether it is prudent to ask the client to sign the attendance note to indicate that it is an accurate record of what was agreed at the interview.

2.2.4 Preserve the attendance note as part of the will file. In the event of a dispute as to the validity of the will, it will be important evidence.
2.2.5 Retain the will file for an appropriate period in accordance with the practice’s policy on storage of wills and retention of files (see WP.8 in Part G below). This will normally be at least until a grant of representation is obtained to the client’s estate. In some instances it may be appropriate to retain the will file for some time afterwards in case of future litigation.

2.2.6 If the practice has appropriate facilities, consider making a video recording of the interview. If this is done, refer to the recording in the attendance note and ensure that the recording is retained for viewing in future.

2.3 Non-face-to-face instructions

2.3.1 In accordance with the practice’s policy on taking instructions (see WP.1 in Part G below) where the practice takes instructions without a face-to-face interview, preserve and retain:

(a) the preliminary information provided to clients;
(b) any checklist or information sheet completed by clients; and
(c) the instructions for the will prepared;

for the same period as attendance notes of face-to-face meetings.

2.4 Time limits for the preparation of the will

2.4.1 At the time when instructions are received from the client, agree a date for the preparation of the will which:

(a) is acceptable to the client; and
(b) reflects any need for urgency.

2.4.2 Unless otherwise agreed, once the client has provided all the information required to complete the agreed instructions:

(a) send the draft will to the client within seven working days; and
(b) send the final version to the client for execution within seven working days of receiving approval of the draft; or
(c) if a draft is not supplied, send the will to the client for execution within 10 working days.

2.4.3 If a draft will or letter requesting instructions has been sent but the client does not respond, comply with obligation 15 below.

2.5 Gathering information

2.5.1 Ask the client to give an outline of his/her assets, liabilities, family and dependants, and priorities in relation to the disposition of the estate.

2.5.2 Use follow-up questions to establish any matters in relation to property which will affect the terms of the will, including but not limited to:
(a) whether any assets are co-owned and, if so, whether such assets are held as beneficial joint tenants or tenants in common;
(b) whether any third parties may have interests in property apparently owned by the client through either constructive or resulting trusts or assurances made by the client which might give rise to a claim for proprietary estoppel;
(c) whether the client may have interests in property apparently owned by third parties through such trusts or assurances;
(d) details of any death in service benefits, the terms of such benefits and any nomination already made by the client;
(e) details of any life assurance policies, the terms of such policies, and any assignments or declarations of trust already made by the client;
(f) details of any funeral or lifetime care plans taken out by the client;
(g) whether the client has any interest under a settlement, is a trustee, or has a power of appointment over trust assets;
(h) whether the client owns or has an interest in a business;
(i) whether the client has any foreign property and, if so, whether any advice has been obtained as to the local inheritance laws;
(j) whether the client expects to inherit property;
(k) whether the client has made any lifetime transfers of value; and
(l) what liabilities the client has and whether any are secured.

2.5.3 In a case where information about assets is held by third parties, such as financial advisers and accountants, seek the client’s consent to obtain necessary information from those third parties and retain it.

2.5.4 Use follow-up questions to prepare a list of dependants and family members including any cohabitee.

2.5.5 Establish the client’s testamentary wishes and consider whether any specific advice is required in light of the information gathered.

2.6 Personal assets log

2.6.1 Suggest that, to facilitate the administration of the estate, the client:

(a) completes and maintains a list of assets, including digital assets; and
(b) considers how to ensure that those dealing with the estate will be able to access those assets.

2.6.2 Recommend that the client completes the Law Society’s Personal Assets Log, or similar document, for this purpose.

2.7 Ascertaining testamentary capacity

2.7.1 Will drafters must be aware of the implications of the series of cases, starting with Kenward v. Adams, which set out good practice in
circumstances where there may be later questions as to testamentary capacity. These implications are summarised below.

In *Kenward v. Adams*, Templeman J stated that:

… in the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest that precautions be taken. The making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and findings.

The so-called 'golden rule' is not a rule of law, it is merely a statement of good practice. Failure to obtain a medical opinion does not invalidate the will. It simply means that there is no contemporaneous medical evidence to assist the court in a dispute as to testamentary capacity.

It is not always possible to obtain a medical opinion as:

(a) the client may be unwilling to consent to such an examination; or
(b) it may be impossible or impracticable to obtain such an opinion within the necessary time frame; or
(c) the client’s capacity is likely to deteriorate quickly; or
(d) death is imminent.

2.7.2 If it is not possible for the will drafter to obtain a medical opinion on the testamentary capacity of the client in accordance with the ‘golden rule’:

(a) explain to the client that, in the event of a subsequent challenge to the will on the basis of lack of capacity, the lack of a contemporaneous medical opinion may make the challenge more likely to succeed; and

(b) ask the client to confirm that they wish to continue, record the advice given and the client’s decision, and preserve as part of the will file.

2.7.3 Whenever proceeding without a medical opinion:

(a) Ask the client open questions to establish whether, on the balance of probabilities, the client fulfills the test of testamentary capacity as set out in *Banks v. Goodfellow*. According to this test, the client should:

(i) understand the nature of the will-making act and its effects;
(ii) understand the extent of the property of which the client is disposing;
(iii) comprehend and appreciate the claims to which the client ought to give effect; and
(iv) not suffer from any disorder of the mind or delusion that prevents rational consideration of these matters and
produces a disposition which the client would not otherwise have made.

(b) Try to establish whether the client can:

(i) retain the information relevant to decisions as to the disposition of the estate throughout the decision-making process;

(ii) use or weigh that information as part of the process of making the decisions; and

(iii) communicate these decisions.

(c) Record the questions asked and the replies of the client together with your assessment of the client’s testamentary capacity and preserve as part of the will file.

2.7.4 If satisfied that the client has sufficient testamentary capacity to make the will in question, proceed to prepare the will.

2.7.5 If satisfied that the client does not have sufficient testamentary capacity to make the will in question:

(a) consider whether the client’s testamentary capacity may fluctuate so that it might be possible to take instructions at a later date and, if so, arrange a further appointment;

(b) consider the likelihood that seeing the client at a different time of day and/or in a different environment, e.g. at home, may improve the client’s testamentary capacity;

(c) where it appears unlikely that the client will recover capacity, have regard to the guidance in the Law Society’s Financial Abuse Practice Note; and

(d) prepare and preserve as part of the will file the attendance note setting out the reasons for determining that the client lacked testamentary capacity.

2.7.6 If uncertain whether the client has testamentary capacity, consider whether it may still be in the client’s best interests to make the will. It will be particularly important to:

(a) explain the situation to the client;

(b) obtain confirmation that the client wishes to proceed; and

(c) prepare and preserve as part of the will file the attendance note setting out the reasons for uncertainty as to the client’s testamentary capacity and the reasons for continuing to make the will.

2.7.7 Where it appears that the client’s capacity fluctuates, consider whether the client may also want advice on how to plan for times when they do not have mental capacity.

2.7.8 If obtaining a medical opinion as to testamentary capacity:
(a) instruct a medical practitioner with appropriate expertise in the assessment of capacity;
(b) provide clear written guidance for the medical practitioner on the legal test of testamentary capacity;
(c) with the client’s consent, give the medical practitioner a summary of the complexity of the client’s affairs and the proposed dispositions of the estate;
(d) ensure that the assessment is as close as possible to the time when instructions are given and the will is executed (as mental capacity can fluctuate); and
(e) if possible, the medical practitioner should be present at execution even if, as is often the case, professional regulations prevent them acting as a witness.

Notes:
(ii) Banks v. Goodfellow (1870) LR 5 QB 549.
(iii) For further guidance and a sample letter to a medical practitioner requesting an assessment of testamentary capacity, see Assessment of Mental Capacity: A practical guide for doctors and lawyers 3rd edition (Law Society, 2010).
(iv) See the Law Society’s Financial Abuse Practice Note.

2.8 Potential for financial abuse

2.8.1 When taking instructions, the will drafter should be alert to signs of potential financial abuse, particularly in the following instances:

(a) Where the person making the will is not being allowed individual access to the will drafter.
(b) Where instructions come from a third party.
(c) Where instructions are coming from a third party who is to benefit from the will.
(d) Where a third party is always present at an interview with the will drafter.
(e) Where a third party is using their own solicitor to prepare a will for a vulnerable person who has previously had his/her own solicitor.

Note:
(i) See the Law Society’s Financial Abuse Practice Note.

2.9 Consideration of earlier wills

2.9.1 If earlier wills are available (see obligation 1.6 above), consider whether they highlight issues which need to be dealt with, such as those in (a)–(d) below:
(a) **The existence of foreign property**
   
   (i) Ascertain what, if any, arrangements are in place in relation to the disposition of the foreign property.
   
   (ii) Consider whether the new will should be limited to assets in England and Wales.
   
   (iii) Consider whether the new will should limit the revocation clause to wills dealing with property in England and Wales.

(b) **A settled pattern of testamentary dispositions from which the client is departing**

   Try to ascertain the reasons for the change to exclude the possibility of undue influence or doubtful testamentary capacity.

(c) **Property or relatives not mentioned by the client**

   Ascertain whether circumstances have changed or whether the client has forgotten property or persons, casting doubt on the client’s testamentary capacity.

(d) **A mutual wills agreement reciting that the will cannot be unilaterally revoked**

   Establish whether the other party to the agreement is still alive and advise appropriately.

3 **ADVICE ON ASSETS PASSING INDEPENDENTLY OF THE WILL**

3.1 **Standard advice to be provided as part of the will drafting retainer**

3.1.1 Establish whether the client has any property which cannot pass under the terms of a will, for example:

   (a) an interest held as a beneficial joint tenant;
   
   (b) the proceeds of a life assurance policy which, before death, have been assigned to, or written in trust for, another person;
   
   (c) nominated death in service benefits; and
   
   (d) property passing under the terms of a settlement.

3.1.2 Explain to the client how such property will pass on death.

3.1.3 Establish whether the proposed disposition of the estate is in accordance with the client’s wishes once the assets passing independently of the will are taken into account. If it is not, advise the client that:

   (a) the proposed testamentary dispositions can be adjusted; and
(b) steps can be taken before death to change the terms on which the
assets passing independently of the will are held, for example by
severing a beneficial joint tenancy.

3.1.4 Establish whether the client wishes to receive detailed advice on the steps to
change the terms on which assets passing independently of the will are
held.

3.1.5 If the practice has the necessary expertise to provide such advice, ensure
that the charge for this work is made clear to the client before any action is
taken.

3.1.6 If the practice does not have the necessary expertise, suggest that the client
takes separate advice and, if the practice has relevant knowledge, assist the
client to identify a suitable adviser, but consider whether it is in the client’s
best interests for the practice to cease to act in relation to the preparation of
the will.

3.2 Further advice and action which a client may require on
property held as beneficial joint tenants

3.2.1 If the client’s testamentary wishes cannot be achieved without severance,
offer to implement severance.

3.2.2 Where a client is uncertain as to whether assets are owned as beneficial
joint tenants or tenants in common, offer to assist the client to establish the
basis of ownership and offer to draft and serve a precautionary notice of
severance.

3.2.3 Check whether the practice’s will drafting retainer excludes the preparation
of ancillary documentation and advise the client of any separate charge for
this work.

3.3 Further advice and action which a client may require on
life assurance

3.3.1 If appropriate, advise the client that:

(a) life assurance policies which have already been written in trust or
assigned are no longer in the beneficial ownership of the client
and his/her disposition cannot be altered, so the client must take
the disposition into account when determining the terms of the
will; and

(b) in unusual cases, a revocable assignment or declaration can be
made, in which case further assignments or declarations are
possible.

3.3.2 If life assurance is still in the beneficial ownership of the client, discuss
with the client whether it is in his/her best interests to:
(a) assign the policy to another person; or  
(b) declare that it is held on trust for another person.

3.3.3 The practice should offer to prepare the necessary documentation if it has the expertise necessary to do so.

3.3.4 If the practice does not have the necessary expertise, suggest that the client takes separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether it is in the client’s best interests for the practice to cease to act in relation to the preparation of the will.

3.3.5 Check whether the practice’s will drafting retainer excludes the preparation of ancillary documentation and advise the client of any separate charge for this work.

3.3.6 If instructed to prepare such documentation, carry out customer due diligence if not already completed.

3.4 Further advice and action which a client may require on death in service benefits

3.4.1 If the terms of the death in service scheme allow employees to nominate who they wish to receive lump sums payable on death, advise the client of:

(a) the importance of making a nomination;  
(b) the importance of making nominations that are appropriate in light of the terms of the will; and  
(c) the straightforward nature of the documents the client can use to make a nomination.

3.4.2 If the client gives specific instructions to prepare the nomination document, check whether the practice’s will drafting retainer excludes the preparation of ancillary documentation and ensure that the charge for this work, if any, is made clear to the client before any action is taken.

3.5 Further advice and action which a client may require on property passing under the terms of a settlement

3.5.1 Where a client is a life tenant or a remainderman of a fixed settlement, advise the client that it may be possible to achieve a more beneficial result if:

(a) the interest is assigned or surrendered; or  
(b) the whole trust is brought to an end by agreement between the various beneficiaries.

3.5.2 If instructed, explore the possibility of such action and, where appropriate, take the necessary steps.

3.5.3 Carry out customer due diligence if not already completed.
3.5.4 Where a client is a member of a class of beneficiaries of a discretionary settlement, consider whether it is appropriate to provide the trustees with information as to the circumstances of the client.

3.5.5 If instructed, write to the trustees providing the relevant information.

3.5.6 If instructed to deal with trust interests, ensure that the charge for this work is made clear to the client before any action is taken.

4 ADVICE ON THIRD PARTY RIGHTS

4.1 Standard advice on third party rights to be provided as part of the will drafting retainer

4.1.1 If the client owns property with another person, check whether the beneficial ownership is clear. If it is not, advise the client that because disputes after death can be difficult and expensive to settle, it is preferable to take steps to clarify the position before death.

4.1.2 If it becomes apparent that the client and a third party may have interests under a constructive or resulting trust, or an entitlement to assets arising from proprietary estoppel, explain to the client:

(a) that such interests may exist; and
(b) in general terms, how these interests would affect the client’s estate on death.

4.1.3 Establish whether or not the client wishes to receive detailed advice on identifying, recording or changing beneficial interests.

4.1.4 If the practice has the expertise necessary to provide such advice, ensure that the charge for this work is made clear to the client before any action is taken.

4.1.5 If the practice does not have the necessary expertise, suggest that the client takes separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether it is in the client’s best interests for the practice to cease to act in relation to the preparation of the will.

4.2 Further advice and action which a client may require on third party rights

4.2.1 Where it appears that problems in relation to third party interests may exist, explore with the client the extent to which the position can be clarified immediately.

4.2.2 If instructed, take such steps as are required to clarify the position.

4.2.3 Carry out customer due diligence if not already completed.
5  ADVICE ON INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

5.1 Standard advice to be provided as part of the will drafting retainer

5.1.1 Provide the client with:
(a) an outline of the effect of the Inheritance (Provision for Family and Dependants) Act 1975 (the Act);
(b) a summary of the potential applicants; and
(c) a warning if the client’s instructions might give rise to an application under the Act.

5.1.2 Establish whether the client wishes to receive detailed advice on:
(a) the implications of the Act; and
(b) any steps which can be taken to minimise the chances of an application being successful.

5.1.3 If the practice has the expertise necessary to provide such detailed advice, make clear the charge that will be made before any action is taken.

5.1.4 If the practice does not have the necessary expertise, suggest that the client takes separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether it is in the client’s best interests for the practice to cease to act in relation to the preparation of the will.

6  ADVICE ON INHERITANCE TAX

6.1 Standard advice on inheritance tax to be provided as part of the will drafting retainer

6.1.1 Advise the client whether, on the basis of current assets and liabilities, the disposition of the estate is likely to produce an inheritance tax liability. Such advice would normally include an explanation of:
(a) the likely amount of tax payable on the estate as a whole; and
(b) where the burden of tax will fall unless the will provides otherwise.

6.1.2 Establish whether the client wishes to change the disposition of the estate in light of that advice.

6.1.3 Draft the will appropriately, taking care to structure the dispositions in the will in the most tax efficient manner, if this is in accordance with the client’s instructions.
6.1.4 Establish whether the client wishes to receive advice on mitigation of inheritance tax and/or other tax liabilities by lifetime planning.

6.1.5 If the practice has the expertise necessary to provide such advice, ensure that the charge for this work is made clear to the client before any action is taken.

6.1.6 If the practice does not have the necessary expertise, suggest that the client takes separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether it is in the client’s best interests for the practice to cease to act in relation to the preparation of the will.

6.2 Further advice and action which a client may require on inheritance tax

6.2.1 If providing such advice, carry out customer due diligence if not already completed.

7 ADVICE ON FOREIGN PROPERTY

7.1 Unless the practice has the necessary expertise, explain to the client that:

(a) the practice cannot give advice on the succession of foreign property; and

(b) the situation of the property may prevent it from devolving under the will.

7.2 Recommend that the client seeks appropriate advice from a local expert.

7.3 If the practice has relevant knowledge, help the client to identify a suitable person.

7.4 If instructed to do so, provide the client with a letter to be given to the local expert explaining that there is an existing will which deals with the client’s UK assets and that any local will should be limited to local assets and should not include a general revocation clause.

8 ADVICE ON BUSINESS AND AGRICULTURAL ASSETS

8.1 Standard advice on business and agricultural assets to be provided as part of the will drafting retainer

8.1.1 Advise the client that these assets may attract relief from inheritance tax but lifetime planning may have to be undertaken to maximise relief.
8.1.2 Where the client is a partner in a business, advise that partnership agreements normally contain provisions dealing with the death of a partner which need to be examined to ascertain their suitability.

8.1.3 Where the client holds shares in a limited company, advise that shares are often subject to pre-emption rights which, unless altered during the client’s lifetime, may prevent the client from disposing of the shares freely.

8.1.4 Where the client is the sole owner of an unincorporated or incorporated business, advise the client to consider how the business will function after death and what succession planning can be put in place.

8.1.5 Establish whether the client wishes to receive detailed advice on dealing with the business or agricultural assets.

8.1.6 If the practice has the expertise necessary to offer such advice, ensure that the charge for this work is made clear to the client before any action is taken.

8.1.7 If the practice does not have the necessary expertise, suggest that the client takes separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether it is in the client’s best interests for the practice to cease to act in relation to the preparation of the will.

8.2 Further advice and action which may be required where the client is a partner

8.2.1 Establish the terms of the partnership agreement in relation to the death of a partner.

8.2.2 Point out any ambiguity or unsatisfactory provisions in those terms, for example, the basis of valuation of the partnership assets.

8.2.3 Establish whether the client wants any further advice on the effect of the partnership agreement and possible amendments to it.

8.2.4 If the client does not want further advice, draft the will appropriately.

8.2.5 If the client does want further advice, and the practice has the expertise necessary to provide it, ensure that the charge for this work is made clear to the client before any action is taken.

8.2.6 If instructed to act, carry out customer due diligence if not already completed.

8.2.7 If the practice does not have the necessary expertise, suggest that the client obtains separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether in the best interests of the client the practice should cease to act in relation to the preparation of the will.
8.3 Further advice and action which may be required where the client is the sole owner of an unincorporated business

8.3.1 Establish whether the client has any plans for succession.

8.3.2 If the client does not have any plans for succession, point out that difficulties will arise if the client dies with no one able to deal with the day-to-day running of the business.

8.3.3 If there is someone with knowledge of the day-to-day running of the business:

(a) discuss with the client the possible appointment of that person as a limited executor of the business;

(b) discuss with the client the powers that person should have; and

(c) if instructed, draft such an appointment appropriately, making clear any additional charge for this work.

8.3.4 The client may decide that incorporation or creation of a partnership is appropriate. If the practice has the expertise necessary to provide advice on the formation of such structures, ensure that the charge for this work is made clear to the client before any action is taken.

8.3.5 If instructed to act, carry out customer due diligence if not already completed.

8.3.6 If the practice does not have the necessary expertise, suggest that the client obtains separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether in the best interests of the client the practice should cease to act in relation to the preparation of the will.

8.4 Further advice and action which may be required where the client runs a business through a limited liability company

8.4.1 Establish whether there are other shareholders and directors or whether it is a ‘one person’ business, and:

(a) if it is a ‘one person’ business, consider the points raised at obligations 8.3.1–8.3.3 above with the client;

(b) if there are others involved in the business who will be able to continue the business after the death of the client, consider with the client the disposition of the shares.

8.4.2 Establish whether there are any pre-emption rights. If there are, discuss with the client whether the proposed disposition is satisfactory in light of those rights.
8.4.3 If the disposition is not satisfactory, consider with the client whether the pre-emption rights can be varied or whether alternative dispositions should be made.

8.4.4 The client may decide that variation of the pre-emption rights is appropriate. If the practice has the expertise necessary to provide advice, ensure that the charge for this work is made clear to the client before any action is taken.

8.4.5 If instructed to act, carry out customer due diligence if not already completed.

8.4.6 If the practice does not have the necessary expertise, suggest that the client obtains separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether in the best interests of the client the practice should cease to act in relation to the preparation of the will.

8.5 Further advice and action which a client may require on inheritance tax and business assets

8.5.1 Explain to a client with business assets, including agricultural assets, that they are likely to require specialist advice on the impact of inheritance tax and the possible availability of business and/or agricultural property relief.

8.5.2 If the practice has the expertise necessary, offer to provide advice, and ensure that the charge for this work is made clear to the client before any action is taken.

8.5.3 If so instructed, carry out customer due diligence if not already completed.

8.5.4 If the practice does not have the necessary expertise, suggest that the client obtains separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether in the best interests of the client the practice should cease to act in relation to the preparation of the will.

9 ADVICE ON THE NEED TO REVIEW THE WILL

9.1 Advise all clients that they should review their will every few years and always after there is a significant event such as a death, birth or decision to form or end a marriage or UK civil partnership.

9.2 Advise all clients that they should keep their Personal Assets Log (or other similar record of assets) up-to-date.

9.3 Advise single clients that marriage or the formation of a UK civil partnership revokes a will unless the will is made in expectation of marriage to, or formation of a UK civil partnership with, a particular person.
and includes a statement that it is not to be revoked by the marriage or formation of the UK civil partnership.

9.4 Advise clients who are married or in a UK civil partnership that the final decree of divorce or dissolution will:

(a) revoke gifts to the former spouse or civil partner; and
(b) revoke the appointment of the former spouse or civil partner as an executor.

10 PLANNING THE DISPOSITION OF THE ESTATE

10.1 General considerations

10.1.1 The will drafter should be aware that clients are often uncertain how best to achieve a satisfactory distribution of their assets, particularly where there are competing demands from second families. They will usually be unaware of the options available and of the effect of implied legal rules.

10.1.2 The will drafter should help the client to achieve his/her testamentary wishes in the most effective way.

10.1.3 Whenever advice is given to a client on alternative dispositions:

(a) provide the client with a written record of the advice; and
(b) preserve a copy of the record as part of the will file.

10.2 More effective ways to achieve the client’s wishes

10.2.1 Explain the legal consequences of the client’s instructions and any alternative ways in which the client may achieve a similar result more effectively.

10.3 Other action

10.3.1 Consider whether it is in the client’s best interests for the practice to offer and discuss other related services such as lifetime gifts, creation of lifetime settlements, the making of a lasting power of attorney, prenuptial agreements and living together agreements.

10.4 Use of trusts

10.4.1 Where appropriate, explain the ways in which a trust can be used to:

(a) protect capital; and
(b) provide for different classes of beneficiary.

10.4.2 Explain the different types of trusts available and their respective advantages and disadvantages.
10.4.3 Advise on the importance of selecting appropriate trustees and the likely costs of administration.

10.5 **Mutual wills agreements**

10.5.1 *Will drafters* should be aware that it is normally preferable to use a formal trust structure rather than entering into a mutual wills agreement. However, there may be cases, particularly in relation to modest estates, where the use of such an agreement is justifiable.

10.5.2 Where the use of a mutual wills agreement is contemplated, provide a written explanation of the effect of the agreement, dealing with the following matters in particular:

(a) The parties agree to leave specified assets in a particular way (normally to the other and, if the other has predeceased, to an agreed third party) and agree that they will not change the disposition of those assets without the consent of the other party.

(b) Once the first party dies, the survivor is not free to change the disposition of the agreed assets in any way, so any will which purports to do so will be ineffective. On the second death the agreed assets will be held on trust for the third party.

(c) During the survivor’s lifetime the survivor is free to deal with those assets for his/her own benefit and may, for example, sell the assets and spend the proceeds on his/her own needs. There is no guarantee, therefore, that the third party will receive anything under the terms of the agreement.

(d) The survivor is not, however, free to give away or settle the agreed assets during his/her lifetime and any attempt to do so will result in a trust in favour of the agreed third party crystallising at that point.

(e) Advice that mutual will agreements carry the following inherent risks:

(i) there may be arguments over the existence of a binding agreement, its exact terms and the extent of the assets bound;

(ii) unless the agreed third party is aware of the existence of the agreement and has a written record of its existence and terms, the survivor may conceal the existence of the agreement and make a new will in contravention of the terms of the agreement, which goes unchallenged.

10.5.3 If the clients agree that they want their wills to be mutual:

(a) agree on the assets which are to be subject to the agreement;

(b) include a clear recital in the will of the agreement and its terms;
prepare a separate agreement that sets out the terms and is signed by both parties (this is essential if the agreement relates to land but desirable in all cases for the avoidance of doubt); and
give each party a copy of the agreement and discuss the desirability of providing the agreed third party or parties with a copy.

If the clients decide after discussion that they do not want the wills to be mutual, record this agreement in writing and include a statement to that effect in each will to avoid subsequent argument and uncertainty.

**Provision for pets**

Clients are often concerned to make provision for the care of pets after their death. Explain the options and their relative merits, such as:

(a) give the animal and a cash sum to the executors with a request that they deal with both in accordance with an expression of wishes; or
(b) give the animal and a cash sum to a named individual with a proviso that the legatee must undertake to care for the animal, and a gift over to another beneficiary in default of the undertaking; or
(c) give the animal and a cash sum to an appropriate animal charity with a direction that the charity finds the animal a suitable home; or
(d) create a trust limited to 21 years leaving funds to trustees to be used for the care of the animal with a gift over.

**THE TERMS OF THE WILL**

**Recording advice and decisions**

The detailed contents of the will require the client to make a number of decisions. Provide the client with a written record of the decisions made and of the advice on which these decisions were made, and preserve a copy as part of the will file.

**Client’s wishes for funeral arrangements and organ donation**

Establish the client’s wishes, if any, with regard to funeral arrangements and organ donation.

Consider whether it is appropriate to encourage the client to make any wishes for funeral arrangements known to those who will be dealing with them.
11.2.3 Consider whether it is appropriate to encourage the client to make lifetime arrangements for organ donation.

11.2.4 If the client instructs, include appropriate statements of wishes in the will.

11.3 **Subsequent marriage or formation of civil partnership**

11.3.1 In the case of a single client in a close relationship, advise the client on the option to include a statement in the will that the will is made in expectation of marriage or the formation of a UK civil partnership to the named individual.

11.3.2 If the client decides to include such a statement:

(a) advise and take instructions on whether the will is to be made conditional on the marriage or the formation of a UK civil partnership taking place; and

(b) include appropriate statements in the will.

11.4 **Executors and trustees**

11.4.1 Explain to the client:

(a) the role and responsibilities of executors and trustees;

(b) the skills required;

(c) the reasons why it may be appropriate to appoint more than one executor and/or a substitute; and

(d) the importance of selecting individuals who can work together harmoniously.

11.4.2 Inform the client that executors and trustees can be either professionals (who will charge for their services) or lay persons such as family members or beneficiaries.

11.4.3 Explain that lay persons appointed as executors and/or trustees have the option of engaging a professional to assist them in the administration of the estate.

11.4.4 Before suggesting that the client can appoint the will drafter or members of the will drafter’s practice as executors and/or trustees, take into account the client’s best interests. For example, if the estate is small or straightforward, it may not be in the client’s best interests to appoint a professional as the executor.

11.4.5 If the client is considering appointing members of the will drafter’s practice, explain what the current cost would be if the will drafter’s practice carried out the administration of the estate:

(a) on behalf of a lay executor; or

(b) as an appointed executor and/or trustee.
11.4.6 Make it clear to the client:
   (a) whether the fees quoted are based on an hourly rate and/or a percentage of the estate;
   (b) whether the amount quoted is for the work involved in administering the estate or is simply the fee for acting as an executor and supervising others doing the necessary work; and
   (c) that these fees may change in the future.

11.4.7 Where there may be a continuing role as a trustee, make clear to the client any trustee fees that may be relevant to the estate.

11.4.8 Inform the client that appointment of the will drafter or the will drafter’s practice as an executor and/or trustee is not compulsory.

11.4.9 Where a client decides to appoint members of the will drafter’s practice as executors and/or trustees, record the client’s reasons for the appointment and preserve as part of the will file. This will assist the practice in making a decision if asked in the future to renounce probate.

11.4.10 Where a will appoints a member of the will drafter’s practice as a named executor, record the appointment centrally so that steps can be taken if the person named dies or leaves the practice.

11.4.11 Where a will appoints a partner or employee of the will drafter’s practice as executor and/or trustee and the will includes a clause exonerating the executor and/or trustee from liability for negligence:
   (a) fully explain the effect of the clause to the client;
   (b) provide the client with a written record of the explanation; and
   (c) preserve a copy of the record as part of the will file.

11.4.12 Where a client directs that an executor is to receive a legacy, establish whether the legacy is conditional on acting as executor and include a statement in the will to make the position clear.

11.4.13 Draft appropriate clauses to give effect to the client’s wishes.

Note:
(i) See the Law Society’s Appointment of a Professional Executor Practice Note.

11.5 Guardians

11.5.1 Ascertain whether:
   (a) the client has parental responsibility for a minor;
   (b) the client has been appointed as a guardian of a minor; and
   (c) the client has already made an appointment of a guardian.
11.5.2 Give advice to the client on:
(a) what happens if no appointment is made;
(b) that an appointment can be made by will or by separate written document which is signed and dated;
(c) when an appointment takes effect; and
(d) the rights of the minor’s other parent.

11.5.3 If the client is uncertain of who to select as a guardian:
(a) discuss the advantages and disadvantages of the various possibilities to assist the client in making a choice; and
(b) advise the client to check that the person(s) chosen are willing to act.

11.5.4 Help the client to decide:
(a) whether any funds available to meet the needs of the minors should be settled for the benefit of the minors or left to them absolutely or contingently;
(b) where funds are settled, whether it is appropriate to appoint the guardians or separate individuals as trustees of any funds to be held for the minors; and
(c) if separate trustees are to be appointed, what powers they will have to make funds available to the guardians.

11.5.5 Discuss with the client the preparation of a letter of wishes for the trustees and/or guardians and, if the preparation of this letter is outside the practice’s standard will drafting retainer, ensure that the charge for this additional work is made clear to the client before any action is taken.

11.5.6 Draft appropriate clauses for the will, or separate appointment of guardians and, if requested, the letter of wishes.

11.6 Personal chattels
11.6.1 Where settling the whole estate or a substantial part of it on trust, make a separate gift of personal chattels unless there is a particular reason for including them within the settlement.

11.6.2 Inform the client that the ownership of personal chattels can give rise to arguments after death and give advice on the need to clarify ownership and resolve any uncertainty, particularly in relation to lent or borrowed items.

11.6.3 Establish whether any chattels are used partly for personal and partly for business purposes and, if so, how the client wants to deal with such assets, and draft appropriately.

11.6.4 Where individuals are being given a power of selection, include:
(a) a time period within which the selection must be made; and
(b) power for personal representatives to resolve any disputes.
11.6.5 If a client is preparing an informal letter of wishes to deal with personal chattels, advise the client of the need:
(a) for accurate identification of items;
(b) to keep the letter up-to-date; and
(c) to ensure that the letter can be found after death.

11.7 Substitutional gifts and survivorship clauses
11.7.1 Encourage clients to consider what they want to happen if beneficiaries die before or shortly after the client.

11.7.2 Draft appropriately, bearing in mind that, in the case of spouses and civil partners, a survivorship clause may result in the payment of unnecessary inheritance tax:
(a) where one estate is above and one below the inheritance tax threshold; and
(b) where the couple die in circumstances where it is uncertain who died first.

11.8 Gifts to minors
11.8.1 In the case of gifts to minors, establish the following and draft appropriately:
(a) Whether the executor is to accept the receipt of a parent or guardian or the minor at a specified age.
(b) Where funds are to be held on trust by specified trustees or by the executors, the extent to which capital and income can be made available to the beneficiary.
(c) Where gifts are to be made to a class, for example ‘to my grandchildren’, whether any provision is to be made for those born after the client’s death and whether the client wants ‘step’ relatives to be included.
(d) Where gifts are to be made to the children of different parents, whether:
   (i) each child is to receive the same amount irrespective of the number of siblings (a ‘per capita’ distribution); or
   (ii) an amount is to be divided amongst each set of siblings (a ‘per stirpes’ distribution); or
   (iii) the distribution is to be on any other basis, such as under Sharia law.

11.9 Gifts of specific assets
11.9.1 Explain the effect of ademption.
11.9.2 Establish whether the client wants:
(a) the beneficiary to take only a particular asset;
(b) the beneficiary to take any asset fulfilling a general description; and
(c) to include a substitutional gift to take effect if the original gift is adeemed.

11.9.3 If the client wishes to make a specific gift of an asset (such as the house in which they are living), advise the client of the risk that they may sell the asset and die without making a new will to deal with the changed circumstances.

11.9.4 In the case of gifts of shares in private companies:
(a) ask the client whether there are any pre-emption rights and, if so, discuss whether the gift is satisfactory in light of those rights;
(b) if the client wishes to include the gift despite the existence of such rights, or while uncertain as to the position:
   (i) record the discussion in writing;
   (ii) provide the client with a copy; and
   (iii) preserve the record as part of the will file.

11.9.5 Establish whether any assets which are to be specifically given are subject to any mortgage or charge and, if so, whether the client wants:
(a) the liability to be discharged from the residue of the estate; or
(b) the liability to fall on the specific beneficiary;
and draft appropriately.

11.10 Pecuniary legacies

11.10.1 Advise the client that gifts of specified amounts carry risks if the will is not kept under review, including:
(a) that inflation may mean the amount given is inadequate for its intended purpose at the date of death; and
(b) the erosion of capital may mean that the amount given represents a disproportionately high proportion of the estate by the date of death.

11.10.2 Discuss with the client whether a gift of a proportion of the estate would be more satisfactory.

11.10.3 Where a client wants to make a gift of an amount equal to his/her available nil-rate band at the date of death:
(a) establish whether they may have transferred nil-rate band available at the date of death;
(b) establish whether the legacy is to include the benefit of any such transferred nil-rate band; and
(c) draft appropriately.

11.10.4 Unless the amount of the legacy is very small, make express provision for the payment of interest, if any, on pecuniary legacies rather than relying on implied rules.

11.10.5 Consider with the client whether legacies should be absolute, contingent or settled and draft appropriately.

11.11 Burden of inheritance tax on non-residuary gifts

11.11.1 Where inheritance tax is likely to be payable on an estate:

(a) explain that, unless the will provides otherwise, the inheritance tax attributable to non-residuary gifts is payable from the residue of the estate;

(b) establish whether this is what the client wants; and

(c) draft accordingly.

11.12 Gifts to charity

11.12.1 Where a client gives an instruction for a gift to a charity:

(a) establish its correct name, address and registration number and whether it is incorporated or unincorporated;

(b) establish what the client wants to happen to the legacy if the charity has amalgamated, ceased to exist or become subject to a winding-up order before death, and draft appropriately;

(c) if inheritance tax is likely to be payable on the part of the estate not passing to charity, explain in outline:

(i) the effect of the reduced rate of inheritance tax;

(ii) the requirements for obtaining it; and

(iii) the possibility of drafting the charitable gift by reference to a formula clause to maximise the chance that the relief will be available on death.

11.12.2 Provide any further advice necessary and draft the legacy to give effect to the client’s wishes.

11.12.3 Where the client instructs that the residue is to be divided ‘equally’ between charitable and non-charitable legatees, ensure that the drafting makes it clear whether the ‘equal’ division is before or after taking into account any inheritance tax to be borne by the non-charitable legatees.

Note:

(i) See Charities as Beneficiaries 3rd edition (Law Society, 2012).
11.13 **Powers of appointment**

11.13.1 Establish whether the *client* has any powers of appointment exercisable by will and, if so, the terms of such powers.

11.13.2 Even if the *client* wishes the property to pass to the person entitled in default of appointment, make an express appointment so that there is no uncertainty as to the *client’s* intention.

11.14 **Option to purchase**

11.14.1 Take particular care with options to purchase as they require the *client* to make a number of decisions and careful drafting to reflect those decisions.

11.14.2 Establish the following and ensure that the clause drafted is appropriate to meet the *client’s* wishes:

(a) A method for determining the price.

(b) Whether the valuation is to be market value or a discounted value.

(c) Whether the value is to be determined at the date of death or whether subsequent events are to be taken into account.

(d) If a named individual or firm is to carry out the valuation, what is to happen if the individual or firm is unable to do so.

(e) How the grantee of the option is to be informed and whether any time limit imposed runs from the date of death or from the date of notification.

(f) Whether any time limit is to be strictly complied with.

11.15 **Gifts of residue**

11.15.1 Help the *client* to assess whether the amount likely to pass under the terms of the residuary gift will be adequate once non-residuary gifts, inheritance tax and other liabilities have been considered.

11.15.2 Help the *client* to consider whether the residuary gift should be absolute or settled, taking into account factors such as:

(a) the need to provide for the competing claims of children, spouses or cohabitees;

(b) asset protection;

(c) flexibility; and

(d) the complexity and cost of managing a settlement.

11.15.3 If the *client* is considering the use of a settlement:

(a) explain the relative merits of settlements with an interest in possession and accumulation and discretionary settlements;

(b) explain the tax treatment of the different types of settlement; and

(c) help the *client* make an appropriate choice.
11.15.4 Where residue is to be settled:

(a) explain to the client that it is normally appropriate for the settlement to be made flexible by including wide powers for trustees to deal with income and capital; and

(b) if instructed, include appropriate powers and explain their effect to the client.

11.15.5 Help the client to make an appropriate choice of trustee and to make the arrangements for appointing and removing trustees.

11.15.6 Where a beneficiary is to be a trustee, include express provisions setting out the circumstances in which a trustee with a beneficial interest can act.

11.15.7 Discuss with the client whether it is desirable to include a further gift of residue to take effect if the primary gift fails.

11.16 Administrative provisions

11.16.1 Include appropriate administrative provisions to facilitate the efficient administration of the estate and management of any trusts arising under the terms of the will.

11.16.2 Provide the client with an explanation in general terms of the effect of such provisions. Where the practice uses standard administrative provisions, it will be helpful to have prepared a standard explanation which can be included in the letter of explanation accompanying the will (or draft).

11.16.3 Provide a separate explanation of the reason for, and effect of, any non-standard provision included in the will.

12 PROBLEMS WITH THE AGREED TIME FRAME

12.1 If unexpected workloads, illness or unforeseen events mean that the person responsible for drafting the will cannot complete it within the agreed time frame, either:

(a) arrange for another member of the practice to do so, making sure that the instructions are clear and unambiguous and putting in place an arrangement for checking the work done; or

(b) renegotiate the time for delivery with the client, making sure that this does not carry any unacceptable risk for the client.

12.1.2 Ensure that the client is informed in writing of the name and status of the new person dealing with the matter as soon as possible.
13 CONFIRMING THE CLIENT’S INSTRUCTIONS

13.1 Before the will is executed, take the steps in obligations 13.2–13.4 below to establish that the will correctly carries out the client’s instructions and that the client does not wish to amend those instructions.

13.2 Send the client either:

(a) a copy of the instructions for the will agreed at the interview; or
(b) a draft of the will together with a letter explaining its effect using clear, understandable language and avoiding technical terms and expressions.

13.3 In cases where the client has difficulty understanding written material, take appropriate steps to explain the draft. This will normally require a second visit unless alternative suitable arrangements have been agreed.

13.4 If the will is not written in the client’s first language, ensure that the client understands the will. This may require an interpreter and consideration of whether the interpreter is sufficiently independent.

14 EXECUTION OF THE WILL

14.1 Offer the client a choice between:

(a) having the execution of the will supervised at the will drafter’s office or by a home visit; or
(b) making his/her own arrangements for the execution of the will, with full written instructions provided by the will drafter.

14.2 Make clear whether the cost of supervised execution is included in the fee charged for preparation of the will.

14.3 If the client has a disability, consider whether the offer of a home visit is a reasonable adjustment (in which case a separate charge is unlawful under the Equality Act 2010, s.20(7)).

14.4 If the offer of supervised execution is declined, provide the client with clear and correct instructions on:

(a) choice of witnesses; and
(b) the procedure for signing and witnessing the will.

14.5 Offer to inspect the will (or a copy) without additional fee after unsupervised execution to check that:

(a) the formalities appear to have been correctly complied with; and
(b) the witnesses do not appear to be beneficiaries or spouses or civil partners of beneficiaries.

14.6 Carry out the inspection referred to in obligation 14.5 above as a matter of course where a will is returned to the practice for storage.
14.7 Where a will is to be signed on behalf of the testator/testatrix, take steps (either by supervising execution or by providing clear written instructions) to ensure that:

(a) the person signing does so in the presence of, and by the direction of, the testator/testatrix; and

(b) the testator/testatrix indicates that he/she knows and approves the contents of the will;

and draft the attestation clause appropriately to recite that this happened.

14.8 Before going to the client’s house or to a hospital or care home to supervise execution, enquire whether suitable individuals will be available to act as witnesses and, if not, make appropriate arrangements to have suitable witnesses available.

14.9 Where the client had sufficient testamentary capacity to give instructions for a will but has deteriorated by the time the will is to be executed and may not recover, assess whether the will can be executed under the rule in Parker v. Felgate, despite the lack of full testamentary capacity. This rule requires establishing whether the client:

(a) remembers giving instructions for the will; and

(b) understands that the will has been prepared in accordance with those instructions.

Note:

(i) See Parker v. Felgate (1883) LR 8 PD 171.

15 CLIENTS WHO DO NOT PROCEED WITH EXECUTION OF THE WILL

15.1 If a client does not respond within a reasonable period after the practice has sent a draft will for approval or a will for execution, write to the client:

(a) explaining that the will drafter has carried out the terms of the retainer and will take no further steps unless instructed to do so;

(b) explaining that the will drafter will make any alterations to the will that the client gives instructions for; and

(c) reminding the client of the way in which the estate will devolve if the will is not executed.

15.2 Send two further reminder letters, at reasonable intervals, and if nothing further is heard from the client, present a bill for the work done.
16 STORAGE OF NEW AND PREVIOUS WILLS

16.1 Explain to the client the importance of informing those who will deal with the administration of the estate of the location of the will. Recommend the use of the Law Society’s Personal Assets Log, or similar document, to convey this information, and consider with the client the option to use a wills registration service.

16.2 Inform the client that wills can be stored with:

(a) the will drafter’s practice, if offering this service;
(b) the Probate Registry under the Senior Courts Act 1981, s.126;
(c) a bank;
(d) the client;
(e) a commercial provider.

16.3 Discuss with the client what is to happen to previous wills to ensure that there is a record of previous testamentary dispositions while limiting the risk of a revoked will being proved by mistake.

16.4 If the will drafter’s practice operates a storage facility:

(a) ensure that the client understands that use of the service is not compulsory;
(b) make clear the basis of any charges;
(c) ensure that any charges are fair and reasonable;
(d) provide the client with a copy of the will and a note to be kept with the copy explaining where the original is stored;
(e) inform clients if the practice changes its name or ceases trading or ceases to offer a will storage facility;
(f) ensure that there is an efficient registration system so that wills can be retrieved when required;
(g) ensure that wills are stored securely in appropriate conditions; and
(h) limit persons who can access wills.

17 CLOSING THE FILE

17.1 Return any documents to which the client is entitled.

17.2 Review the file to ensure that documents and correspondence are filed correctly and discard any scrap or duplicate copies.

17.3 If storing the original will, ensure that it is registered in accordance with the registration system operated by the practice.

17.4 Store the contents of the file in accordance with the practice’s file retention policy.

17.5 Retain the file until all risk of a claim has passed.
18 LATER DISPUTES

18.1 Where there is a serious dispute as to the validity of a will, make the attendance note (and any other relevant information) available to anyone who has an interest in challenging the will in accordance with the decision in Larke v. Nugus.

Notes:
(ii) See the Law Society’s Disputed Wills Practice Note.
PART B    GENERAL ESTATE ADMINISTRATION

19    BEFORE ACCEPTING INSTRUCTIONS

19.1    Possible insolvency
19.1.1 Consider whether it is appropriate to carry out a ‘bankruptcy only’ search against the deceased at the Land Registry’s Land Charges Department online or by using Form K16. Ensure that the search is made in the correct name of the deceased and try to ascertain whether the deceased used more than one version of his/her name. If so, search against all versions.

19.1.2 If there is a probability that the estate will be insolvent, consider whether it is in the client’s best interests to let a creditor take the grant.

19.2    All assets passing by survivorship
19.2.1 If all assets are passing by survivorship, professional advice may not be required. However, if there is inheritance tax to pay, consider whether it may be in the client’s best interests to have professional advice.

19.3    Complexity of the estate
19.3.1 Assess whether there are aspects of the estate which may be beyond your practice’s expertise, for example:

(a)   litigation arising from lifetime disputes;
(b)   disputes as to the validity of the will;
(c)   disputes as to the ownership of assets apparently included in the estate;
(d)   a foreign element, such as a deceased domiciled outside England and Wales, or non-resident in UK or owning foreign assets; and
(e)   assets requiring ‘specialist’ knowledge such as copyright, patents, royalties and mineral rights.

19.3.2 If so, suggest that the client takes separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether it is in the client’s best interests for the practice to cease to act in relation to the estate administration.

19.4    Initial assessment of validity of any will
19.4.1 Where there is a will, establish whether there is any apparent reason to doubt its validity. In particular, examine the attestation clause, if any, and the signatures of the testator/testatrix and witnesses to establish whether the will appears to have been validly executed.
19.5 Money laundering suspicions

19.5.1 Assess whether there are any grounds for suspecting that assets of the estate may derive from criminal activity and, if so, whether those suspicions should be disclosed to the practice’s nominated officer before deciding whether to accept instructions.

19.6 Contracts made ‘off premises’

19.6.1 Where a contract for estate administration services is not made at the practice’s office, comply with the Cancellation of Contracts made in a Consumer’s Home or Place of Work etc. Regulations 2008 (as summarised in obligation 1.7 above).

Note:
(i) See the Law Society’s Cancellation of Contracts Practice Note.

20 MEMBERS OF THE PRACTICE APPOINTED AS EXECUTORS

20.1 Requests for renunciation

20.1.1 Where members of the practice have been appointed as executors and/or trustees, and are requested by beneficiaries of the estate to renounce probate, consider such requests in light of the practice’s renunciation policy (see EP.2 in Part H below).

20.1.2 No steps which could amount to intermeddling and, therefore, acceptance of the office of executor are to be taken while such requests are being considered.

20.2 Charges

20.2.1 Ensure that the charges made for acting as executor (and, if relevant, trustee) are fair and reasonable having regard to all the circumstances of the matter.

20.2.2 Where there are no lay co-executors, clearly explain in writing to all those with an entitlement to share in the residuary estate:

(a) the basis of charging; and
(b) all likely disbursements;

making it clear whether charges are calculated only on a time basis and/or include a value element.
20.3 **Time frame**

20.3.1 As soon as practicable after ascertaining beneficiaries:

(a) inform them of their interest and, if established, its approximate extent;

(b) give an estimate of the time frame for the administration of the estate and any time constraints that will affect it; and

(c) give an explanation of the frequency of communication.

21 **TAKing INSTRUCTIONS FROM PERSONAL REPRESENTATIVES**

21.1 **Charges**

21.1.1 Charge on a fair and reasonable basis having regard to all the circumstances of the matter.

21.1.2 Clearly explain in writing to those giving instructions to act:

(a) the basis of charging; and

(b) all likely disbursements;

making it clear whether charges are calculated only on a time basis and/or include a value element.

21.1.3 Clearly explain in writing to those giving instructions to act whether the retainer is for obtaining the grant and dealing with the entire administration of the estate or whether it is limited to particular aspects of the process and, if limited, exactly what elements are included and excluded.

21.2 **Entitlement to act**

21.2.1 Consider with those giving instructions to act whether it is necessary to employ genealogists to trace family members and, if so, what charging structure is appropriate.

21.2.2 If the will appears to be valid, ascertain whether those with the best right to a grant are willing to act and, if not, who is going to take a grant.

21.2.3 In the case of a full or partial intestacy, once the family members are identified, ascertain whether those with the best right to a grant are willing to act and, if not, who is going to take a grant.

21.2.4 Advise whether more than one administrator is required.

21.2.5 If instructed to act for a person who does not have the best right to take a grant, take any steps necessary to clear off persons with a prior right. This may involve:

(a) obtaining a renunciation from those with a prior right; or
(b) issuing a citation; or
(c) making an application to pass over the person with the prior right.

**21.2.6** If the person with the best right to a grant feels unable to act as a personal representative, discuss whether it is in his/her best interests to:

(a) renounce; or
(b) appoint an attorney.

**21.3 Uncertainty as to whether the deceased made a will**

**21.3.1** Advise the client on the steps that can be taken to search for a will. These will normally include:

(a) searching the house;
(b) contacting the deceased’s banks, former professional advisers and local law society;
(c) advertising;
(d) commissioning a commercial provider to undertake a search; and
(e) checking whether the deceased deposited the will with the Probate Registry.

**21.4 Supporting affidavits**

**21.4.1** Determine whether any affidavits are required (e.g. an affidavit as to due execution where there is no attestation clause or the attestation clause is defective) and, if so, prepare any necessary affidavit.

**21.4.2** Give clear instructions to the person(s) making the affidavit as to the steps necessary to swear or affirm and, if necessary, make arrangements for them to swear or affirm.

**21.5 Renunciations**

**21.5.1** Where those with prior rights to take a grant wish to renounce, either:

(a) prepare the renunciation; or
(b) make arrangements for obtaining the renunciation if prepared by someone else.

**21.6 Power reserved**

**21.6.1** Where some of those appointed as executors wish to have power reserved to take the grant at a later stage, serve notice of the application for a grant.

**21.7 Powers of attorney**

**21.7.1** Where the person with the best right to take a grant wishes to authorise someone to take a grant under a power of attorney, either:
(a) draft the power of attorney, give clear instructions as to execution and check that it has been properly executed; or
(b) if someone else prepared the power of attorney, check that it is correctly worded and has been correctly executed.

21.7.2 Be aware of the potential for financial abuse where an elderly person wishes to appoint an attorney for the purposes of taking out a grant of probate or letters of administration.

Note:
(i) See the Law Society’s Financial Abuse Practice Note.

21.8 Duties and responsibilities of personal representatives

21.8.1 Advise those proposing to act as personal representatives:
(a) that criminal and civil sanctions will arise:
   (i) if a will or codicil is concealed; and
   (ii) if false information is provided about the assets of the estate, lifetime gifts, those who may be entitled to share in the estate or those entitled;
(b) of the steps involved in obtaining a grant and dealing with the administration of an estate;
(c) of their duty to ascertain and secure the assets and liabilities of the estate;
(d) of their duty to distribute the estate correctly;
(e) of their duty to calculate and arrange for the payment of the inheritance tax due;
(f) of the risk that penalties will be imposed on them if they provide inaccurate information to HM Revenue and Customs;
(g) of their potential liability to creditors and beneficiaries of the estate in the event of maladministration; and
(h) whether a continuing trust will arise.

21.9 Customer due diligence

21.9.1 Carry out appropriate customer due diligence on personal representatives.

22 DISPUTED VALIDITY OF A WILL

22.1 In the event of a dispute as to the validity of a will, determine what steps are appropriate and advise accordingly.

22.2 Consider whether the practice has the necessary expertise to deal with a contentious probate matter. If not, suggest the client obtains separate advice.
and, if the practice has relevant knowledge, assist the client to find a suitable adviser.

22.3 If someone in the practice drafted the disputed will and there is an allegation of negligence, inform all interested parties without delay of the need to obtain independent advice and cease to act in relation to the dispute.

22.4 If there is a serious dispute as to the validity of a will prepared by the practice, make all information relating to the circumstances in which the will was made and executed available to those with an interest in the dispute.

22.5 Inform the practice’s professional indemnity insurer.

Note:
(i) See the Law Society’s Disputed Wills Practice Note.

23 IMMEDIATE ACTION TO PROTECT THE ESTATE

23.1 Identify all necessary immediate action and either arrange it or advise personal representatives to arrange it. Such action will normally include the following steps, set out in obligations 23.2–23.13 below, as appropriate.

23.2 Register the death.

23.3 Check in the deceased’s will (if any) or elsewhere for any expressions of wishes as to the funeral.

23.4 Make funeral arrangements and explore the possibility of paying funeral expenses directly from the deceased’s bank or building society accounts.

23.5 Secure the deceased’s real property and possessions by:

- arranging buildings and contents insurance;
- changing locks, if appropriate;
- redirecting post;
- securing the fabric of buildings by adjusting the heating and draining the water system as appropriate;
- arranging a house-sitter for the property before the time of the obituary/funeral, if appropriate;
- taking photographs of home contents;
- removing particularly valuable items and arranging for secure storage;
- making appropriate arrangements for certified firearms;
- cancelling regular deliveries;
- notifying the landlord and local authority, as appropriate; and
- notifying tenants and/or management company.

23.6 Arrange care for livestock and pets.
23.7 Determine whether any assets can be realised without a grant of representation and, if so, take steps to obtain payment.

23.8 Open a bank account to be operated by the personal representatives unless all cash is to be paid into the practice’s client account.

23.9 Discuss what is to happen to personal chattels and, where the deceased lived alone, house contents.

23.10 Make arrangements for the disposal of perishable items and rubbish.

23.11 Inform the Office of the Public Guardian and the Court of Protection if there was a lasting power of attorney or enduring power of attorney or deputyship order.

23.12 Ascertain what steps need to be taken to identify and realise digital assets.

23.13 Establish whether any UK beneficiary is bankrupt. When carrying out any bankruptcy searches, ensure that the search is made in the correct name of the beneficiary and try to ascertain whether the beneficiary uses more than one version of his/her name. If so, search against all versions. Consider whether it is necessary to take advice on the need for searches against non-UK beneficiaries.

Note:

(i) See the Law Society’s Bankrupt Beneficiaries Practice Note.

24 ADVICE ON STATE BENEFITS

24.1 Where appropriate, provide advice to family and/or personal representatives on claiming:

(a) funeral payment;
(b) bereavement payment; and
(c) bereavement or widowed parent’s allowance.

25 PREPARING TO APPLY FOR A GRANT OF REPRESENTATION

25.1 Collecting information

25.1.1 Contact stockbrokers, accountants and other professional advisers instructed by the deceased as to the assets of the estate.

25.1.2 Warn those acting as personal representatives that if they give inaccurate information to HM Revenue and Customs, which results in an underpayment of inheritance tax, they are likely to have to pay penalties.

25.1.3 Take steps to ensure that:
(a) family members; and
(b) others of whom enquiries are made;
are aware that, if they give inaccurate information to personal representatives which results in an underpayment of inheritance tax, they are likely to have to pay penalties.

25.1.4 Obtain all possible information from family members and professional advisers on assets owned at the date of the death, including those owned as beneficial joint tenants.

25.1.5 Where an estate is, or may be, chargeable to inheritance tax, ascertain whether the deceased inherited any assets in the five years before death to establish the availability of quick succession relief.

25.1.6 Write to asset holders to establish exact values at the date of death.

25.1.7 Instruct qualified valuers to provide open market valuations of assets such as land and specialist chattels.

25.1.8 Obtain information on the liabilities of the deceased at the date of death.

25.1.9 Write to known creditors to establish the exact amount owing at the date of death.

25.1.10 Ascertain the cost of the funeral and other testamentary expenses.

25.1.11 Obtain information on lifetime transfers made by the deceased within seven years before death.

25.1.12 If any transfer made within seven years of death was immediately chargeable, obtain information on any transfers made by the deceased within seven years before that transfer.

25.1.13 Where the deceased was a surviving spouse or civil partner, establish whether there is any unused nil-rate band available from the estate of the first to die.

25.1.14 Obtain information on any assets which may qualify for business or agricultural relief or any other relief, such as that available on growing timber.

25.1.15 Establish whether any assets qualify for heritage property relief and whether those entitled to such assets are willing to give the necessary undertakings.

25.1.16 Establish whether any assets are passing to exempt beneficiaries, such as spouses, civil partners, charities or political parties.

25.1.17 Be alert to the possibility that estate assets may be the proceeds of crime (e.g. welfare benefits to which the deceased was not entitled) and, if you acquire knowledge or become suspicious:
(a) make immediate disclosure to the practice’s nominated officer; and
(b) continue to act but do not transfer funds or take any other irrevocable step.

Note:
(i) See the Law Society’s Anti-Money Laundering Practice Note.

25.2 Foreign assets

25.2.1 If there is a foreign will, check its terms for inconsistency with the last will and codicils made by the deceased in England and Wales.

25.2.2 Advise lay personal representatives or, if none, residuary beneficiaries, that specialist assistance may be necessary to realise foreign assets and that the foreign jurisdictions may not recognise the status of personal representatives.

25.2.3 Advise those apparently entitled under the terms of a will or under the intestacy rules that there may be forced heirship rights and, if appropriate, suggest that the client obtains legal advice in the relevant jurisdiction.

25.2.4 Once entitlement to foreign assets is established, consider if the practice has the necessary expertise to obtain the assets and, if so, take instructions.

25.2.5 If the practice does not have the necessary expertise, suggest that the client obtains separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser, but consider whether in the best interests of the client the practice should cease acting in relation to the administration of the estate.

25.3 Insolvent estate

25.3.1 If the estate appears to be insolvent, explain the implications to those proposing to act as personal representatives and advise that it may be preferable to allow a creditor to take the grant.

26 APPLYING FOR A GRANT OF REPRESENTATION

26.1 Inheritance tax account and calculation of the inheritance tax due

26.1.1 Carry out the steps in obligations 26.1.2–26.1.7 below to complete the inheritance tax account and calculate the inheritance tax due as appropriate.
26.1.2 If the inheritance tax is due, apply for an inheritance tax reference number at least three weeks before the expected date for payment either online or by submitting Form IHT 422 by post.

26.1.3 If the estate qualifies as an excepted estate, complete Form IHT 205.

26.1.4 If the estate is not excepted, complete Form IHT 400 or Form IHT 401 and all necessary supporting schedules.

26.1.5 Calculate any inheritance tax due.

26.1.6 Arrange for personal representatives to sign and date the relevant account.

26.1.7 Liaise with trustees of any trust in which the deceased had an interest in possession.

26.2 **Arrangements for payment of the inheritance tax due**

26.2.1 Consider whether the instalment option is available on any assets of the estate and, if so, whether it is appropriate to claim it.

26.2.2 Pay the inheritance tax due as quickly as possible to prevent unnecessary payment of interest.

26.2.3 If there is a delay in calculating the exact amount due, consider with the personal representatives and interested beneficiaries whether it is appropriate to make a payment on account.

26.2.4 Consider with the personal representatives and interested beneficiaries whether it is possible to tender assets in satisfaction of the inheritance tax liability under the Inheritance Tax Act 1984, s.230 and, if so, whether this is desirable.

26.2.5 Make arrangements for paying any inheritance tax due as cost effectively as possible. This may be by arranging:

(a) to obtain the grant on credit;
(b) direct payment from a bank, building society or National Savings and Investments;
(c) payment of assets realisable without a grant of representation;
(d) borrowing from a beneficiary; or
(e) borrowing from a bank or building society.

26.2.6 Diarise dates for payment of future instalments of inheritance tax.

26.3 **The Oath**

26.3.1 Complete an appropriate Oath containing all necessary information.

26.3.2 Where there are lay personal representatives, give clear instructions as to the steps necessary to swear or affirm the Oath and, if necessary, make arrangements for them to swear or affirm.
26.4 Submission of the inheritance tax account
26.4.1 Submit the following to HM Revenue and Customs:
   (a) Form IHT 400 or IHT 401 and accompanying schedules.
   (b) Any inheritance tax due, either by cheque or by electronic transfer using the inheritance tax reference number previously obtained.

26.5 Obtaining the grant
26.5.1 Consider whether there are circumstances which make it appropriate to search the index of caveats before applying for a grant.
26.5.2 Submit to the Probate Registry:
   (a) the Oath;
   (b) the last will or wills together with any codicils, signed by the personal representatives as exhibits to the Oath;
   (c) two unbound A4 copies of each testamentary document;
   (d) any affidavits, renunciations of the right to take a grant and powers of attorney required;
   (e) the receipted Form IHT 421 or Form IHT 205; and
   (f) the probate fee.
26.5.3 Where an application cannot proceed because a caveat has been lodged, consider whether the practice has the necessary expertise to deal with a probate dispute. If not, suggest that the client obtains separate advice and, if the practice has relevant knowledge, assist the client to identify a suitable adviser.
26.5.4 Order sufficient official copies of the grant of representation to enable swift and efficient administration of the estate.

27 ADVISING ON BENEFICIAL ENTITLEMENT
27.1 Advising personal representatives where there is a will
27.1.1 Advise personal representatives on the correct construction of the will and its effect. Typically this will include advice on the following matters:
   (a) whether gifts have failed, which may have happened for a number of reasons, including:
      (i) a beneficiary, spouse or civil partner of a beneficiary witnessed the will;
      (ii) divorce or dissolution of a UK civil partnership;
      (iii) ademption;
      (iv) lapse;
      (v) failure to survive a required period;
(vi) uncertainty;
(vii) contrary to public policy; or
(viii) forfeiture;
(b) whether gifts are absolute or contingent;
(c) whether gifts carry the right to intermediate income or interest;
(d) the extent of property passing under the terms of particular gifts;
(e) the identity of beneficiaries;
(f) the identity of members of a class of beneficiaries;
(g) whether the will creates a trust and, if so, the terms of the trust;
(h) whether the will was made in pursuance of a mutual wills agreement as a result of which the other party to the agreement is now bound by its terms;
(i) whether the will contains a half-secret trust;
(j) the extent to which inheritance tax is to be paid from residue or is borne by the non-residuary beneficiary;
(k) any ambiguities which may require counsel’s opinion and/or the direction of the court; and
(l) the destination of any property passing independently of the will, such as:
(i) property passing by survivorship or under the terms of a lifetime trust;
(ii) the proceeds of life assurance policies written in trust or assigned during the lifetime of the deceased;
(iii) lump sums payable from pension schemes;
(iv) death in service benefits; and
(v) property passing under the intestacy rules where there is a partial intestacy.

27.1.2 Agree any steps that need to be taken, such as obtaining counsel’s opinion, and take appropriate action.

27.2 Advising personal representatives where property passes under the intestacy rules

27.2.1 Explain to personal representatives:
(a) who is entitled to share the estate;
(b) the extent of their entitlement; and
(c) whether their interests are vested or contingent.

27.2.2 If relevant, explain to a surviving spouse or civil partner:
(a) the effect of a life interest;
(b) his/her right to capitalise a life interest, dealing with the points set out at obligation 38.1 below;
27.3 Communication with beneficiaries and creditors

27.3.1 On obtaining the grant, review the assets and liabilities. If payment of liabilities cannot be made within 28 days of obtaining the grant, write to the creditors of the position.

27.3.2 Within 10 working days of obtaining the grant, or within such other time frame set by the practice which ensures consistently prompt action in this regard, communicate with beneficiaries to:

(a) remind them of their interest and, if established, its approximate extent;
(b) give an estimate of the time frame for distribution and any time constraints that will affect it;
(c) give an explanation of the frequency of communication;
(d) if appropriate, ask for instructions as to whether they want assets encashed or transferred in specie.

28 PROTECTION AGAINST CREDITORS AND CLAIMANTS

28.1 Consider what steps, if any, are appropriate to ascertain creditors and claimants and protect personal representatives from liability. Possible steps include:

(a) statutory advertisements; or
(b) insurance.

28.2 If statutory advertisements have been placed, record the date of the advertisement, the time frame for claims and preserve copies of the paperwork in the file.

29 COLLECTING THE ASSETS

29.1 Unless instructed otherwise, without delay, write to holders of cash such as banks, building societies and National Savings and Investments enclosing an official copy of the grant (unless the institution will accept a certified copy) and asking for payment of the amount due.

29.2 Ask for a separate note of any interest accrued since the date of death.

29.3 In the case of non-cash assets such as land and shares which are passing to beneficiaries, obtain and complete appropriate documentation to transfer...
title from the deceased to either the personal representatives or to the beneficiaries entitled.

29.4 In the case of foreign assets, ascertain (if necessary by instructing an expert in the relevant jurisdiction):

(a) the steps required to realise the asset; and
(b) the appropriate person to take them if the office of personal representative is not recognised.

Note:

(i) See the Law Society’s Estate Administration: Banking Protocols Practice Note.

30 PAYING THE DEBTS

30.1 With the authority of the personal representatives, as soon as cash is available, pay any outstanding debts of the estate and sums borrowed to meet the estate’s liability for inheritance tax.

30.2 If there is any possibility that the estate may prove to be insolvent, follow the bankruptcy order when paying debts, as required by the Administration of Insolvent Estates of Deceased Persons Order 1986.

30.3 Unless a lay personal representative is taking the whole estate, establish whether there are any contingent or uncertain liabilities. If there are, in order to protect the personal representative, either:

(a) set aside sufficient assets to meet the liability, should the liability arise; or
(b) take indemnities from those who will receive assets from the estate to reimburse the personal representative should the liability arise and warn the personal representative of the limitations of indemnities; or
(c) arrange insurance cover; or
(d) apply to the court for directions.

30.4 Unless a lay personal representative is taking the whole estate, establish whether the deceased had a leasehold interest and, if so:

(a) pay all existing liabilities; and
(b) set aside a fund to meet any future claims that may be made in respect of any fixed and ascertained sum which the lessee agreed to lay out in the future.

Note:

(i) See the Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986/1999).
31 SELLING THE ASSETS

31.1 Discuss the issues in obligations 31.2–31.4 below with the personal representative and take instructions.

31.2 Sale for more than the value of the asset at the date of death

31.2.1 Consider whether the sale will be for more than the value of the asset at the date of death. If so, capital gains tax at the higher rate may be payable to the extent that the gain exceeds any available annual exemption of the personal representatives.

31.2.2 Consider whether tax can be saved by appropriating the asset to:

(a) a beneficiary that is a charity; or
(b) a beneficiary who has unused annual exemption or available losses; or
(c) a beneficiary who will pay tax at a lower rate than the personal representative.

31.2.3 If tax can be saved by appropriating the asset to a beneficiary:

(a) inform the relevant beneficiaries;
(b) appropriate or assent the asset to the agreed beneficiary; and
(c) make the sale on behalf of the beneficiary.

31.2.4 Ensure that there is a full written record of the appropriation and/or assent, and the instruction to sell.

31.3 Sale for less than the value of the asset at the date of death

31.3.1 If the estate has not made, and is not likely to make, any capital gains, consider whether it is preferable to appropriate the asset to a beneficiary and make the sale on behalf of that beneficiary.

31.3.2 If it is preferable to appropriate the asset to a beneficiary:

(a) inform the beneficiary;
(b) if agreement is reached, appropriate or assent the asset to the agreed beneficiary; and
(c) make the sale on behalf of the beneficiary.

31.3.3 Ensure that there is a full written record of the appropriation, and/or assent and the instruction to sell.

31.4 Sale of land or qualifying investments for less than value at date of death
31.4.1 Consider whether the value of ‘qualifying investments’ or an ‘interest in land’ (as defined in the Inheritance Tax Act 1984, ss.178 and 190) has fallen, with the result that the sale price will be less than the value at the date of death, making it possible to substitute the sale price for inheritance tax purposes.

31.4.2 If so, consider and advise on the extent to which any inheritance tax liability of the estate can be reduced by making a claim to substitute the sale price for the original inheritance tax value.

31.4.3 To obtain the maximum benefit from loss relief, plan:
(a) the timing of such sales;
(b) which assets should be sold by the personal representatives; and
(c) which assets should be transferred to beneficiaries.

31.4.4 Where appropriate, make a claim for loss relief using Form IHT 35 or Form IHT 38.

31.5 Selection of estate investments for sale

31.5.1 Consider whether it is necessary to select some of the estate investments for sale.

31.5.2 If it is necessary to select investments for sale, unless the practice is authorised to provide financial advice, advise the personal representative to consult an appropriately qualified adviser.

32 INCOME TAX

32.1 If instructed, and in accordance with your retainer, carry out the steps in obligations 32.2–32.4 below. Be aware that, although preparation of income tax liability may fall outside of your retainer, you must settle the income tax liability of the estate.

32.2 Income tax position of deceased

32.2.1 If necessary, make returns in respect of the income of the estate up to the date of death.

32.2.2 Establish whether the deceased owed income tax at the date of death or was entitled to a refund in relation to any income, including income from settled property in which the deceased had an interest.

32.2.3 Make a claim for a refund or pay the amount due.

32.2.4 Include the refund or liability on the inheritance tax account submitted or, if the account has already been submitted, consider whether it is necessary to submit a corrective account.
32.3 Income tax liability of estate

32.3.1 Record all income received together with any tax credit in the case of dividend, and tax deducted in the case of interest.

32.3.2 Record any interest paid for the 12 months following death on a loan to pay inheritance tax, in so far as it relates to the payment of tax on personalty vesting in the personal representatives.

32.3.3 Unless income tax is being dealt with by a third party, claim any refund due to the estate as a result of borrowing to pay inheritance tax.

32.3.4 Complete the estate and trust return if required. Where a return is not required, deal with the HM Revenue and Customs office that handled the deceased’s tax affairs.

32.3.5 Pay any tax due.

32.4 Income entitlement of beneficiaries

Beneficiaries entitled to specific assets

32.4.1 Pay any income produced by the assets to the beneficiary entitled at the same time that the asset is transferred and also give the beneficiary any documentation received in relation to any income tax deducted.

Pecuniary legatees

32.4.2 Pay interest to legatees from 12 months after the date of the death, at the basic rate payable on funds held in court, unless:

(a) the legacy is contingent or deferred (in which case interest is payable only from the deferral date or the date when the contingency is fulfilled); or

(b) the will provides otherwise.

Residuary beneficiaries

32.4.3 Check the income tax position of residuary beneficiaries to see if they would prefer to receive income payments over more than one tax year and, if so, try to stagger income payments.

Income tax statements

32.4.4 Provide all beneficiaries receiving income from the estate with a statement of income tax paid.
33 DISTRIBUTING THE ASSETS AND PAYING PECUNIARY LEGACIES

33.1 Advise personal representatives on:

(a) their personal liability if they misdistribute the estate; and
(b) the protection they can obtain by waiting before distributing and by insuring against liabilities.

33.2 Advise personal representatives that they will be personally liable if they distribute assets without waiting for at least:

(a) two months from the placing of statutory advertisements in relation to creditors and unknown claimants to the estate; and
(b) six months from the date of the grant in the case of a family provision claim.

(Be aware that, as family provision claimants have four months from issue of the claim in which to serve it, waiting a further four months is required for absolute protection.)

33.3 Help personal representatives assess the level of risk that an early distribution entails and, if appropriate, explore the possibility of insurance.

33.4 In the case of beneficiaries who are known to have existed but who cannot be traced, or who refuse to accept payment but will not disclaim or vary their entitlement, be aware that advertisements are no protection. Therefore, to protect personal representatives against the risk of an untraced beneficiary appearing after distribution:

(a) take indemnities from those who will receive assets from the estate but also warn personal representatives of the limitations of indemnities; or
(b) arrange insurance cover; or
(c) apply to court for an order allowing distribution on the basis that the beneficiary has predeceased (a ‘Benjamin order’) or on a similar basis; or
(d) consider whether a beneficiary’s refusal to accept payment amounts to a disclaimer by conduct; or
(e) check whether the Court Funds Office will accept payment.

33.5 Before transferring assets or paying cash to a beneficiary based in the UK, carry out ‘bankruptcy only’ searches at the Land Registry’s Land Charges Department online or by using Form K16.

33.6 In the case of a beneficiary based in a foreign jurisdiction:

(a) consider whether it is advisable to seek appropriate professional advice on the need for searches equivalent to a UK bankruptcy search;
(b) carry out such searches before transferring assets or paying cash; and
33.7 Subject to the time constraints set out at obligation 33.2 above, transfer assets to non-residuary beneficiaries as soon as it becomes apparent that the assets are not required for the payment of liabilities.

33.8 In the case of residuary beneficiaries:
(a) consider whether interim estate accounts are appropriate;
(b) consider whether distributions can be made before preparation and approval of final estate accounts; and
(c) prepare interim estate accounts and make distributions as appropriate.

33.9 Beneficiaries who have been left specific assets may prefer to have the assets sold on their behalf, receiving the proceeds of sale instead. If beneficiaries make such a request, and the personal representatives are willing to comply with it, make the arrangements promptly and:
(a) record the instruction; and
(b) record the appropriation and/or assent of the asset to the beneficiary;
to ensure that it is clear the sale was on behalf of the beneficiary.

33.10 In the case of pecuniary legacies:
(a) check whether the beneficiaries would prefer to have an asset appropriated in, or towards, satisfaction of their entitlement;
(b) explain that the appropriation will be at market value at the date of the appropriation and give the beneficiary full information;
(c) obtain the beneficiary’s consent to the appropriation unless the will removes this requirement; and
(d) where the beneficiary wants cash, obtain bank account details and make payment as soon as practicable.

33.11 When transferring assets to a beneficiary:
(a) send a confirmation of receipt for signature and return; and
(b) provide written details of the value of the assets at the date of death for use on later disposals in the calculation of capital gains tax.

34 PREPARING ESTATE ACCOUNTS

34.1 Keep accurate records throughout the period of the administration of the estate so you are aware of the financial position at any time and to enable the timely preparation of estate accounts.

34.2 The accounts should show:
(a) the value of assets at the date of death;
(b) profits and losses on the sale of assets during the administration period;
(c) payments made during the administration period;
(d) charges made by the practice;
(e) transfers of assets made to non-residuary beneficiaries;
(f) income receipts, including interest allowed on money held in the client account;
(g) income payments;
(h) interim distributions to residuary beneficiaries;
(i) retention of funds to meet contingent or future liabilities; and
(j) balance of capital and income due to residuary beneficiaries.

35 DISTRIBUTING THE RESIDUE OF THE ESTATE
35.1 Send the estate accounts to the personal representatives for approval together with the final bill.
35.2 Send residuary beneficiaries the estate accounts for approval.
35.3 Provide a copy of the bill to the residuary beneficiaries if members of the practice are the only personal representatives.
35.4 Once the residuary beneficiaries have approved the accounts, carry out the searches as required in obligations 33.5 and 33.6 above, and transfer the balance of assets and cash to them.
35.5 When transferring assets to the residuary beneficiaries, send a confirmation of receipt for signature and return.
35.6 Provide a Form R185 to the beneficiary with details of income distributed.

36 CLOSING THE FILE
36.1 Write a final letter to the personal representatives or, if members of the practice are the personal representatives, to the residuary beneficiaries explaining:
(a) what you have done;
(b) that you are closing your file;
(c) what tasks, if any, remain to be done (e.g. payment of inheritance tax instalments);
(d) what information and documents should be retained, for example:
   (i) valuations of assets at the date of death for use on later disposals in the calculation of capital gains tax;
   (ii) all documentation required for claiming the transferable nil-rate band.
36.2 Return any documents to which the personal representatives or residuary beneficiaries are entitled.

36.3 Review the file to ensure that documents and correspondence are filed and recorded correctly and discard any scrap or duplicate copies.

36.4 Store the contents of the file in accordance with the practice’s file retention policy.
PART C SPECIAL ASPECTS OF ADMINISTRATION

37 WHERE THE WILL CREATES A CONTINUING SETTLEMENT

37.1 Where the will creates a continuing settlement, practices appointed as, or instructed by, personal representatives must carry out the obligations set in 37.2–37.6 below. This will ensure that the assets settled are transferred into the legal ownership of trustees as quickly as possible, subject to the time constraints required for their protection.

37.2 Specific assets

37.2.1 Transfer assets to the trustees once it is apparent that the assets are not required to pay liabilities. Use the appropriate documentation for each asset.

37.2.2 Where personal representatives and trustees are the same people, mark the transition by using an assent or written appropriation.

37.3 Cash

37.3.1 Transfer cash to the trustees once it is apparent that it is not required to pay liabilities using a cheque or electronic transfer.

37.4 Debt or charge arrangements

37.4.1 Check whether the will authorises the executors to compel the trustees of a settlement to accept a debt or charge over residuary assets instead of cash.

37.4.2 Where this is the case, help the executors to decide, in light of any letter of wishes left by the deceased, whether it is in the best interests of the beneficiaries of the estate to exercise this right.

37.4.3 If the executors decide that it is beneficial, help them to decide whether to constitute the settlement with a debt or charge.

37.4.4 Draft the appropriate documentation to give effect to the debt or charge arrangement. This will normally consist of:

(a) a record of the executors’ decision;
(b) a letter to the trustees of the settlement requiring them to accept the debt or charge and stating whether the debt will carry any interest or index-linking; and
(c) a loan agreement confirming that the residuary beneficiary owes the stated amount to the trustees of the settlement, or a charge agreement confirming that the debt is charged on the residuary assets.
37.5 Residue

37.5.1 As soon as the residue is ascertained and the estate accounts are approved by the trustees of the residuary settlement, transfer assets to the trustees using the appropriate documentation for each asset.

37.5.2 Where personal representatives and trustees are the same people, it is still important to mark the transition. This should be done by using an assent or written appropriation.

37.6 Making appointments from settlements without an interest in possession within two years of death

37.6.1 In the case of settlements without an interest in possession, check whether the trustees have powers of appointment allowing funds to be appointed to beneficiaries absolutely, thereby bringing the settlement to an end.

37.6.2 If they do, consider with the trustees whether it is in the interests of the beneficiaries to terminate the settlement within two years of death and obtain ‘reading back’ for inheritance tax purposes.

37.6.3 Draft a memorandum setting out the trustees’ decision and any deed of appointment required, taking care to wait three months from the date of death where necessary to obtain ‘reading back’ for inheritance tax purposes.

38 SETTLEMENTS ARISING UNDER THE INTESTACY RULES

38.1 Life interest for surviving spouse or civil partner

38.1.1 Where the intestacy rules produce a life interest for a spouse or civil partner, explain to the spouse or civil partner as soon as possible:

(a) the effect of a life interest;
(b) his/her right to capitalise the life interest within 12 months of the grant of representation; and
(c) the procedure to be followed to exercise the right.

38.1.2 Once the size of the life interest fund is known, calculate the capital sum that would be payable on capitalising the life interest and inform the spouse or civil partner.

38.1.3 Explain the inheritance tax consequences of capitalising the life interest.

38.1.4 If the issue are of full age and capacity, they and the spouse or civil partner can, under the rule in *Saunders v. Vautier*, agree to bring the settlement to an end and divide up the assets on any basis they wish. Therefore, if applicable, inform them of this and explain the inheritance tax consequences.
Note:

(i) See Saunders v. Vautier (1841) EWHC Ch J82.

38.2 Assets held on statutory trusts for minors

38.2.1 Explain to the personal representatives that they will continue to hold assets for minors until the statutory trusts come to an end.

38.2.2 Provide the personal representatives with a written explanation of:

(a) the terms of the statutory trusts;
(b) their obligations to invest the trust funds and produce accounts for the beneficiaries; and
(c) their powers in relation to capital and income.

38.2.3 Mark the transition from estate administration to trusteeship with an assent or written appropriation.
PART D  ADVISING ON VARIATION OF DISPOSITIONS

39  TAKING INSTRUCTIONS ON VARIATION OF DISPOSITIONS

39.1 When acting for the personal representatives, make clear to them that the standard retainer for the administration of an estate does not include the provision of advice on variation of dispositions.

39.2 When acting as personal representatives, make clear to beneficiaries that the provision of advice on variation of dispositions is not part of the duties of a personal representative.

39.3 If it appears appropriate to inform personal representatives and/or beneficiaries that a post-death variation may have advantages for them, for example, by achieving a tax savings:

(a) explain in outline the advantages and ask whether they want detailed advice; and

(b) if they do want detailed advice:

(i) explain that they are not required to instruct you but can go elsewhere; and

(ii) provide clear information in writing on the basis on which you would charge.

40  WHEN INSTRUCTED ON VARIATION OF DISPOSITIONS

40.1 Provide advice to help beneficiaries to make decisions which are in their best interests.

40.2 Prepare any necessary documentation in a timely manner.

40.3 In the case of variations in favour of charities:

(a) inform the charity of the variation; and

(b) obtain confirmation from the charity that it has been informed.

40.4 Submit documentation to HM Revenue and Customs.
PART E   CLAIMS UNDER THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ACT 1975

41   ACTION REQUIRED WHERE A CLAIM IS MADE

41.1 Where you are acting in the administration of an estate and a claim under the Inheritance (Provision for Family and Dependents) Act 1975 is made or it seems likely that one will be made:

(a) inform the beneficiaries;
(b) explain the process for a claim and the effect on the administration of the estate;
(c) consider whether any third parties need to be informed of the probable delay in completing the administration;
(d) consider whether the probable delay in completing the administration requires you to take any additional steps in relation to protecting assets and/or investing available funds.

42   ACTING FOR PERSONAL REPRESENTATIVES WHERE A CLAIM IS MADE

42.1 A claim under the Inheritance (Provision for Family and Dependents) Act 1975 is not a claim against the estate so advise the personal representatives to remain neutral and await the outcome of the litigation.

42.2 If the personal representatives are remaining neutral, state this in the acknowledgement of service.

42.3 Prepare a witness statement for the personal representatives providing the information required by the Civil Procedure Rules, rule 57.16.5 and Practice Direction 57, para.16.

42.4 If personal representatives who are also beneficiaries wish to defend the claim, explain that they are free to do so but must not neglect the tasks required of the personal representatives.

42.5 Be aware that, if the practice has the necessary expertise, it can act for personal representatives who are defending a claim under the Inheritance (Provision for Family and Dependents) Act 1975 in their capacity as beneficiaries. There should be no conflicts of interests or risk of breach of confidentiality since all information about the value and assets/liabilities will be made known to the claimant in the Part 57 Witness Statement. However, consider whether acting in both capacities is in the best interests of the defendant(s) or whether it would be preferable to refer them to another practice.

42.6 If the practice has the necessary expertise, it can normally act for personal representatives who are bringing a claim provided they bring no claim.
which is adverse to the estate. However, consider whether acting in both capacities is in the best interests of the claimant(s) or whether it would be preferable to refer them to another practice.

42.7 If a personal representative proposes to bring other claims which are adverse to the estate, advise that this is in conflict with his/her fiduciary duties to the estate.

42.8 If the personal representative continues with the adverse action, advise any other personal representatives or, if none, the residuary beneficiaries of the estate, to apply for the removal of the claimant as personal representative under the Administration of Justice Act 1985, s.50.
PART F   GENERAL PRACTICE POLICIES

GP.1   CLIENTS WITH A DISABILITY
A practice will have a written policy to help prevent unlawful discrimination in relation to the provision of services to clients with a disability. This policy will address the following matters:

(1) Enquiries to be made before an interview as to whether the client has any visual, communication or mobility problems.

(2) Adjustments it is reasonable for the practice to make. These are likely to include:

(a) provision of large print or Braille correspondence and documents at no cost;

(b) arrangements for access and parking suitable for less mobile clients;

(c) visits to the client to take instructions instead of requiring the client to come to the office.

(3) Contacts with organisations which can provide trained signers to interpret for clients who use sign language and who do not wish to use family members or close friends.

Notes:
(i) It is not permissible to charge for reasonable adjustments.
(ii) See the Law Society’s Equality and Diversity Requirements: SRA Handbook Practice Note.
(iii) See the Law Society’s Equality Act 2010 Practice Note.

GP.2   ADVICE REQUIRED WHICH THE PRACTICE CANNOT PROVIDE
A practice will have a written policy to ensure that clients receive appropriate advice and a competent service. This policy will address the following matters:

(1) Those providing services to clients must always consider whether the client requires advice on a particular matter which is beyond the expertise of the practice.

(2) Where this is the case, the practice must:

(a) advise the client to seek separate advice on that matter;

(b) consider whether the best interests of the client may require the whole of the client’s affairs to be dealt with in the context of that advice and, if this is the case, suggest to the client that the practice ceases to act.
(3) Where a client refuses to take separate advice, the practice must provide the client with a written record of:

(a) all the general advice given, and in particular any risks identified;
(b) any offer of detailed advice and whether the offer was accepted or refused;
(c) the client’s refusal to follow detailed advice given;

and preserve a copy of the record as part of the file.
PART G \ WILL DRAFTING PRACTICE POLICIES

WP.1 \ TAKING INSTRUCTIONS

A practice will have a written policy to help with the management of risk relating to taking instructions. This policy will address the following matters:

(1) Whether customer due diligence is to be carried out as a matter of course, even though it is not required under the Money Laundering Regulations 2007 for the making of a will. (This may be considered as a sensible precaution and to prevent delay if a client requires advice on matters such as inheritance tax planning which would require customer due diligence.)

(2) What steps must be taken to check the identity of clients to prevent impersonation of a testator/testatrix.

(3) Whether all instructions are only to be taken face-to-face or whether there are circumstances in which they are accepted in writing and/or online.

(4) If instructions are accepted in writing and/or online, what additional checks and safeguards are in place to assess potential risks and ensure that the client is properly informed.

(5) The circumstances, if any, when it is acceptable for a will to be written by someone other than the person who took the instructions, the information to be provided to the person drafting the will and the checks to be made to ensure that the will accurately reflects the client’s instructions.

(6) Whether clients are to be asked to complete a questionnaire before attending a face-to-face interview and, if so, what checks are to be made to establish whether the client completed the questionnaire personally or was assisted by a third party.

Note:

(i) See the Money Laundering Regulations 2007 (SI 2007/2157).

WP.2 \ RETAINER LETTERS/AGREEMENTS

A practice will have a written policy on the use of standard letters/agreements which set out the terms of the will drafting retainer. This policy will address the following:

(1) Matters on which advice will be offered as part of the standard retainer.

(2) Matters outside the standard retainer on which advice can be offered for a separate charge.
(3) Any matters normally falling within a standard will drafting retainer which the practice is expressly excluding and on which separate advice would, therefore, have to be obtained.

(4) A fee structure clearly showing how charges are made for separate elements of the retainer.

WP.3 CLIENT INFORMATION ON RISK

A practice will have a written policy on how the key risks and benefits associated with making a will are communicated to clients. This policy will include details on how the practice will deal with the following key matters:

(1) Whether the practice will have templates for information on risk to be given to clients, responsibility for reviewing the content of the templates and ensuring the templates are used correctly.

(2) Communication to the client of the message that making a will is not a ‘once and for all’ activity. There is a risk that a will may cease to carry out the client’s wishes if circumstances change and so it is therefore desirable to review a will periodically and when significant events occur (particularly births, deaths and decisions to marry, divorce, form or dissolve UK civil partnerships).

(3) Advice for clients that where a will is stored by another person there is a risk of:

   (a) loss or damage; or
   (b) disclosure of confidential information;

   unless the person storing has appropriate safeguards in place.

(4) A warning to clients that a person appointed as a sole executor has wide powers to access and deal with the deceased’s assets.

(5) Advising a client considering paying the cost of future estate administration services at the time of making a will that this may not be in his/her best interests as:

   (a) the provider may no longer be operating; and
   (b) the agreement may prevent more suitable arrangements being made in light of circumstances.

WP.4 URGENT INSTRUCTIONS

A practice will have a written policy setting out how it will deal with the additional risks presented by taking urgent instructions to make a will. This policy will address the following matters:

(1) The circumstances in which the practice will accept such instructions.
(2) Where such instructions have been accepted, or where a client’s health suddenly deteriorates, the steps to be taken to try to establish whether:

(a) the client has testamentary capacity when giving instructions;
(b) the client continues to have capacity at the time the will is executed or, while lacking full capacity, remembers giving instructions and understands that the will has been prepared in accordance with those earlier instructions;
(c) at the time the will is executed the client knows and approves the contents of the will or understands that the will has been prepared in accordance with those earlier instructions; and
(d) the client is acting as a result of undue influence.

(3) Modifications to the practice’s normal terms of retainer to reflect the need for urgent action.

(4) The checklist and template documents to be used when taking such instructions, for example severance of a beneficial joint tenancy, attestation clause for use where the will is signed on behalf of testator/testatrix.

(5) Circumstances in which it may be appropriate to prepare a codicil to an existing will rather than a new will.

**WP.5 CONSISTENCY**

A practice will have a written policy to help to ensure the consistency and quality of all wills produced by the practice. This policy will address the following matters:

(1) The precedents and/or will drafting packages to be generally used by those preparing wills within the practice and procedures for periodic review of the suitability of these precedents and packages.

(2) Where non-standard precedents are used and amended, a copy of the original precedent to be kept with the file in case of later problems.

(3) Training for those using precedents to ensure that they understand their meaning and purpose.

(4) Restrictions on those allowed to prepare wills within the practice to ensure that only those with an appropriate level of expertise do so.

(5) Templates for recording instructions for wills.

(6) Time limits within which key tasks are to be completed.
(7) Processes in place to evaluate the skill and experience of all those taking instructions for, and drafting, wills to ensure that work is appropriately allocated and completed.

WP.6 ATTENDANCE NOTES

A practice will have a written policy setting out how it will ensure that full attendance notes of key meetings are made. This policy will address the use of templates to make attendance notes of meetings at which:

(1) instructions for wills are given;
(2) the meaning and effect of wills prepared for the client are explained or discussed; and
(3) wills are executed.

WP.7 GIFTS TO THOSE DRAFTING WILLS OR PERSONS CONNECTED WITH THEM

A practice will have a written policy setting out how it will deal with the significant professional conduct issues arising from gifts and legacies to those drafting wills or persons connected with them. This policy will address the following matters:

(1) A requirement that if a client proposes to make a gift, which is of more than a token amount, whether by will or by lifetime gift to:
   (a) the will drafter;
   (b) an employee, partner, director or owner of the practice to which the will drafter belongs;
   (c) a family member of the above;
   the will drafter must normally refuse to act until:
   (i) the client has obtained independent legal advice; and
   (ii) the will drafter has received written confirmation from the independent adviser that such advice has been obtained.

(2) A limited exception to the requirement for independent legal advice where:
   (a) the client is a member of the beneficiary’s family; and
   (b) the amount being given to the beneficiary is not disproportionate, taking into account the reasonable expectations of others who would reasonably expect to benefit because of their relationship to the deceased.

(3) A requirement that even where instructions fall within the limited exception:
(a) the will drafter should obtain permission to act from a designated practice member or members; or

(b) if the will drafter is the sole owner of the business, the will drafter should consider whether it is appropriate to act; and

(c) those deciding whether or not it is appropriate to act should consider the need to avoid conflict of interests and act in the best interests of the client.

WP.8 **STORAGE OF WILLS AND RETENTION OF FILES**

A practice will have a written policy for dealing with the safe storage of wills and the retention of files. This policy will address the following matters:

1. Whether a charge is to be made for storage of wills.
2. Appropriate systems to allow for the efficient identification and retrieval of stored wills.
3. An appropriate system, in relation to wills made by the practice after this policy is put in place, to identify wills appointing members of the practice as executors and/or trustees and an agreed policy on the steps to be taken to inform clients if such persons die or leave the practice.
4. An appropriate system, in relation to wills made by the practice before this policy is put in place, to take effect when a member of the practice leaves to identify wills appointing that person as executor and/or trustee and an agreed procedure on the steps to be taken to inform clients if such persons die or leave the practice.
5. Guidelines on who can access wills and will files.
6. Appropriate storage arrangements to ensure physical security of wills and will files.
7. Guidelines on the length of period for which wills and will files are to be retained.

*Note:*

(i) See the [Law Society’s File Retention: Wills and Probate Practice Note](#).
PART H  ESTATE ADMINISTRATION PRACTICE
POLICIES

EP.1  ESTATE ADMINISTRATION RETAINER
LETTERS/AGREEMENTS

A practice will have a written policy on its use of standard
letters/agreements setting out the terms of the estate administration
retainer. This policy will address the following:

(1) Matters which are included as part of the standard estate
    administration retainer.
(2) Matters outside the standard estate administration retainer on
    which advice can be offered for a separate charge.
(3) Any matters normally falling within a standard estate
    administration retainer which the practice is expressly excluding
    and on which separate advice would, therefore, have to be
    obtained.
(4) Fee structure showing clearly how charges are made and whether
    a separate charge is made for acting as executor and/or trustee as
    opposed to dealing with the work involved and whether charges
    are calculated on a time basis and/or include a value element.
(5) Explanation of the practice’s obligations in relation to anti-money
    laundering and the proceeds of crime.
(6) Warning that payments to the beneficiaries of the estate will be
    made by cheque or bank transfer to the person entitled and not to
    third parties unless there is a clear reason for payment to the third
    party.

EP.2  RENUNCIATION OF EXECUTORSHIP AND TRUSTEESHIP
AT THE REQUEST OF THOSE ENTITLED TO THE ESTATE

A practice will have a written policy to set out the way in which it deals
with requests for renunciation of executorship and trusteeship. This policy
will deal with the following matters:

(1) A requirement that such requests are to be considered in light of
    the reasons for the original appointment.
(2) If the reasons for the original appointment continue to operate, it
    is inappropriate to renounce. Examples of situations where
    renunciation would not be appropriate are where the
    testator/testatrix:

(a) was concerned about tensions between family members
    and expressed a wish for an impartial professional to act,
    and those tensions continue to exist; or
(b) was concerned about the complexity of the estate and wished to spare family members the responsibility of dealing with those complexities, and those complexities remain; or
(c) did not consider that family members were mature enough to deal with the estate, and this remains the case.

(3) Where circumstances have changed since the appointment, renunciation may be appropriate. Examples of changes which might justify renunciation are:

(a) the tensions that caused the testator/testatrix concern no longer exist, perhaps because certain beneficiaries have died; or
(b) the estate is significantly less complex than it was at the date the will was made; or
(c) family members are significantly more mature than they were at the date the will was made.

(4) Where members of the practice are appointed as both executors and trustees, it is necessary to consider separately whether it is appropriate to disclaim the trusteeship as well as renouncing the executorship, as the two roles are different.

(5) Giving written acknowledgements of receipt of such requests, which include a time frame for giving a substantive reply.

(6) A time frame for acknowledging such requests and for giving a substantive reply which properly reflects the need for promptness, (for example, five working days for an acknowledgement and a further 10 working days for a substantive reply).

Note:

(i) Where there is no request, a practice is free to take its own decision to renounce having considered the nature and size of the estate.

EP.3 CONSISTENCY IN ESTATE ADMINISTRATION

A practice will have a written policy to ensure the consistency and quality of its estate administration work. This policy will address the following matters:

(1) The precedents and/or estate administration packages to be used by those dealing with estate administration within the practice and procedures for the periodic review of the suitability of these precedents and packages.

(2) Training for those using such precedents and packages to ensure that they understand their meaning and purpose.
(3) Processes in place to evaluate the skill and experience of all those dealing with estate administration to ensure that work is appropriately allocated and completed.

(4) Time limits within which tasks to be completed.

(5) Supervision and internal controls to ensure that all client money is properly handled and that all assets are properly accounted for.

(6) Frequency of communication with personal representatives or residuary beneficiaries unless varied by agreement.
PART I  RECOMMENDED FURTHER READING

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