not be recognised in the third State.[285] That limitation is not exhaustive, however, and is not to be read as affecting the right of the parties by agreement to limit the scope of the proceedings under the law of the Member State of the court seised.[286]

**Applicable law**

**2-083** The applicable law as specified by the Succession Regulation is to be applied whether or not it is the law of a Member State. So the fact that, for example, the UK has not adopted the Succession Regulation makes no difference—if the applicable law is determined to be the law of any part of the UK then a Member State which has adopted the Succession Regulation is bound to apply it to the succession.

**2-084** In similar fashion to the issue of jurisdiction, the general rule is that the law applicable to the succession as a whole shall be the law of the State in which the deceased had his habitual residence at the time of death.[287] This also will not apply in a number of situations.

*Closer connection with another State*

**2-085** An express exception to the general rule is stated in the Succession Regulation where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with a State other than the State of habitual residence.[288] The example given elsewhere in the Succession Regulation is where "the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State".[289] But it has been emphasised that the test of close connection is not to be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.[290]

*Choice of law by the deceased*

**2-086** The Succession Regulation provides that a person may choose the applicable law as the law of the State whose nationality he possesses at the time of making the choice or at the time of death.[291] The focus on nationality is explained as necessary to ensure a connection between the deceased and the law chosen and to avoid a law being chosen with the intention of frustrating the legitimate expectations of persons entitled to a reserve share.[292]

The choice is to be made expressly in a "declaration in the form of a disposition of property upon death or shall be demonstrated by the terms of such a disposition".[293] Such a disposition is expressly defined in the Succession Regulation as "a will, a joint will or an agreement as to succession".[294] The chosen law governs the substantive validity of the act by which the choice of law itself is made.[295] What this means practically speaking for the law of any part of the UK to be chosen is unclear, but this may be of limited concern given that it is elsewhere stated that a choice of law should be valid even if the chosen law does not provide for a choice of law in matters of succession.[296]

**2-087** If the testator makes a choice of law under the Succession Regulation which refers to the law of the UK without specifying which part of the UK, the court of the relevant Member State will be required to determine which internal law applies (i.e. England and Wales, Scotland or Northern Ireland). The Succession Regulation itself provides that where the law specified thereunder is that of a State which comprises several territorial units, each of which has its own rules of law in respect of succession, the internal conflict-of-laws rules of that State shall determine the relevant territorial unit whose rules of law are to apply.[297] So far as the UK is concerned, therefore, this would be determined in accordance with the principles set out in this chapter above. However, if there are no such rules then various tests are set out depending on the provisions in the Succession Regulation with which the court is concerned.[298]

*Scope of the applicable law*

**2-088** Once determined, the applicable law governs the succession of the deceased's estate as a whole.[299] Succession is very broadly defined as "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer upon a disposition of property upon death or a transfer through intestate succession".[300] This does not purport to specify the types of proceedings which would fall within the meaning of "succession". However, a number of matters are listed as part of the definition of the scope of the applicable law which inform that issue, namely (a) the causes, time and place of the opening of the succession; (b) the determination of the beneficiaries, their respective shares, the obligations which may be imposed on them by the deceased and the determination of other succession rights including the succession rights of the surviving spouse or partner; (c) the capacity to inherit; (d) disinheritance and disqualification by conduct; (e) the transfer to the heirs and the legatees of the assets, rights and obligations forming part of the estate including any conditions and effects of the acceptance or waiver of the succession or of a legacy; (f) the powers of the heirs, the executors of the wills and other administrators of the estate, in particular regarding the sale of property and payment of creditors; (g) liability for debts under the succession; (h) the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs; (i) any obligation to restore or account for gifts, advancements or legacies



285 Succession Regulation art.12(1).
286 Succession Regulation art.12(2).
287 Succession Regulation art.21(1).
288 Succession Regulation art.21(2).
289 Succession Regulation recital 25.
290 Succession Regulation recital 25.
291 Succession Regulation art.22(1). See also recitals 38–40.
292 Succession Regulation recital 38.
293 Succession Regulation art.22(2).
294 Succession Regulation art.3(1)(d).
295 Succession Regulation art.22(3). It is stated in the Succession Regulation that this means asking "whether the person making the choice may be considered to have understood and consented to what he was doing": Succession Regulation recital 39.
296 Succession Regulation recital 40.
297 Succession Regulation art.36(1).
298 Succession Regulation art.36(2) and (3).
299 Succession Regulation art.23(1).
300 Succession Regulation art.3(1)(a).

when determining the shares of the different beneficiaries; and (j) the sharing-out of the estate.[301] That list is presumably intended to be non-exhaustive.

The types of proceedings falling within the meaning of "succession" recently arose in connection with the original EC Judgments Regulation.[302] In that case, the Court of Appeal rejected the argument that the claim before them fell within the meaning of "succession" because it could not be described as "the determination of the disposable part of the estate or its sharing out".[303] That conclusion was not altered by consideration of the equivalent definition in the Succession Regulation and it is likely to be similarly instructive in identifying the types of proceedings to which the Succession Regulation applies.

*Renvoi*

**2-089** The doctrine of renvoi in English law has been considered previously.[304] So far as the Succession Regulation is concerned, it provides that where the applicable law is the law of any third State (i.e. not a Member State) this shall mean the rules of law in force in that State, including its rules of private international law insofar as they make a renvoi either to the law of a Member State or to the law of another third State which would apply its own law.[305] However, it is made clear that no renvoi shall apply in respect of, among other things, the law of a State with which the deceased was manifestly more closely connected[306] or a law chosen by the deceased.[307] It is unclear whether the UK was to be treated as a Member State for these purposes prior to its withdrawal from the EU on 31 January 2020 given that it did not adopt the Succession Regulation during that period. That is not addressed in the Succession Regulation. It is clear that the UK is now a third State after its withdrawal from the EU.

**Recognition, enforceability and enforcement of decisions**

*Recognition of decisions*

**2-090** The basic rule is that a decision given in a Member State shall be recognised in the other Member States without any special procedure being required.[308] There may be a question over the status of a decision by a court in the UK in the period prior to the UK's withdrawal from the EU on 31 January 2020, more particularly whether it would be recognised (and held enforceable) in other Member States. However, by virtue of the UK not adopting the Succession Regulation, it is clear that a court in the UK was not bound to recognise or enforce decisions of courts of other Member States prior to 31 January 2020. The rule does not apply either way in the period after 31 January 2020.

There are a number of grounds upon which a decision will not be recognised. These are (a) where such recognition is manifestly contrary to public policy in the

301 Succession Regulation art.23(2).
302 Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] O.J. L12/1.
303 *Sabbagh v Khoury* [2017] EWCA Civ 1120 at [162] and see too [160].
304 See paras 2-069 and following.
305 Succession Regulation art.34(1).
306 Succession Regulation art.21(2).
307 Succession Regulation art.22.
308 Succession Regulation art.39(1).





Member State in which recognition is sought; (b) where the decision was given in default of appearance and the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence (save where the defendant has not exhausted the means to challenge that decision); (c) if it is irreconcilable with a decision in the Member State in which recognition is sought in proceedings between the same parties; and (d) if it is irreconcilable with an earlier decision given in another Member State or in a third State in proceedings involving the same cause of action and between the same parties (although that decision must itself be recognisable in the Member State in which recognition is sought).[309]

*Enforcement of decisions*

**2-091** The Succession Regulation sets out a procedure whereby any interested party in proceedings in Member State A may apply for a decision given in Member State B to be declared enforceable in Member State A.[310] In essence, that procedure requires the applicant to provide certain documents in support and, if the formalities are complied with, a declaration of enforceability shall be made which may be the subject of appeal.[311] The procedure itself is governed by the law of the Member State of enforcement.[312]

**Authentic instruments and court settlements**

*Authentic instruments*

**2-092** The Succession Regulation defines an "authentic instrument" as "a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which: (i) relates to signature and the content of the authentic instrument; and (ii) has been established by a public authority or other authority empowered for that purpose by the Member State of origin".[313] It provides that an authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, save where it is manifestly contrary to public policy in that Member State.[314] Any challenge to the authenticity of such a document is to be made before the courts of the Member State of origin—it is not for another Member State to determine that issue.[315]

An authentic instrument may be declared enforceable in another Member State on the application of any interested party.[316] The procedure is identical to that for the enforcement of one Member State's decision in another Member State.[317]

309 Succession Regulation art.40.
310 Succession Regulation art.43.
311 For the full procedure, see Succession Regulation arts 45–58.
312 Succession Regulation art.46(1).
313 Succession Regulation art.3(1)(i).
314 Succession Regulation art.59(1).
315 Succession Regulation art.59(2).
316 Succession Regulation art.60.
317 Succession Regulation art.60(1). For the procedure, see Succession Regulation arts 45–58.

*Court settlements*

**2-093** A "court settlement" for the purposes of the Succession Regulation is "a settlement in a matter of succession which has been approved by a court or concluded before a court in the course of proceedings".[318] Such court settlements which are enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party, such procedure being identical to that for enforcement of decisions and authentic instruments.[319]

**European Certificate of Succession**

**2-094** The Succession Regulation has introduced what is referred to as the "European Certificate of Succession". The purpose of the Certificate is to enable heirs, legatees having direct rights in the succession and executors of wills or administrators to invoke their status or exercise their rights deriving from that status in another Member State.[320] The Certificate is to be used, in particular, to demonstrate (a) the status and/or rights of each heir or legatee mentioned therein and their respective shares of the estate; (b) the attribution of a specific asset or specific assets forming part of the estate to the heir or legatee mentioned therein; and (c) the powers of the person mentioned in the Certificate to execute the will or administer the estate.[321]

As the UK has not adopted the Succession Regulation and is not bound by its provisions, a Certificate cannot be issued here and a Certificate issued by an adopting Member State will not automatically have any of the effects described in the Succession Regulation set out below. However, a Certificate may nonetheless have evidential weight in, for example, obtaining a grant of representation in the UK.

**2-095** Use of the Certificate is not mandatory, even for those Member States who have adopted the Succession Regulation, and it is not intended to take the place of international documents used for similar purposes in the Member States.[322] But where a Certificate is issued then, without any special procedure being required, it shall be presumed to accurately demonstrate elements which have been established under the law applicable to the succession or under any other law applicable to specific elements and the person mentioned in the Certificate as the heir, legatee, executor of the will or administrator shall be presumed to have the status mentioned in the Certificate along with the rights or powers stated therein.[323] It is, however, not an enforceable title in its own right and the effect of the Certificate is merely evidentiary—it does not avoid any requirements which may exist for establishing title to property in a Member State which has adopted the Succession Regulation.[324]

Protection is given to those who act on the basis of the information certified in the Certificate, for example those who make payments or pass on property to a person mentioned in the Certificate as authorised to accept the payment or property, save only where the party who would otherwise be protected knows that the contents of the Certificate are inaccurate or is unaware of such inaccuracy due to

[318] Succession Regulation art.3(1)(h).
[319] Succession Regulation art.61(1). For the procedure, see Succession Regulation arts 45–58.
[320] Succession Regulation art.63(1).
[321] Succession Regulation art.63(2).
[322] Succession Regulation art.62(2) and (3). See also recital 69.
[323] Succession Regulation art.69(1) and (2). Any rights or powers shall have no conditions and/or restrictions save where expressly stated in the Certificate.
[324] Succession Regulation recital 71.





gross negligence.[325] Protection on a similar basis is provided to third parties who transact with persons mentioned in the Certificate as authorised to dispose of succession property.[326]

**2-096** The Certificate shall be issued in the Member State with jurisdiction following the provisions described above.[327] It is to be issued upon application by the heirs, legatees, executors or administrators following a prescribed procedure, under which certain specified information and documents should be provided.[328] Upon receipt of the application, the issuing authority must then verify the information, including carrying out any necessary enquiries, and issue the Certificate without delay where the elements to be certified have been established.[329] The contents of the Certificate itself are specified in the Succession Regulation, including the date of issue, details concerning the deceased and the beneficiaries, the applicable law to the succession, the shares of the heirs, the list of rights and/or assets for any given legatee and the powers of the executor or administrator.[330]

Separate provision is made for the rectification, modification, withdrawal or suspension of the Certificate.[331]



[325] Succession Regulation art.69(3). See also recital 71.
[326] Succession Regulation art.69(4). See also recital 71.
[327] Succession Regulation art.64.
[328] Succession Regulation art.65(3). The information listed therein is to be provided "to the extent that such information is within the applicant's knowledge and is necessary in order to enable the issuing authority to certify the elements which the applicant wants certified". The European Court of Justice has confirmed that there is no presumption that the Certificate should only contain the information specified in the Succession Regulation, or indeed only be concerned with matters within the scope of the Succession Regulation: *Re Mahnkopf* [2018] I.L.Pr. 13 at [AG113] and [43] (inclusion of information relating to the surviving spouse's rights regarding the estate under a matrimonial property regime in domestic law).
[329] Succession Regulation arts 66 and 67.
[330] The full list is set out at Succession Regulation art.68.
[331] Succession Regulation arts 71 and 73. See also recital 72.

presumption arises that an alteration in pencil is merely deliberative and that an alteration in ink is intended to be final.[3]

*Presumption as to time of alteration*

**6-003** Where several sheets of paper constituting a connected disposal of the estate are found together after the death of the testator, the last sheet being duly executed, the presumption is that they all formed part of the will at the time of its execution.[4] This presumption, it seems, is not rebutted by the mere fact that the sheets do not constitute a consistent disposal of the estate.[5] In this, as in other circumstances, the court leans towards the validity of the testamentary instrument. The statements of the testator are admissible to show whether any, and what, sheets were constituent parts of the will at the time of execution.[6]

**6-004** Subject to that, there is a rebuttable presumption that an unattested alteration was made after the execution of the will[7] or any subsequent codicil.[8] This presumption may be rebutted by evidence, which may be internal evidence from the will itself or extrinsic evidence, such as the evidence of the attesting witnesses, or both. If the alterations are trifling and of little consequence, the presumption may be readily rebutted.[9]

The presumption has been rebutted by internal evidence from the will itself where the insertions were made to supply blanks left in the will by the draftsman.[10] In some cases words written below the signature of the testator before execution of his will, and referred to in the body thereof, have been regarded as interlineations and admitted to probate,[11] particularly where interlineations were written with the same ink as the rest of the will or completed the otherwise unintelligible sentences of the will.[12] These cases may show that the court is more ready to hold that interlineations were written before execution than other types of change. But the fact that alterations have been dated in the testator's handwriting before the date of the will has been held insufficient to show that they were made before execution.[13] Extrinsic evidence rebutting the presumption may take different forms, for instance evidence

signatures to first codicil). For knowledge and approval of an alteration made before execution see *Greville v Tylee* (1851) 7 Moo.P.C. 320.

3 *Hawkes v Hawkes* (1828) 1 Hag. Ecc. 321 (each presumption is stronger if both ink and pencil alterations); *Re Hall* (1871) 2 P. & D. 256 (pencil deliberative); *Re Adams* (1869-72) L.R. 2 P. & D. 367 (ink and pencil): see *Gann v Gregory* (1854) 3 D.M. & G. 780; *Ibbott v Dell* (1865) 34 B. 395; *Re Bellamy* (1866) 14 W.R. 501.

4 *Gregory v Queen's Proctor* (1846) 4 N.C. 620; *Marsh v Marsh* (1860) 1 Sw. & Tr. 528; *Rees v Rees* (1872-75) L.R. 3 P. & D. 84.

5 *Marsh* (1860) 1 Sw. & Tr. 528 at 531.

6 *Gould v Lakes* (1880) 6 P.D. 1; *Re Hutchison* (1902) 18 T.L.R. 706.

7 *Cooper v Bockett* (1846) 4 Moo.P.C. 419; *Greville v Tylee* (1851) 7 Moo.P.C. 320; *Simmons v Rudall* (1851) 1 Sim. N.S. 115; *Doe d. Shallcross v Palmer* (1851) 16 Q.B. 747; *Williams v Ashton* (1860) 1 J. & H. 115; *Re Adamson* (1875) L.R. 3 P. & D. 253.

8 *Re Sykes* (1873) L.R. 3 P. & D. 26 at 27–28; *Lushington v Onslow* (1848) 6 N. of C. 183.

9 *Re Hindmarsh* (1866) 1 P. & D. 307 (testator a lawyer, alterations trifling and apparently written with same pen and ink as rest of will, and not very strong evidence of writing expert: presumption rebutted): see also *Re Swindin* (1850) 2 Rob. Ecc. 192.

10 *Birch v Birch* (1848) 1 Rob. Ecc. 675 (blanks left for amounts of legacies); *Greville v Tylee* (1851) 7 Moo.P.C. 320, 327.

11 *Re Birt* (1871) L.R. 2 P. & D. 214; *Re Greenwood* [1892] P. 7.

12 *Re Cadge* (1868) L.R. 1 P. & D. 543: see *Re Birt* (1871) L.R. 2 P. & D. 214; *Re Adams* (1872) L.R. 2 P. & D. 367 cf. *Re White* (1860) 30 L.J.P. 55.

13 *Re Adamson* (1875) L.R. 3 P. & D. 253.





from the draftsman of the will[14] or an attesting witness, or declarations by the testator showing that he made the alterations before executing the will.[15] The court considers all the evidence, both internal and extrinsic, in deciding whether the presumption is rebutted.[16]

A different presumption applies if the will was made by the testator whilst privileged. In that case a rebuttable presumption arises that the alteration was made whilst the testator was still privileged and therefore entitled to make informal alterations.[17]

*Effect of republication*

**6-005** The republication[18] of a will by its re-execution with the proper formalities validates an alteration made in the will after it was executed but before it was republished, provided the testator intends the alteration to form part of the will when it is republished.[19] The same result follows if, after the alteration is made, the will is republished by a duly executed codicil containing some reference to the will.[20] But the alteration is not validated by republication of the will if the alteration was merely deliberative and not final,[21] or if the codicil shows that the testator was treating the will as unaltered.[22]

As already explained the presumption is that an unattested alteration to the will was made, not only after the execution of the will, but also after the execution of any codicil.[23] Accordingly, unless this presumption is rebutted by evidence show-

14 *Keigwin v Keigwin* (1843) 3 Curt. 607.

15 The admissibility of such declarations is now governed by the Civil Evidence Act 1995, and was formerly governed by the Civil Evidence Act 1968. Under the common law such declarations were not admissible if made by the testator after the execution of any relevant will or codicil, see *Doe v Palmer* (1851) 16 Q.B. 747; *Re Sykes* (1873) L.R. 3 P. & D. 26; *Dench v Dench* (1877) 2 P.D. 60; *Re Jessop* [1924] P. 221; *Re Oates* [1947] 63 T.L.R. 83.

16 *Williams v Ashton* (1860) 1 J. & H. 115; *Re Duffy* (1871) I.R. 5 Eq. 506; *Moore v Moore* (1871) I.R. 6 Eq. 166; *Doherty v Dwyer* (1890) 25 L.R.Ir. 297; *Re Tonge* [1891] 66 L.T. 60; *Re Benn* [1938] I.R. 313. Under Non-Contentious Probate Rules 1987 r.14(1) and (2) a registrar must require evidence to show whether an unattested alteration was present in a will when it was executed, unless the alteration appears to him to be of no practical importance.

17 *Re Tweedale* (1874) L.R. 3 P. & D. 204 (soldier's will); *Re Newland* [1952] P. 71 (seaman's will). For privileged wills, see para.3-040.

18 For republication and revival, which has the same effect, see para.7-077 onwards.

19 *Re Shearn* (1880) 50 L.J.P. 15 (alteration after execution: alteration invalid as will not properly re-executed); *Re White* [1991] Ch. 1 (importance of strict compliance with statutory requirements). cf. *Re Dewell* (1853) 1 Sp.Ecc. & Ad. 103, where alterations were made after execution. The testator acknowledged his original signature but did not re-sign, and witnesses initialled the alteration and signed a memorandum. It was held that the alteration was duly executed. But this must be regarded as wrongly decided, and it was doubted in *Re White* at 9; the alterations followed the testator's signature in time and so the second prohibition in s.1 of the Wills Act Amendment Act 1852 applied, see para.3-014.

20 *Re Sykes* (1873) L.R. 3 P. & D. 26; *Tyler v Merchant Taylors' Co* (1890) 15 P.D. 216; *Re Heath* [1892] P. 253. See also *Neate v Pickard* (1843) 2 N.C. 406; *Skinner v Ogle* (1845) 4 N.C. 74 at 79; *Re Wyatt* (1862) 2 Sw. & Tr. 494.

21 *Re Hall* (1871) 2 P. & D. 256 (pencil markings held merely deliberative).

22 *Re Hay* [1904] 1 Ch. 317 (three legacies in will struck out by unattested alteration; later codicil revoked only one of them: held the other two stood as testatrix was confirming her will without the alterations).

23 *Re Sykes* (1873) L.R. 3 P. & D. 26 at 27–28; *Lushington v Onslow* (1848) 6 N. of C. 183.

ing that the unattested alteration was made before the execution of the codicil,[24] the alteration is not validated by the republication of the will by the codicil.

### (b) Alteration duly executed

*Formalities*

**6-006** If the alteration was duly executed with the formalities required for the execution of the will, the alteration is valid. In this connection, s.21 of the Wills Act 1837 expressly provides that the signatures of the testator and the attesting witnesses may be made:

> "in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will".

Accordingly an alteration is valid if the testator signs, even just by writing his initials, in the margin against the alteration, and the testator either makes or acknowledges this signature in the simultaneous presence of two witnesses, who then sign in the presence of the testator by writing their initials in the margin.[25] The same result followed where the testator altered a clause appointing executors on both the second and third pages of his will, and the testator and two witnesses only initialled the second page.[26] An alteration is also validated by a duly executed memorandum referring to the alteration.[27]

*Privileged testator*

**6-007** A testator who has made a will whilst privileged may make alterations to it without any formalities whilst still privileged[28] because no formalities are required for due execution under s.11.

### (c) Part of will not apparent

**6-008** An alteration after execution—an obliteration or erasure—which succeeds in making any part of the will not "apparent", revokes that part if the testator has an intention to revoke it, even though the alterations is not executed. Probate of the will must be granted with a blank space for the part not apparent.[29]

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[24] *Re Sykes* (1873) L.R. 3 P. & D. 26 (testator's declaration); *Tyler v Merchant Taylors' Co* (1890) 15 P.D. 216; *Re Heath* [1892] P. 253 (wording of codicil showed interlineation in will had already been made).

[25] *Re Blewitt* (1880) 5 P.D. 116 (initials in margin): cf. *Re Shearn* (1880) 50 L.J.P. 15 (only witnesses initialled alteration).

[26] *Re Wilkinson* (1881) 6 P.D. 100.

[27] *Re Treeby* (1875) L.R. 3 P. & D. 242.

[28] *Re Tweedale* (1874) L.R. 3 P. & D. 204. See para.3-040 onwards.

[29] *Re Ibbetson* (1839) 2 Curt. 337; *Townley v Watson* (1844) 3 Curt. 761; *Re James* (1858) 1 Sw. & Tr. 238; *Doherty v Dwyer* (1890) 25 L.R.Ir. 297; *Re Hamer* (1944) 113 L.J.P. 31.





*The test of not being apparent*

**6-009** "Apparent" in s.21 means optically apparent on the face of the will itself; it is not permissible to draw an inference as to what the obliterated words were.[30] A word or phrase in a will is not apparent if an expert cannot decipher it by any "natural" means, such as holding the paper up to the light with a frame of brown paper around the portion attempted to be read[31] or by an expert using a powerful magnifying glass.[32] In determining whether a word is apparent it is not permissible to ascertain the word by the use of extrinsic evidence,[33] or by physically interfering with the will by, for instance, using chemicals to remove ink-marks or removing a slip of paper pasted over the word,[34] or by making another document, such as an infra-red photograph.[35] If the word can only be ascertained by these "forbidden" methods it is not "apparent".

It is unclear at what power a light or magnifying device ceases to be "natural". It is also unclear why the court should wish to strive to find "apparent" those words which the testator plainly wished to make not apparent, and to revoke.

*Intention to revoke*

**6-010** The testator must make the alteration which renders part of the will not apparent with an intention to revoke that part.[36] A testator who accidentally obliterates part of his will by spilling ink over it does not revoke it.

*Conditional intention to revoke words*

**6-011** If the testator's intention to revoke the obliterated words is conditional, revocation does not take place despite the obliteration unless the condition is fulfilled.[37] If the condition is not fulfilled the word or phrase obliterated must be ascertained so that it can be admitted to probate. For this purpose the court has recourse to any means of legal proof, including any of the above "forbidden" methods.[38]

Usually the condition relates to the validity of a substitutional legacy of a differ-

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[30] *Townley v Watson* (1844) 3 Curt. 761 at 768: see *Re Beaven* (1840) 2 Curt. 369; *Re Itter* [1950] P. 130 at 132; *Re Adams* [1990] Ch. 601 at 608.

[31] *Ffinch v Combe* [1894] P. 191 (slips of paper pasted over words in a will after execution); applied in *Re Adams* [1990] 1 Ch. 601, where the signatures to the will had been so heavily scored out with a ballpoint pen that they could not be read, Mr Francis Ferris QC (as he then was) holding that they were therefore "not apparent", such that the whole will was revoked.

[32] *Re Brasier* [1899] P. 36.

[33] *Townley v Watson* (1844) 3 Curt. 761 at 768 (evidence of draftsman not admissible to prove what words obliterated were when will executed).

[34] *Re Horsford* (1874) L.R. 3 P. & D. 211 (the same will came before the court in *Ffinch v Combe* [1894] P. 191). But a slip of paper may be removed in order to ascertain whether it covers words of revocation which took effect before being covered, *Re Gilbert* [1893] P. 183.

[35] *Re Itter* [1950] P. 130.

[36] *Brooke v Kent* (1839) 3 Moo.P.C. 334; *Townley v Watson* (1844) 3 Curt. 761 at 769.

[37] *Brooke v Kent* (1839) 3 Moo.P.C. 334; *Soar v Dolman* (1842) 3 Curt. 121; *Re Harris* (1860) 1 Sw. & Tr. 536; *Re Horsford* (1874) L.R. 3 P. & D. 211; *Re Nelson* (1872) I.R. 6 Eq. 569; *Re McCabe* (1873) L.R. 3 P. & D. 94; *Sturton v Whetlock* (1883) 52 L.J.P. 29; *Re Itter* [1950] P. 130. For conditional revocation of a will or particular clauses by other means, see paras 7-061 and following.

[38] *Re Horsford* (1874) L.R. 3 P. & D. 211 (strips of paper pasted over amount of legacy in codicil ordered to be removed as condition of revocation not fulfilled); *Re McCabe* (1873) L.R. 3 P. & D. 94; *Re Itter* [1950] P. 130; *Sturton v Whetlock* (1883) 52 L.J.P. 29 (evidence of draftsman as to original words).

perpetuity or uncertainty unless there is something in the terms of the gift or the constitution or rules of the association which precludes the members at any given time by unanimous agreement (or by an appropriate majority, if the rules so provide) from dividing the subject of the gift between themselves on the footing that they are solely entitled to it in equity.[20] It is a necessary characteristic of any gift within this second category that the members of the association can, by acting unanimously (or by an appropriate majority, if the rules so provide), alter their rules so as to provide that the funds should be applied for some new purpose or distributed amongst the members for their own benefit.[21] The last surviving member of such an association will take its assets beneficially.[22]

**(iii) Subject of gift to be held in trust for or applied for association's purposes**

**10-006** The terms of the gift or the constitution or rules of the association may show that the subject of the gift is to be "held in trust for or applied for the purposes of the association as a quasi-corporate entity".[23] If these purposes are charitable, the gift is valid but, if these purposes are not wholly charitable, the gift may fail under the rule against inalienability,[24] or under the beneficiary principle which requires a trust to have a beneficiary who can enforce the trust,[25] or for uncertainty. Thus if the will, on its true construction, shows that the testator intended to provide a permanent endowment for the association, so that the income of the property given is to be applicable in perpetuity in promoting the association's purposes, the gift fails under the rule against inalienability unless the purposes are charitable.[26] The same result follows if the constitution or rules of the association require the subject of the gift to be dealt with as a permanent endowment.[27]

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20 *Neville Estates Ltd v Madden* [1962] Ch. 832 at 849; *Re Recher* [1972] Ch. 526 at 539. It is immaterial that the testator did not intend the members to divide the subject of the gift between themselves, *Re Recher* [1972] Ch. 526 at 539.

21 *Re Grant* [1980] 1 W.L.R. 360 at 368 and 374–375; *Re Horley Town Football Club* [2006] EWHC 2386 (Ch).

22 *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch); [2009] Ch. 173; not following *Re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No.2)* [1979] 1 W.L.R. 936 at 943.

23 *Neville Estates Ltd v Madden* [1962] Ch. 832 at 849: see *Re Grant* [1980] 1 W.L.R. 360 at 368 (a gift to an association as a quasi-corporate entity, that is, to present and future members indefinitely, fails for perpetuity unless confined to an appropriate period); *Hogan v Byrne* (1862) 13 Ir.C.L. 166.

24 As to charitable gifts, see Ch.25, as to perpetuity, see para.35-072; *Re St Andrew's (Cheam) Lawn Tennis Club Trust* [2012] 1 W.L.R. 3487.

25 *Leahy v Attorney General* [1959] A.C. 457 at 478–479 and 484–485 NSW; *Bacon v Pianta* (1966) 114 C.L.R. 634 (The Communist Party of Australia for its sole use and benefit): in *Re Price* [1943] Ch. 422 this rule was, it seems, overlooked, see *Re Lipinski* [1976] Ch. 235 at 245–347; *Re Grant* [1980] 1 W.L.R. 360 at 369–370. For the ambit of the beneficiary principle, see para.10-027.

26 *Carne v Long* (1860) 2 De G.F. & J. 75 (devise of house to subscription library trustees to hold for ever for use of the library: held void but different "if the devise had been in favour of the existing members of the society, and they had been at liberty to dispose of the property as they might think fit"); *Morrow v M'Conville* (1883) 11 L.R.Ir. 236; *Re Amos* [1891] 3 Ch. 159; *Re Swain* (1908) 99 L.T. 604; *Re Topham* [1938] 1 A11 E.R. 181; *Re Macaulay's Estate* [1943] Ch. 435n (gift to Folkestone Lodge of Theosophical Society for maintenance and improvement of Lodge: void as endowment intended); *Leahy v Attorney General* [1959] A.C. 457 NSW: cf. *Re Lipinski* [1976] Ch. 235 (association free to spend capital: no endowment intended).

27 *Carne v Long* (1860) 2 De G.F. & J. 75.





*Association not in existence*

If the gift to an unincorporated association falls within the second category, the **10-007** gift fails if the association is dissolved before the testator's death.[28] A gift to a non-existent association fails[29] unless, on its true construction, it is a gift for a purpose which is charitable.[30]

## 3. POLITICAL PARTIES

Section 54 of the Political Parties, Elections and Referendums Act 2000 forbids **10-008** a registered political party from accepting a donation from an individual who is not registered in an electoral register. In *Re Robson*,[31] it was held that this prohibited the bequest of residue from a testator who had lived in Spain for more than five years before his death, and that a party could not even assign its right to a third party by way of variation without offending against this rule. Accordingly, the residuary estate passed on intestacy.

## 4. ALIENS AND FOREIGN RESIDENTS

By the Status of Aliens Act 1914 s.17[32] real and personal property of every **10-009** description, except a British ship, may be taken, acquired, held or disposed of by an alien in the same manner as by a British subject. In wartime however no money can be paid to or for the benefit of an alien enemy.[33]

## 5. MURDER OR MANSLAUGHTER BY BENEFICIARY

**The forfeiture rule**

The rule of public policy which provides that someone who kills another is **10-010** debarred from taking any benefit under the will or intestacy of his victim, and the court's power under the Forfeiture Act 1982 to modify the effect of the rule in some instances, where the justice of the case so requires, is not directly relevant to the law of wills, as opposed to the administration of estates generally. Readers should refer to the detailed treatment of the topic in Williams, Mortimer & Sunnucks.[34] For deaths on or after 1 February 2012, the rule under s.33A of the Wills Act 1837 is that where the forfeiture rule applies, the killer is deemed to have predeceased the testator, and the will is construed accordingly unless a contrary intention appears by the will. The same rule applies to those who choose to disclaim a gift under the will.

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28 *Re Recher* [1972] Ch. 526.

29 *Re Thackrah* [1939] 2 A11 E.R. 4 (the Oxford Group); *Radmanovich v Nedeljkovic* (2001) 3 I.T.E.L.R. 802.

30 See para.25-056.

31 *Re Robson* [2014] EWHC 295 (Ch); [2014] Ch. 470.

32 As amended by British Nationality Act 1948 s.34(3). As to aircraft registered in the UK see *Halsbury's Laws*, 4th edn, Vol.4, para.959.

33 Trading with the Enemy Act 1939 s.1(2)(a)(ii).

34 Williams, Mortimer & Sunnucks, *Executors, Administrators and Probate* (21st edn), paras 68-02 and following; see also Williams, "How Does the Common Law Fofeiture Rule Work?' in Häcker and Mitchell, *Current Issues in Succession Law* (Bloomsbury, 2016).

## 6. ATTESTING WITNESSES AND THEIR SPOUSES

### Wills Act 1837 s.15[35]

**10-011** By s.15 of the Wills Act 1837 any beneficial gift or appointment by will to an attesting witness[36] or to the husband or wife,[37] or civil partner,[38] of an attesting witness is void. Advisors who fail to advise their testator client of the effects of s.15 may be liable in negligence to the disappointed beneficiary.[39]

The subsequent marriage or civil partnership of an attesting witness to a beneficiary does not avoid the gift: s.15 only disqualifies a beneficiary who is the spouse of an attesting witness when the will is executed.[40] Such supervening invalidity would not advance the policy of s.15, which is for the protection of testators.[41]

There is no rule analogous to s.15 invalidating a gift to a beneficiary who has signed a will on behalf of the testator at the testator's direction in accordance with s.9(a) of the Wills Act 1837.[42] The Court of Appeal has however expressed the view that "it is plainly undesirable that beneficiaries should be permitted to execute a will in their own favour in any capacity, and that Parliament should consider changing the law to ensure that this cannot happen in future",[43] and the Law Commission, in their Consultation Paper 231, *Making a will*, have proposed reform accordingly.

### Codicils

**10-012** Only a gift by the same instrument as is attested by the legatee is rendered void. A gift under a will to the attesting witness of a codicil is good,[44] unless of course he also attested the will.[45] A gift by will to an attesting witness thereof is good if the will is afterwards republished by a codicil attested by other witnesses,[46] and is not avoided by the fact that the legatee subsequently attests a second codicil.[47] But where a contingent gift by will is made absolute by a codicil which the legatee attests, and the legatee could only have taken under the codicil, the gift is void.[48]

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35 See generally Yale, (1984) 100 L.Q.R. 453 and, for Commonwealth case law, Hardingham, *Wills and Intestacy in Austalia and New Zealand* (2nd edn), pp.212 and following; *Feeney's Canadian Law of Wills* (4th edn).

36 Wills Act 1837 s.15 refers to any person who "shall attest the execution of any will"; under the new s.9 a witness who acknowledges his previous signature is not required to attest, see para.3-026: some doubt arises whether s.15 applies to such a witness or his or her spouse. See *Osborne v Follett Stock* [2017] EWHC 1811 (QB).

37 By para.1 of Sch.3 to the Marriage (Same Sex Couples) Act 2013, all references to marriage are to include references to a married same sex couple.

38 Civil Partnership Act 2004 Sch.4 para.3.

39 See para.44-021.

40 *Thorpe v Bestwick* (1881) 6 Q.B.D. 311.

41 *Re Royce* [1959] Ch. 626 at 633, 637.

42 *Barrett v Bem* [2011] EWHC 1247 (Ch); [2012] Ch. 573 at [99], per Vos J. The decision was reversed on appeal, [2012] EWCA Civ 52, but not on this ground.

43 *Barrett v Bem* [2012] EWCA Civ 52; [2012] Ch. 573 at [144].

44 *Gurney v Gurney* (1855) 3 Dr. 208.

45 *Re Marcus* (1887) 57 L.T. 399. Sed quaere if the will was invalid, prior to being republished by the codicil.

46 *Anderson v Anderson* (1872) 13 Eq. 381; *Re Silverston* [1949] Ch. 270.

47 *Re Trotter* [1899] 1 Ch. 764.

48 *Gaskin v Rogers* (1866) 2 Eq. 284.





Each witness attests only the instrument to which he puts his name. Hence if the will consists of separate sheets of paper separately attested, a legatee under one of them does not forfeit his legacy if he attests one of the others.[49]

### Remainders and substitutionary gifts

**10-013** If there are remainders and substitutionary gifts after the gift which is invalidated by s.15 of the Wills Act 1837, the correct procedure is to construe the will, and ascertain what interests are thereby given. Section 15 is then applied to the offending gift. Thus, if the gift is to A for life with remainder to his children, and A attests the will, if there are children living at the death of the testator, the gift to them is accelerated.[50] If there are no children living at the death of the testator, an ultimate remainder in default of children is not accelerated, and there is an intestacy during A's life or until children are born.[51] The effect of the section is to cause the will to be treated as if it did not contain the disposition; it can only be looked at to ascertain the nature of other gifts in the will, or in what event other gifts are to take effect.[52] Where, therefore, a testator devised property to his daughter or her children (and the gift to the daughter was void) it was held that the children could take nothing.[53] The daughter survived, and thus was on the true construction of the will entitled to take; s.15 prevented her from doing so, but the substitutional gift was ineffective. Similarly, where a testator gave 2 per cent of his residuary estate to the spouse of a witness, with a gift over "if the trusts of any of the shares … of my Residuary Estate shall fail", it was held that the 2 per cent was undisposed of, and did not pass under the gift over.[54] The original gift was utterly null and void; that being so, there was no trust of the residuary estate which "failed".

### Superfluous witnesses

**10-014** The disability of an attesting witness and his or her spouse to benefit was not, under the 1837 Act, affected merely because there were sufficient witnesses without the attesting witness.[55] It is a question of fact whether a person whose signature appears on the will signed as a witness or in some other capacity,[56] but there is a strong presumption that a person signing at the end of the document does so as a witness.[57] The strength of that presumption varies according to the position of the signature and the order of signing, but the onus remains on the signatory who seeks to take a benefit to establish that he did not sign as a witness. The court cannot apply the maxim *omnia praesumuntur rite esse acta* (everything is assumed to have been done correctly) on this point, nor is it a material consideration that the effect of applying s.15 will be to destroy all the beneficial gifts in the will.

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49 *Re Craven* (1908) 99 L.T. 390.

50 *Jull v Jacobs* (1876) 3 Ch.D. 703; *Re Clark* (1885) 31 Ch.D. 72.

51 *Re Townsend* (1886) 34 Ch.D. 357. For the doctrine of acceleration see para.26-026; and *Re Taylor* [1957] 1 W.L.R. 1043.

52 *Re Doland* [1970] Ch. 267 at 276; *Westland v Lilis* [2003] EWHC 1669.

53 *Aplin v Stone* [1904] 1 Ch. 543.

54 *Re Doland* [1970] Ch. 267.

55 *Wigan v Rowland* (1853) 11 Hare 157; *Randfield v Randfield* (1862) 11 W.R. 847; *Cozens v Crout* (1873) 42 L.J.Ch. 840; *Re Bravda* [1968] 1 W.L.R. 479.

56 *Re Sharman* (1869) L.R. 1 P. & D. 661; *Re Murphy* (1874) I.R. 8 Eq. 300; *Re Smith* (1889) 15 P.D. 2; *Kitcat v King* [1930] P. 266; but see *Re Bravda* [1968] 1 W.L.R. 479 at 488, 491 and 493.

57 *Re Bravda* [1968] 1 W.L.R. 479.

In the case of persons dying after 29 May 1968 (whenever the will was executed), the application of the rule is restricted by the Wills Act 1968.[58] Section 1(1) of the Act provides that:

> "... the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in [s.15 of the Wills Act 1837] shall be disregarded if the will is duly executed without his attestation and without that of any other such person".

Thus if A, B, C and D witness the testator's signature, gifts to A and B (or the spouse of each of them) are saved by the Act provided that neither C nor D (nor either of their spouses) is given any benefit under the will. There must be two witnesses neither of whom (and neither of whose spouses) are given any benefit by the will. If that requirement is not fulfilled, a person signing the will (and his or her spouse) can only take a benefit if the court decides that he did not sign as a witness, but in some other capacity.

**Privileged wills**

**10-015** Section 15 does not apply to a privileged will which by virtue of s.11 does not require attestation.[59]

**Power to charge profit costs—at common law**

**10-016** Before 1 February 2001, where a solicitor-executor (or his spouse or civil partner) attested a will, a clause empowering him to charge profit costs was avoided by s.15.[60] But if a solicitor witnessed a will which establishes a trust under which the trustees could charge for their services, and after the testator's death the solicitor was appointed a trustee, he was not debarred from charging his profit costs.[61]

**Power to charge profit costs—deaths after 31 January 2001**

**10-017** Section 28 of the Trustee Act 2000 ended the previous incapacity of a solicitor or other professional executor to charge. If (a) there is a provision in the will entitling him to receive payment out of the estate in respect of services provided by him on behalf of the trust; (b) he is acting in a professional capacity; and (c) the application of the section is not inconsistent with the terms of the trust instrument, then he is to be treated as entitled to receive payment in respect of services which are capable of being provided by a lay trustee and any payments to which he is

[58] Inspired by the decision in *Re Bravda* [1968] 1 W.L.R. 479, in which the effects of the rule were criticised by all three members of the Court of Appeal. The judgment in that case was delivered on 2 February 1968, and the Act received the Royal Assent on 30 May 1968. It was a private member's measure.

[59] *Re Limond* [1915] 2 Ch. 240; and see *Re Priest* [1944] Ch. 58. For privileged wills generally, see para.3-040.

[60] *Re Barber* (1886) 31 Ch.D. 665; see 34 Ch.D. 77; *Re Pooley* (1888) 40 Ch.D. 1; *Re Trotter* [1899] 1 Ch. 764.

[61] *Re Royce* [1959] Ch. 626.





entitled in respect of services are to be treated as remuneration for services and not as a gift for the purposes of s.15.[62]

**Trusts**

**10-018** Section 15 of the Wills Act 1837 applies only to render void gifts given beneficially to witnesses. A gift to an attesting witness (or his spouse or civil partner) as trustee is not void.[63] Thus a gift to an attesting witness in her capacity as abbess of a convent was upheld on it appearing that the gift was in trust for the purposes of the convent.[64]

**Secret trusts**

**10-019** Where a legacy is given to a person which in terms is for his own use and benefit, and a secret trust is established in favour of a beneficiary who is an attesting witness (or his spouse), the beneficiary is not disqualified from taking under the secret trust.[65]

**Proposal for reform**

**10-020** The Law Commission has provisionally proposed that this rule be retained, and extended so that gifts to the cohabitants of attesting witnesses would also be void.[66] It also invited views on whether a power to save gifts should be extended.

## 7. FORMER SPOUSE[67] OR CIVIL PARTNER

**10-021** Before 1 January 1983, decrees of divorce or nullity had, as such, no effect on a will.[68] Judicial separation likewise had no effect on a will, although it did in relation to intestacy (if continuing at death).[69] Section 18(2) of the Administration of Justice Act 1982 inserted a s.18A in the Wills Act 1837 (applying to deaths after 31 December 1982) in an attempt to give effect to the likely intention of a divorced testator that a provision in favour of his or her divorced spouse should lapse.

Unfortunately, the decision in *Re Sinclair*[70] showed that this section did not make appropriate provision for the effect of the lapse on the other dispositions in the will.

[62] Trustee Act 2000 s.28(3)(b) has the same effect for the purposes of the order in which the estate is applied in administration: see paras39-023 and following.

[63] *Re Ryder* (1843) Prerog. 2 N.C. 462; *Cresswell v Cresswell* (1868) 6 Eq. 69; *Kelly v Walsh* [1948] I.R. 388.

[64] *Re Ray* [1936] Ch. 520.

[65] *O'Brien v Condon* [1905] 1 Ir. 51; *Re Young* [1951] Ch. 344; not following on this point *Re Fleetwood* (1880) 15 Ch.D. 594, where the question was not fully argued. See also *Sullivan v Sullivan* [1903] 1 Ir. 193, 202.

[66] Law Commission Consultation Paper 231, *Making a Will* (2017), para.5.56.

[67] By para.1 of Sch.3 to the Marriage (Same Sex Couples) Act 2013, all references to marriage in existing legislation are to include references to a married same sex couple (from 13 March 2014).

[68] *Re Boddington* (1884) 22 Ch.D. 597, 25 Ch.D. 685; *N v M* (1885) 1 T.L.R. 523.

[69] See Matrimonial Causes Act 1973 s.18(2) and Sch.1 para.13; Family Law Act 1996 s.21 (not yet in force).

[70] *Re Sinclair* [1985] Ch. 446: see Prime (1986) 49 M.L.R. 108.

### Time limit; and formalities

**23-005** The will may fix a time limit for the exercise of the option. If no time limit is prescribed, the grantee must exercise the option within a reasonable time.[29] The will may require the grantee to exercise the option even before the price has been ascertained[30]: but, unless the will plainly does require this, the court has adopted a construction which does not force the grantee to exercise the option blindly before the price is ascertained and communicated to him.[31]

Whether or not an option will lapse if the grantee fails to exercise it within the time limit is a question of construction of the particular will. Where there is no gift over, no prejudice, and no specified consequences of non-compliance the court is unlikely to find that time is of the essence.[32] Similarly, whether or not the option fails if any other requirement attached to it is likewise not satisfied is also a question of construction.[33]

Where time is of the essence, the court might give the grantee relief if his failure to exercise was due to the fraud or laches of the personal representatives.[34]

The will may make provision for certain formalities as to the way in which the option must be exercised in order for that exercise to be valid. In *Re Phoenix (deceased)*,[35] the testator granted options to each of her sons to enable them to purchase farmland (which each brother separately farmed) from the other. By clause 5.3 of the will, that option was exercisable by serving notice on the trustees (namely, the two sons and a solicitor executor). The only address provided in the will (by clause 1.1) was that of the solicitor. One son exercised his option by personally delivering the notice to the solicitor trustee but did not give separate notice to his brother, who argued that the option was thus invalidly served. The claimant son accepted that as a matter of law service on one trustee was not service on all; but contended that clause 1.1 provided an "address for service" so that his delivery of his notice to that address was in fact service upon his co-trustees. The court emphasised that the exercise of any option must be performed strictly in accordance with its terms[36]; but that the construction of the will which was more consistent with common sense was that the address provided was that for service, and thus that the option had been validly exercised.

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*Re Malpass* [1985] Ch. 42 (at agricultural value determined for probate purposes as agreed with district valuer, who refused to value).

29 *Huckstep v Mathews* (1685) 1 Vern. 362; *Oliver v Oliver* [1958] A.L.R. 609; *Talbot v Talbot* [1968] Ch. 1 at 16; *Re Seldon* (1970) 10 D.L.R. (3d) 306 at 308; *McKay v McSparran* [1974] N.I. 137 at 144 (a reasonable time, say, three months).

30 *Re De Lisle* [1968] 1 W.L.R. 322 at 328.

31 *Lilford (Lord) v Powys Keck (No.1)* (1862) 30 B. 295 (no offer unless price stated); *Austin v Tawney* (1867) L.R. 2 Ch.App. 143; *Talbot v Talbot* [1968] Ch. 1 at 12–13 and 15–16 ("before we buy the pig, take it out of the poke"); *McKay v McSparran* [1974] N.I. 137 at 144.

32 *Re Bowles, Hayward v Jackson* [2003] EWHC 253 (Ch); [2003] Ch. 422 (price to be that agreed with the Capital Taxes Office; no agreement within time limit), disapproving *Re Avard* [1948] Ch. 43.

33 *Re Gray, Allardyce v Roebuck* [2004] EWHC 1538 (Ch); [2005] 1 W.L.R. 815 (acceptance within time, price not paid within time); distinguishing *Brooke v Garrod* (1857) 3 K. & J. 608; 2 De G. & J. 62. See also *Dawson v Dawson* (1837) 8 Sim 346.

34 *Brooke v Garrod* (1857) 3 K. & J. 608 at 613; 2 De G. & J. 62 at 67. For the case law on whether time is of the essence in the performance of a condition to a gift see para.33-011.

35 *Re Phoenix (deceased)* [2020] EWHC 1409 (Ch); [2020] 6 WLUK 229.

36 *Re Phoenix (deceased)* [2020] EWHC 1409 (Ch); [2020] 6 WLUK 229 at [22], applying *Re Gray*.





### Freedom from incumbrances

**23-006** It is largely a question of construction of the will whether under the option the grantee is entitled to a title free from incumbrances (so that a mortgage must be discharged out of the testator's estate)[37] or must take the property subject to existing incumbrances (so that he takes subject to a mortgage).[38] If in the will the testator treated the grantee as a purchaser (it may be, a favoured purchaser), rather than as a beneficiary, the grantee is entitled to a title free from incumbrances.[39] On the other hand, if in the will the testator treated the grantee as a beneficiary, the grantee takes subject to an existing mortgage under s.35 of the Administration of Estates Act 1925, unless the testator has signified a contrary intention.[40] Again, it is probably a question of construction of the will whether the grantee is entitled to investigate the title (so that he may require an abstract of title) or must accept the title without investigation.[41]

### Option following life interest

**23-007** The will may give land to L for life (under a trust of land)[42] and give an option to the grantee to purchase after L's death. If the land is sold before L's death, a question of construction[43] arises whether the option only relates to the land (so that the option fails)[44] or extends to the proceeds of sale of the land (so that the option remains exercisable against the proceeds of sale and the grantee takes these proceeds less the option price).[45] Options to purchase shares in two companies at par value after the death of L as life tenant have been held to be exercisable notwithstanding changes which occurred before L's death: the shares in the first

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37 *Given v Massey* (1892) 31 L.R.Ir. 126; *Re Wilson* [1908] 1 Ch. 839; *Re Fison's W.T.* [1950] Ch. 394.

38 *Waite v Morland* (1866) 14 L.T. 649.

39 *Given v Massey* (1892) 31 L.R. Ir. 126 at 130; *Re Wilson* [1908] Ch. 839 at 844–845; *Re Fison's W.T.* [1950] Ch. 394 at 407 and 414; *Re Eve* [1956] Ch. 479 at 482. cf. the rule governing the incidence of tax, para.23-008.

40 *Re Fison's W.T.* [1950] Ch. 394 at 407. See also *Re Jolley* (1901) 17 T.L.R. 244 (incidence of estate duty): in *Re Fison's W.T.* at 414, Romer J said it was "difficult in the extreme" to reconcile *Re Jolley* with *Given v Massey* (1892) 31 L.R. Ir. 126; and *Re Wilson* [1908] Ch. 839 (see also *Re Lander* [1951] Ch. 546 at 552); but note that in *Re Jolley* the "option" was in a direction to appropriate and the direction in the will as to mortgage debts on specifically given property expressly included property taken under this appropriation.

41 *Brooke v Garrod* (1857) 3 K. & J. 608; 2 De G. & J. 62 (grantee was tenant in common); *Davison and Re Torrens* (1865) 17 Ir.Ch. 7; *McKay v McSparran* [1974] N.I. 136 at 144: see *Given v Massey* (1892) 31 L.R.Ir. 126.

42 See Trusts of Land and Appointment of Trustees Act 1996 s.1. No settlement made after 1996 (save certain settlements derived from pre-existing settlements) is within the Settled Land Act 1925: Trusts of Land and Appointment of Trustees Act 1996 s.2.

43 *Re Armstrong's W.T.* [1943] Ch. 400 at 403.

44 *Re Zerny's W.T.* [1968] Ch. 415 at 424 ("on any sale after the death" of L, grantee to have option). A right of pre-emption has been held to be overridden by the statutory trusts declared by s.35 of the Law of Property Act 1925, which became applicable under the transitional provisions applicable to trusts for beneficiaries in undivided shares, *Re Flint* [1927] 1 Ch. 570 (held also, on construction, right of pre-emption only applied on exercise of power of sale in will): the question whether the person entitled to the right of pre-emption had any right in the proceeds of sale was not considered, *Re Armstrong's W.T.* [1943] Ch. 400 at 402. See Barnsley, para.5-005 and Ch.6; Bodkin, (1944) 8 Conv. (N.S.) 139.

45 *Re Armstrong's W.T.* [1943] Ch. 400 (sale under Settled Land Act power) and see Settled Land Act 1925 s.75(5); *Re Cant's Estate* (1859) 4 De G. & J. 503 (sale on compulsory acquisition): see also *Re Kerry* [1889] W.N. 3 (sale in creditor's administration action).

company were exchanged for shares in another company and the second company was wound up and cash distributed.[46]

Does an option fail if it is made exercisable on the death of the life tenant L by notice given within three months thereafter, and L dies some years before the testator? In *Re Hammersley*,[47] the option was held to fail but the decision may well be wrong in light of other authority. In *Evans v Stratford*,[48] decided a century before, such an option was upheld and the time limit for exercise was held to run from the testator's death. The latter decision has been preferred in New Zealand[49] on grounds that "the fundamental intention was not so much to limit the time within which the option could be exercised but rather to define the point before which it was not to be exercised".[50]

**Incidence of inheritance tax**

**23-008** Subject to any contrary direction in the will, inheritance tax is payable as a testamentary expense if the option property is real or personal estate in the UK[51]; but, if the option property is situated outside the UK, on exercising the option the better view would seem to be that the grantee bears the tax on any beneficial interest he receives under the option, i.e. on any difference between the option price and the higher market value of the property.[52]

## 3. FAILURE OF OPTION

**23-009** Some causes of failure have already been mentioned, such as failure to exercise the option within the time limit applicable. Two further potential causes are (1) perpetuity; and (2) where the property is required in the course of administration.

**Perpetuity**

**23-010** If the testator died before 16 July 1964, an option is void if it may possibly be exercised outside the common law perpetuity period.[53] If the testator died on or after that date, but before 6 April 2010, the Perpetuities and Accumulations Act 1964 applies and the perpetuity period is 21 years.[54] If the testator died after that date, which will clearly apply to the vast majority (if not all) options now, the effect of the

[46] *Re Fison's W.T.* [1950] Ch. 394: cf. *Smith v Cotton's Trustees* [1956] S.C. 338 (right of pre-emption).

[47] *Re Hammersley* [1965] Ch. 481: see L.H. Hoffmann, (1965) 81 L.Q.R. 344; J.T. Farrand, (1965) 29 Conv. (N.S.) 237.

[48] *Evans v Stratford* (1864) 2 H. & M. 142: *Evans v Stratford* was not mentioned in *Re Hammersley*. See *Halsbury's Laws* (5th edn), Vol.102, para.126, fn.1, "[i]f time is directed to run from an event actually happening in the testator's lifetime, but assumed by the testator to happen after his death, the direction may be construed so that time will run from the death of the testator".

[49] *Re Stewart* [1976] 1 N.Z.L.R. 661 (option exercisable by X within three months of attaining 21; X was 25 at T's death: held exercisable within three months of T's death).

[50] *Re Stewart* [1976] 1 N.Z.L.R. 661 at 664 per Wild C.J.

[51] Inheritance Tax Act 1984 s.211: see *Re Clemow* [1900] 2 Ch. 182.

[52] *Re Lander* [1951] Ch. 546 (incidence of estate duty under the Finance Act 1894): cf. *Re Jolley* (1901) 17 T.L.R. 244; *Re Cockerill* [1929] 2 Ch. 131 at 134. See also the discussion in *Dymonds Capital Taxes*, paras 27.730 and following.

[53] See para.35-005. See also *Re Seldon* (1970) 10 D.L.R. (3d) 306 (grantee must exercise within reasonable time after annuitant's death: valid); *Re Gibson* [1952] N.Z.L.R. 875.

[54] See para.35-058.





Perpetuities and Accumulations Act 2009 is that the option is not subject to any perpetuity period.[55]

**Option property required for administration**

**23-011** It has been said that an option is destroyed by operation of law if the option property is required in the course of administration for the payment of the testator's debts and expenses, because the option price, with the other available assets, is insufficient for this purpose.[56]

[55] See paras 35-060 and following.

[56] *Re Eve* [1956] Ch. 479 at 483: but cf. *Re Kerry* [1889] W.N. 3.

*Gift to creditor*

**26-006** A gift to a creditor of the amount of the debt, if the debt is time-barred by statute, or has been discharged by a composition deed, is mere bounty. It is a legacy, and has no priority over other legacies.[19] It would seem that in an ordinary case such a gift would be subject to lapse, like any other gift. However, it has been suggested that if upon the construction of the will it appears that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what they regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in the testator's lifetime; and therefore death in such a case does not cause a lapse.[20] This doctrine may possibly be too widely stated, if it is intended to apply to anything but debts. The cases go no further than this, that the testator may express the intention that a direction to pay certain debts, which have been released or discharged, is to include the debts owing to persons who predecease the testator. For instance, the testator may direct to be handed over to the trustee in bankruptcy, which occurred years before the date of the will, sufficient money as will enable all the debts proved in the bankruptcy to be paid in full,[21] or the testator may direct a fund to be divided between such of creditors to a firm as are contained in a schedule according to the amount of their debts where the schedule contained debts due to firms and to the executors of different persons,[22] or upon the construction of the will it may be that the estates of deceased creditors are intended to be benefited.[23]

*Effect of a declaration against lapse*

**26-007** A declaration that a legacy shall not lapse is not sufficient to prevent lapse, unless it is clear that it is to go to the estate of the legatee in the event of their death.[24] A gift to A and their executors or administrators with a direction that the legacy is not to lapse has been held sufficient, it being clear that the gift to A's estate was intended to be substituted for the gift to A in the events which had happened.[25] On the other hand, in the case of a gift in similar terms, a direction that the legacy was to vest from the date of the will was held insufficient to prevent lapse.[26]

A direct gift to A with a substitutional gift to A's executors in case he predeceases the testator would not lapse if A predeceased the testator.[27] But if the beneficiary entitled under A's will or intestacy also predeceased the testator there would be a lapse.[28] Similarly, where a testator gave their residue to A and in case of A's decease to their executors, but A predeceased the testator and left their residuary estate to

19 *Coppin v Coppin* (1725) 2 P. Wms. 291 at 296; *Turner v Martin* (1857) 7 D.M. & G. 429.
20 *Stevens v King* [1904] 2 Ch. 30 at 33; see *Re Leach* [1948] Ch. 232.
21 *Re Sowerby's Trust* (1856) 2 K. & J. 630; *Turner v Martin* (1857) 7 D.M. & G. 429.
22 *Williamson v Naylor* (1838) 3 Y. & C.Ex. 208.
23 *Philips v Philips* (1844) 3 Ha. 281.
24 *Wilder's Trusts* (1859) 27 B. 418; *Re Ladd* [1932] 2 Ch. 219.
25 *Sibley v Cook* (1747) 2 Atk. 572.
26 *Browne v Hope* (1872) 14 Eq. 343. cf. *Re Featherstone's Trusts* (1882) 22 Ch.D. 111.
27 *Long v Watkinson* (1853) 17 B. 471; see *Maxwell v Maxwell* (1868) I.R. 2 Eq. 478.
28 *Re Cousen's W.T.* [1937] Ch. 381.





the testator, it was held that the moiety given to A lapsed despite the words of the will, to prevent a circularity.[29]

*Persons taking in remainder*

**26-008** The interests of those taking in remainder do not fail by the death of the tenant for life before the testator. But if an absolute interest is given and the testator then proceeds to settle the share, the question is whether what is settled is a share to which the legatee has become entitled by surviving the testator,[30] or whether the settlement is of the share which the legatee would have taken if he or she had survived.[31] In the former case the gift fails if the legatee dies before the testator, in the latter case it does not.

Where the testatrix gave an annuity and directed the appropriation of a capital sum the income of which should be sufficient to meet it, with recourse to capital if the sum was insufficient, and subject thereto gave the appropriated sum to a charity, and the annuitant predeceased her, it was held that the gift to the charity took effect. Some weight was attached to the fact that the testatrix confirmed her will by codicil after the death of the annuitant; but in principle the decision should be the same without a confirming codicil.[32]

*Gift in remainder to A or his executors*

**26-009** It is clear that a gift to A or A's executors for the benefit of A's estate, after a life interest, or where the payment is postponed, will fail by the death of A before the testator.[33] This rule, however, does not apply where the gift is to A or A's heirs after a life interest, where heirs means next-of-kin, who take beneficially and not as mere representatives.[34]

*Charges*

**26-010** If there is a gift to A charged with a sum payable to B, the legacy to B does not lapse by the death of A before the testator.[35]

Where land was devised to a creditor on condition that he should release his debt, and the testator declared that the debt should not be paid out of residue, the debt was held charged on the land, though the creditor predeceased the testator.[36]

29 *Re Valdez's Trusts* (1888) 40 Ch.D. 159.
30 *Stewart v Jones* (1859) 3 De G. & J. 532; *Re Roberts* (1885) 27 Ch.D. 346; 30 Ch.D. 234; *Re Taylor* [1931] 2 Ch. 237.
31 *Re Speakman* (1876) 4 Ch.D. 620; *Re Pinhorne* [1894] 2 Ch. 276; *Re Powell* [1900] 2 Ch. 525; *Re Whitmore* [1902] 2 Ch. 66; *Re Harward* [1938] Ch. 632.
32 *Re Clarke* [1942] Ch. 434.
33 *Bone v Cook* (1824) M'Clel. 168; 13 Pr. 332; *Corbyn v French* (1799) 4 Ves. 418; *Tidwell v Ariel* (1818) 3 Mad. 403, where "heirs" was read as "executors and administrators"; *Leach v Leach* (1866) 35 B. 185.
34 *Re Porter's Trusts* (1857) 4 K. & J. 188.
35 *Wigg v Wigg* (1739) 1 Atk. 382; *Hills v Wirley* (1743) 2 Atk. 605; *Oke v Heath* (1748) 1 Ves. Sen. 134.
36 *Re Kirk* (1882) 21 Ch.D. 431.

*Secret trusts*

**26-011** There is no lapse if a beneficiary under a secret trust predeceases the testator, and the property goes to the beneficiary's personal representatives.[37] It appears to be an open question whether the gift would lapse if the trustee predeceased the testator.[38]

*Wills Act 1837 s.32: estates tail*

**26-012** By s.32 of the Wills Act 1837 a devise of an estate tail would not lapse if there were at the death of the testator any issue inheritable under the entail. In the case of wills coming into operation between 1925 and 1997, this section will apply to entailed interests in personal property.[39] It has not been possible to create entailed interests in real or personal property since 1 January 1997.[40]

### (b) Gifts of shares to a class do not lapse

**26-013** In the case of gifts to a class as tenants in common, as opposed to a gift to named persons as tenants in common, the shares of members of the class dying before the testator do not lapse but go to the other members of the class.[41] It is therefore important to distinguish a class gift from a gift of shares.

*Class gifts distinguished*

**26-014** Prima facie a class gift is a gift to a class of persons who are included and comprehended under some general description and bear a certain relation to the testator or to someone else.[42]

A direction that the testator's estate should be divided into as many shares as he should have daughters surviving him was held to be a gift to a class.[43] A gift of residue to several persons and to A if living, or to several persons and to such of the children of A as are living at the date of the will, is also a gift to a class and does not lapse as to the share of A or the children of A, if A is dead or there are no children living at the date of the will.[44] A gift to "my executors herein-named" has been held a gift to a class, the gift being attached to the office, and therefore passing wholly to those who survive to perform the office.[45] But this is not the case if the gift, though the donees happen to be executors, is not given to them in respect of their office.[46]

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37 *Re Gardner (No.2)* [1923] 2 Ch. 230. See (1947) 12 Conv. (N.S.) 31–32, and paras 5-029—5-030.
38 See, on the one hand, *Re Maddock* [1902] 2 Ch. 220 at 231; and on the other hand, *Blackwell v Blackwell* [1929] A.C. 318 at 328. See also (1947) 12 Conv. (N.S.) 32–33. The general rule is that a trust will not fail for want of a trustee, but without the gift to the trustee there is no trust property.
39 Law of Property Act 1925 s.130(1)
40 Trusts of Land and Appointment of Trustees Act 1996 Sch.1 para.5.
41 For the effect of a class gift to the testator's issue see para.26-021.
42 *Kingsbury v Walter* [1901] A.C. 187 at 192.
43 *Re Dunster* [1909] 1 Ch. 103.
44 *Re Hornby* (1859) 7 W.R. 729; *Re Spiller* (1881) 18 Ch.D. 614; see *Saunders v Ashford* (1860) 28 B. 609.
45 *Knight v Gould* (1833) 2 M. & K. 295.
46 *Barber v Barber* (1838) 3 M. & Cr. 688; *Hoare v Osborne* (1864) 12 W.R. 397.





It may be a class even though some of the individuals of the class are named. Thus a gift to "my children, including W", is a gift to a class.[47] So are gifts to four named daughters and all after-born daughters, and to five named children and such after-born children as shall attain 21 or marry.[48] So is a gift to A, B, C and D or such of them as shall attain 21 and if more than one in equal shares, where the legatees were half-nephews of the testator.[49] There may also be a composite class, as, for instance, the children of A and the children of B. On the other hand, a gift to A and the children of B is prima facie not a gift to a class[50] unless the context shows that the testator intended a gift in such a form to be a gift to a class. This is the case, if A is shown to stand in the same relation to the testator as the children of B.[51] It is also the case, where the gift is "to A and the children of my sister B who attain twenty-one", where A was a niece who had nearly attained 21.[52] But the gift will not be a gift to a class if some condition is attached to the children of B which does not attach to A. For instance, if the gift is to the children of B living at the death of the tenant for life and A.[53]

It is immaterial that the class may be so determined as to be incapable of increase; as, for instance, if the class is "my nephew and nieces living at the time of my husband's decease", as tenants in common.[54] No person incapacitated from taking at the death of the testator is looked upon as a member of the class. Thus, the share of a member of the class incapacitated from taking because he witnessed the will,[55] or unlawfully killed the testator,[56] does not lapse, but goes to the other members.

But a gift of aliquot shares to several named persons as tenants in common is not a gift to a class, with the result that the shares of any dying before the testator lapse.[57] Nor is a gift to all the persons "before mentioned", the persons having been previously named, a gift to a class.[58] A gift to "the five daughters" of A, or to "my nine children", or to "my said three sisters", is not a gift to a class.[59] Nor is the gift to a class, the members of which are then named.[60] A gift to "my wife's brother and sister and my brothers and sister equally", when the testator had at the date of the

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47 *Shaw v MacMahon* (1843) 4 D. & War. 431.
48 *Re Stanhope's Trusts* (1859) 27 B. 201; *Re Jackson* (1883) 25 Ch.D. 162.
49 *Re Maynard* [1930] W.N. 127.
50 *Re Ann Wood's Will* (1862) 31 B. 323; *Re Chaplin's Trusts* (1863) 33 L.J. Ch. 183; *Re Allen* (1881) 44 L.T. 240; *Re Venn* [1904] 2 Ch. 52; *Clark v Phillips* (1853) 17 Jur. 886.
51 *Aspinall v Duckworth* (1866) 35 B. 307.
52 *Kingsbury v Walter* [1901] A.C. 187.
53 *Drakeford v Drakeford* (1863) 33 B. 43; *McKay v McKay* [1900] 1 Ir. 213 is not consistent with this principle.
54 *Dimond v Bostock* (1875) 10 Ch. 358; *Lee v Pain* (1845) 4 Ha. 201 at 250; *Leigh v Leigh* (1854) 17 B. 605.
55 *Young v Davies* (1863) 2 Dr. & Sm. 167; *Fell v Biddulph* (1875) L.R. 10 C.P. 701; *Re Colman and Jarrom* (1876) 4 Ch.D. 165.
56 *Re Peacock* [1957] Ch. 310.
57 *Cresswell v Cheslyn* (1762) 2 Ed. 123.
58 *Re Gibson* (1861) 2 J. & H. 656.
59 *Re Smith's Trusts* (1878) 9 Ch.D. 117; *Re Stansfield* (1880) 15 Ch.D. 84; *Orford v Orford* [1903] 1 I.R. 121.
60 *Bain v Lescher* (1840) 11 Sim. 397; *Re Bentley* (1914) 110 L.T. 623; *Re Selby* [1952] V.L.R. 273 (approving the text in this paragraph); *Re Ramadge* [1969] N.I. 71 (naming a pointer, but not conclusive); *Re Smith* [2018] NSWSC 97.

will three brothers and one sister, was held a *designatio personarum*,[61] and the shares of two brothers who died before the testator lapsed.[62]

*Operation of class gifts*

**26-015** When there is a gift to a class, the revocation of the gift to one of the members of the class does not cause a lapse, but the whole goes to the other members of the class.[63] If there is a gift to several named persons as tenants in common, and the gift to one of them is revoked by codicil, there is a lapse of the gift of that share,[64] unless there is something in the codicil which gives the revoked share to the other named objects.[65] A mere confirmation of the will by the codicil is insufficient for this purpose.[66] It appears to be otherwise if the gift is to such of several named persons as survive the testator or the tenant for life.[67]

A gift to the children of A as tenants in common, to be vested at 21, is in effect a gift to the children who attain 21.[68]

A direction that the shares of any members of the class who die before the testator leaving issue shall not lapse will not have the effect of causing the shares of those who die before the testator without issue to lapse.[69]

This doctrine does not apply to cases where property is appointed under a power to objects and non-objects. In such cases, the objects of the power only take the shares they would have taken if the whole appointment had been valid, and the rest goes as in default.[70] But where under a power property is appointed by will to objects of the power, and by a codicil, which does not purport to revoke the will, part of the same property is appointed to non-objects, the original appointment takes effect over the whole property.[71]

**26-016** *Practice Note: Draftsmen can avoid unwanted lapse of shares to named persons by making the gift "to such of the following as survive me and if more than one in equal shares", or by deploying a cross-accruer clause.*

### (c) Wills Act 1837 s.33: Gifts to testator's issue

**26-017** Section 19 of the Administration of Justice Act 1982 substituted a new s.33 in place of the original s.33 of the Wills Act 1837. The new s.33 applies if the testator dies after 31 December 1982.[72] The original s.33 (together with s.15 of the Family Law Reform Act 1969) continues to apply if the testator dies before 1 January 1983.[73]

61 A "designation of persons", the equivalent of naming them.
62 *Havergal v Harrison* (1843) 7 B. 49.
63 *Shaw v MacMahon* (1843) 4 D. & War. 431; *McKay v McKay* [1900[ 1 Ir. 213.
64 *Sykes v Sykes* (1868) 3 Ch.App. 301; *Re Forrest* [1931] 1 Ch. 162; *Re Midgley* [1955] Ch. 576.
65 *Re Wilkins* [1920] 2 Ch. 63.
66 *Re Wilkins* [1920] 2 Ch. 63; *Re Forrest* [1931] 1 Ch. 162; not following *Re Whiting* [1913] 2 Ch. 1.
67 *Re Donaldson* [1915] 1 I.R. 63; *Re Woods* [1931] 2 Ch. 138 (a group of persons); see *Re Peacock* [1957] Ch. 310; cf. *Re Midgley* [1955] Ch. 576.
68 *Re Colley's Trusts* (1866) 1 Eq. 496.
69 *Aspinall v Duckworth* (1866) 35 B. 307.
70 *Harvey v Stracey* (1852) 1 Dr. 73; *Re Farncombe's Trusts* (1878) 9 Ch.D. 652; *Re Witty* [1913] 2 Ch. 666.
71 *Duguid v Fraser* (1886) 31 Ch.D. 449; *Re Well's Trusts* (1889) 42 Ch.D. 646.
72 Administration of Justice Act 1982 s.76(11).
73 Administration of Justice Act 1982 ss.73(6) and 75(1) and Sch.9.





Section 33(1) applies to prevent lapse of gifts to the issue of the testator by passing them to the beneficiary's issue. Section 33(2) contains equivalent provisions applying to a class gift to the testator's issue.

By the original s.33 of the Wills Act, a gift of real or personal property to a child, or other issue of the testator, did not lapse if any issue of the devisee or legatee are living at the death of the testator, but took effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appeared by the will. The effect of the section accordingly was that, if the requirements of the section were satisfied, the testator's gift to the intended beneficiary did not lapse, but took effect as if the beneficiary had died immediately after the testator. Thus the subject matter of the gift passed to the persons beneficially entitled under the intended beneficiary's will or intestacy.[74] Those persons might not, of course, have been the issue of the objects of the original gift.

The reader is referred to previous editions of this work for a more detailed treatment of the original s.33.

The new s.33(1) applies, unless a contrary intention appears by the will: **26-018**

> "where (a) a will contains a devise or bequest to a child or remoter descendant of the testator; and (b) the intended beneficiary dies before the testator, leaving issue; and (c) issue of the intended beneficiary are living at the testator's death".

The section applies though the intended beneficiary B is already dead at the date of T's will.[75] As with the original s.33, the new section does not require the same issue left by B at his death to be living at T's death.[76] Section 33(4) provides that a person conceived before T's death and born living thereafter is to be taken to have been living at T's death.[77] The new s.33 applies to an appointment by will under a general power[78] but not under a special power.[79] It is also not necessary for the gift to lapse entirely before s.33 can apply, so that the section can apply in the case of a class gift where not all members of the class have predeceased T.[80]

If the requirements of the new s.33(1) are satisfied then, unless a contrary intention appears by the will, the devise or bequest takes effect as a devise or bequest to the issue of B, the intended beneficiary, living at the testator's death and B's issue take through all degrees per stirpes, if more than one in equal shares, but so that no issue shall take whose parent is living at the testator's death and so capable of taking.[81] Thus the new s.33 operates in the same way as express substitutional gifts in a will commonly operate, benefiting B's issue and (unlike the original s.33) not benefiting B's estate.

74 *Johnson v Johnson* (1843) 3 Hare. 157; *Parker, In the Goods of* (1860) 1 Sw. & Tr. 523; *Re Mason's Will* (1865) 34 B. 494; *Eager v Furnivall* (1881) 17 Ch.D. 115 (intestacy).
75 See *Wisden v Wisden* (1854) 2 Sm. & G. 396.
76 See *Parker, In the Goods of* (1860) 1 Sw. & Tr. 523.
77 Probably this was not so under the original s.33.
78 *Eccles v Cheyne* (1856) 2 K. & J. 676.
79 *Holyland v Lewin* (1883) 26 Ch.D. 266.
80 *Hives v Machin* [2017] EWHC 1414 (Ch); [2017] W.T.L.R. 983 at [23].
81 Wills Act 1837 s.33(1) and (3): again illegitimacy is disregarded (s.33(4)(a)) and a person conceived before and born living after the testator's death is taken to have been living at the testator's death (s.33(4)(b)). If the gift to B is contingent, query whether the issue take subject to the same contingency. For deaths on or after 1 February 2011 this rule is made subject to s.33A of the Wills Act 1837, which deems those who disclaim or forfeit their interest to have predeceased the testator, see para.26-005.

Unlike the original s.33, the new s.33(1) does not impose the additional requirement that the gift to B is for an interest not determinable at or before B's death.[82] Owing to this additional requirement, the original s.33 did not apply to a gift to B contingent on attaining a specified age if B died before the contingency happened[83] nor did the original s.33 apply to a gift to B and C as joint tenants.[84] It is uncertain whether the new s.33 applies to such gifts.[85] The answer may turn on whether a contrary intention appears by the will.

**26-019** As to whether a contrary intention is shown, it is not necessary to demonstrate that a conscious decision has been taken to exclude the effect of s.33 or refer to s.33 at all.[86] Rather, the contrary intention will be shown where the language of the will demonstrates that the gift should not take effect as a gift to the living issue of the deceased beneficiary.[87] The mere fact that the application of s.33 will produce a different result to that under the will is plainly not sufficient on its own.[88]

Accordingly, whether a contrary intention has been shown is a question of construction of the language used in the will taking into account all admissible extrinsic evidence. This may be a difficult question, as demonstrated by several recent authorities concerning similar wording. It was held in *Rainbird v Smith*[89] that the words "such of my daughters [who were then named] as shall survive me" and "if more than one in equal shares" were sufficient to exclude the operation of s.33, and were not even sufficiently ambiguous to admit extrinsic evidence under s.21 of the Administration of Justice Act 1982. It was also held in *Rainbird* that extrinsic evidence under that section could in principle be admissible to determine the application of s.33. In this the deputy judge differed from the view expressed in *Hawkins on the Construction of Wills* at 24–12, that the words "appears by the will" exclude extrinsic evidence, holding instead that the will means the will as properly construed, i.e. in the light of admissible evidence.

However, the opposite conclusion was previously reached in *Ling v Ling*,[90] where similar words had been used save that the children were not named and so it was a class gift. The fact that the child had to survive T to take a share gave no indication of a contrary intention in respect of the deceased child's issue for the purposes of s.33.

Most recently, in *Hives v Machin*,[91] it was held that, in the case of a residuary gift to such of T's three sons "who shall be living at the date of my death" where one of the sons predeceased T, a contrary intention had not been shown simply because the two surviving sons would be presumptively entitled to enlarged shares. The natural and ordinary meaning of the language did not demonstrate any such contrary intention and the admissible extrinsic evidence went no further than demonstrating that T wanted her sons to be the primary beneficiaries. This conclusion was ef-

[82] See para.26-018.
[83] *Re Wolson* [1939] Ch. 780.
[84] *Re Butler* [1918] 1 I.R. 394.
[85] See Clark, (1984) 37 Current Legal Problems 115 at 123–124.
[86] *Re Meredith* [1924] 2 Ch. 552 at 556; *Hives v Machin* [2017] EWHC 1414 (Ch); [2017] W.T.L.R. 983 at [25].
[87] *Hives v Machin* [2017] EWHC 1414 (Ch); [2017] W.T.L.R. 983 at [25]; and see *Naylor v Barlow* [2019] EWHC 1565 (Ch)
[88] *Hives v Machin* [2017] EWHC 1414 (Ch); [2017] W.T.L.R. 983 at [25].
[89] *Rainbird v Smith* [2012] EWHC 4276 (Ch); [2013] W.T.L.R. 1609.
[90] *Ling v Ling* [2002] W.T.L.R. 553. And see *Naylor v Barlow* [2019] EWHC 1565 (Ch).
[91] *Hives v Machin* [2017] EWHC 1414 (Ch); [2017] W.T.L.R. 983





fectively identical to that in *Ling*, which had been distinguished in *Rainbird* on grounds that the relevant language and quality of the drafting was different in *Ling*. However, the court in *Hives* rejected the attempt to distinguish *Ling* as unconvincing and held that the essential reason for the different conclusion in *Rainbird* was the direct extrinsic evidence of the testator's intention under s.21 of the Administration of Justice Act 1982.[92] This does represent a more intelligible basis for explaining what would otherwise appear to be a conflicting line of authority. That said, the decisions in *Ling* and *Hives* do not sit entirely comfortably with the principle above that it is not necessary to demonstrate a conscious decision to exclude s.33. That is all the more so where, as in *Rainbird*, it may be possible to achieve the desired outcome by means of rectification.

Some decisions under the original s.33 are or may be relevant when the new section applies: **26-020**

(1) It had not been decided whether the section could apply to save a nomination under s.23 of the Industrial and Provident Societies Act 1965 from lapse.[93]
(2) Where a testator gave his property to his children, by name, who being sons should attain 21, or being daughters should attain that age or marry, and, after directing that the shares of daughters who should attain 21 or marry, and thereby acquire a vested interest, should be settled, gave over the share of any child who failed to acquire a vested interest, the legal personal representative of a son who attained 21 in the testator's lifetime but predeceased him leaving issue was held entitled to his share.[94]
(3) The old section did not apply where A exercised a power of charging in favour of a child, conferred on him by the will of B, and then died in B's lifetime.[95]
(4) Under a clause in a will, similar to the provisions of the original s.33, the property bequeathed did not lapse but passed to the legal personal representative of the donee as part of his personal estate.[96] This was so, though the will contained a direction that the share which the legatee would have taken if surviving the testatrix should devolve to his next-of-kin or legatees.[97] Such a clause would not, however, enlarge a class who took under a gift by the inclusion of a person who predeceases the testator.[98]
(5) Where a testator by a codicil stated that by reason of the death of a son the legacy and share of residue given to such son by his will had lapsed, and with a view to making provision for the children of his son he gave each of them a legacy, his failure to make a further disposition of the son's legacy and share of residue showed an intention to let them lapse, and thereby

[92] *Hives v Machin* [2017] EWHC 1414 (Ch); [2017] W.T.L.R. 983 at [38].
[93] *Re Barnes* [1940] Ch. 267 at 274.
[94] *Re Wilson* (1920) 89 L.J.Ch. 216.
[95] *Griggs v Gibson* (1866) 14 W.R. 538.
[96] *Re Clunies-Ross* (1912) 106 L.T. 96; *Re Greenwood* [1912] 1 Ch. 392.
[97] *Re Morris* (1917) 86 L.J.Ch. 456.
[98] *Re Gresley* [1911] 1 Ch. 358.

*(b) Contrary intention*

**30-066** It was held in *Re Fletcher*[242] that though "children" in an English will (made in 1942) prima facie meant legitimate children and prima facie did not include either illegitimate or adopted children, nevertheless the contrary intention referred to in s.5(2) of the 1926 Act need not appear in the will itself, but might be gathered from the surrounding circumstances known to the testator. Thus, where a testator made a gift to the children of his daughter A, who at the date of the will had adopted children only and was to the testator's knowledge incapable of bearing children, and the testator was shown to be acquainted with the children, it was held that the adopted children took. The case fell within the first exception stated by Lord Cairns in *Hill v Crook*,[243] and it was permissible to extend that exception from illegitimate to adopted children because it was "unthinkable that Parliament intended to place an adopted child in a worse position than an illegitimate child".[244]

In *Re Jebb*[245] the Court of Appeal held that an adopted child could take under T's gift by will (made in 1947) to the "children of B living at my death" because extrinsic evidence showed that at the date of T's will, to T's knowledge, B was aged 47 and had an adopted child, and it was most improbable (though not impossible) that B would marry and have a child of her own. Thus "strong improbability"[246] (arising from the surrounding circumstances at the date of the will) sufficed to establish the contrary intention referred to in s.5(2) of the 1926 Act.

**Will executed after 1949 and before 1 April 1959: death before 1976**

**30-067** The Adoption of Children Act 1949 repealed s.5(2) of the Adoption of Children Act 1926.[247] In its place the 1949 Act laid down new rules which came into force on 1 January 1950[248] and did not apply to wills executed before that date or the intestacy of a person dying before that date.[249] These new rules were re-enacted, first in ss.13 and 14 of the Adoption Act 1950, and later (with one important change) in ss.16 and 17 of the Adoption Act 1958.

*(a) Will executed after adoption*

**30-068** Section 13(2) of the Adoption Act 1950 provided that in any disposition of real or personal property made by a will or codicil which was executed[250] after the date of an adoption order, unless the contrary intention appeared, (a) any reference (express or implied) to the child or children of the adopter should be construed as including a reference to the adopted person; (b) any reference (express or implied) to the child or children of the adopted person's natural parents should be construed as not including a reference to the adopted person; and (c) any reference (express

[242] *Re Fletcher* [1949] Ch. 473: followed in *Re Gilpin* [1954] Ch. 1. See also *Re Jones's W.T.* [1965] Ch. 1124.
[243] *Hill v Crook* (1873) L.R. 6 H.L. 265 at 282–283: see para.30-021.
[244] *Re Fletcher* [1949] Ch. 473 at 481.
[245] *Re Jebb* [1966] Ch. 666. For criticism, see (1966) 82 L.Q.R. 196; and see para.30-025.
[246] *Re Jebb* [1966] Ch. 666 at 672–673, and see at 674 ("complete improbability").
[247] Adoption of Children Act 1949 s.10(5).
[248] Adoption of Children Act 1949 ss.9, 10 and 16(3); Adoption Act 1950 ss.13 and 14.
[249] Adoption of Children Act 1949 s.9(5); Adoption Act 1950 s.46 and Sch.5 para.4: *Re Gilpin* [1954] Ch. 1.
[250] Under the Adoption Act 1950, a will was made when it was executed and not when the testator died: *Re Gilpin* [1954] Ch. 1.





or implied) to a person related to the adopted person in any degree should be construed as a reference to the person who would have been related to him in that degree if he had been the child of the adopter born in lawful wedlock and not the child of any other person.

Section 14(2) provided that a disposition made by will or codicil executed before the date of an adoption order should not be treated as made after that date by reason only that the will or codicil was confirmed by a codicil executed after that date.

The 1949 Act applied to adoption orders made under the Adoption of Children Act 1926, and adoption orders made in Scotland and Northern Ireland.[251]

*(b) Death intestate after adoption*

Section 13(1) provided that where any person died intestate after the making of **30-069** an adoption order in respect of any real or personal property, other than property subject to an entailed interest under a disposition made before the adoption order, that property should devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

*(c) Entail created after adoption*

The 1949 Act did not expressly provide that an adopted child could succeed to **30-070** an entailed interest created by deed or will executed after the date of an adoption order. However, this result appears to follow from the words in brackets in s.13(1). And it is probable that a gift to A and the heirs of his body, or to A in tail, contains an implied reference to children within the meaning of s.13(2).

*(d) Relationship of adopted person to other children of the adopter*

By s.14(1), for the purposes of succession on intestacy and the construction of **30-071** wills, an adopted person adopted by two spouses jointly was deemed to be related to the children or other adopted children of both of them as brother or sister of the whole blood, and an adopted person adopted in any other circumstances was deemed to be related to the children or other adopted children of the adopter as brother or sister of the half-blood. However, unlike the Legitimacy Act 1926, the Adoption of Children Act 1949 made no provision to regulate the relative seniority of an adopted child.

*(e) Exceptions*

The rules of construction contained in s.13(2) applied "unless the contrary inten- **30-072** tion appeared". In *Re Jones's Will Trusts*,[252] Buckley J held that a contrary intention appeared, so that a child adopted by third parties was entitled to take under a gift by will to the children of his natural parent, despite the rule to the contrary in s.16(2)(b) of the Adoption Act 1958 (re-enacting s.13(2)(b) of the Adoption Act 1950). He decided that a contrary intention need not appear on the face of the will but might appear "from any surrounding circumstances which carry conviction to

[251] Adoption Act 1950 ss.13(4) and 46 and Sch.5 para.4. For the effect of an adoption order made in respect of a person who has been previously adopted, see s.14(4).
[252] *Re Jones' Will Trusts* [1965] Ch. 1124 ("a borderline case").

### Special powers

**30-082** The first question to be answered in deciding whether an adopted child takes under an appointment under a special power is whether the child was an object of the power. If not, the adopted child cannot take. The answer depends on the construction of the instrument which created the power, although subject to the impact of the Human Rights Act 1998 and the Convention.[281] If that instrument was executed before 1950, the expression "children or remoter issue" did not prima facie include an adopted child.[282] If that instrument was executed at a later date, it constituted a disposition of property within s.13(2) of the Adoption Act 1950 (if it was executed after 1949), or within s.16(2) of the Adoption Act 1958 (if it executed on or after 1 April 1959).[283] And if that instrument was a deed executed, or the will of a testator who died, on or after 1 January 1976, its construction was governed by Pt IV of the Adoption Act 1976, and is now governed by Ch.4 of the 2002 Act.[284]

The second question to be answered is whether the appointment is in favour of the adopted child. Again, the answer depends on the construction of the appointment. In *Re Brinkley's Will Trusts*,[285] under the 1899 instrument which created the special power, an adopted person was not an object of the power: after the adoption of grandchildren, an appointment in favour of "grandchildren" was made by a will executed in 1951. It was held that the appointment was not a disposition of property within s.13(2) of the Adoption Act 1950 and did not extend to grandchildren by adoption.

### Conflict of laws

**30-083** Unlike the Legitimacy Act 1926, the Adoption Acts 1950 and 1958 contained no provision for recognising and giving effect in England to an adoption effected under a foreign law. The Adoption Acts 1950 and 1958 did recognise adoptions by orders made in Scotland and Northern Ireland.[286] The Adoption Act 1964 extended this to adoptions by orders made in the Isle of Man and the Channel Islands.[287] The Adoption Act 1968 extended this statutory recognition to overseas adoptions as defined by s.4(3) of that Act,[288] but otherwise preserved the common law rules for recognition of an adoption outside Great Britain.[289] The 1976 Act recognised and gave effect in England to adoption orders made in Scotland, Northern Ireland, the Isle of Man and the Channel Islands, overseas adoptions as defined by s.72(2) of that Act, and also a foreign adoption recognised at common law.[290]

The 2002 Act recognises and gives effect to adoption orders made in Scotland,

281 See paras 30-002 and following.
282 *Re Brinkley's W.T.* [1968] Ch. 407 (will in 1899).
283 *Re Brinkley's W.T.* [1968] Ch. 407; *Re Hoff* [1942] Ch. 298.
284 Adoption Act 1976 s.46(1) and Adoption and Children Act 2002 s.73(2), defining "disposition" as including the conferring of a power of appointment and "power of appointment".
285 *Re Brinkley's Will Trusts* [1968] Ch. 407: for the result if the instrument creating the power had been made after 1949 and after the adoption, see at 413.
286 Adoption Act 1958 s.15(5) and Sch.5 para.4(1).
287 Adoption Act 1964 s.1, which applies to deaths on or after 16 July 1964.
288 Adoption (Designation of Overseas Adoptions) Order 1973 (SI 1973/19). See also Dicey & Morris, paras 20R-117 and following. XR; *Cheshire and North on Private International Law* (14th edn), pp.1170 and following.
289 Adoption Act 1968 s.10(2).
290 Adoption Act 1976 ss.38 and 72(2).





Northern Ireland, the Isle of Man and the Channel Islands; adoption orders effected under the law of a Convention country; "overseas adoptions"; and foreign adoptions recognised at common law ("recognised by the law of England and Wales and effected under the law of any other country").[291] The convention referred to is the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993. Overseas adoptions are defined by s.87 of the 2002 Act as adoptions of a description specified in an order made by the Secretary of State, effected under the law of any country or territory outside the British Islands, but not including Convention adoptions. The impact of the Human Rights Act 1998 and the Convention on an adopted child's rights is unaffected by whether the adoption is a foreign adoption.[292]

The requirements for recognition of a foreign adoption at common law are not fully settled.[293]

## 8. CHILDREN BORN AS A RESULT OF ASSISTED REPRODUCTION TECHNIQUES

**30-084** Developments in human fertilisation in the 1980s onwards resulted in Parliament having to promulgate rules for the determination of the parentage of children born as a result of the developing new techniques of assisted reproduction. The parentage of such children born before 4 April 1988 is to be determined by reference to the common law. The statement of the common law position made by the Law Commission in its 1982 Report on Illegitimacy[294] has been judicially approved[295]:

> "A child conceived as a result of artificial insemination of the mother with sperm provided by a third party donor is, as the law now stands, illegitimate. It is immaterial that the mother's husband has consented to the insemination. The status of the child is in law the same as that of a child conceived in adultery. Likewise, the donor, not the mother's husband, is the legal father of an A.I.D. child."

**30-085** Where a child is born on or after 4 April 1988, but before 1 August 1991, as a result of assisted reproduction techniques other than artificial insemination, the common law will similarly apply. There are otherwise three potentially relevant statutes, namely the Family Law Reform Act 1987 (from 4 April 1988 to 31 July 1991),[296] the Human Fertilisation and Embryology Act 1990 (from 1 August 1991 to 5 April 2009)[297] and the Human Fertilisation and Embryology Act 2008 (from 6 April 2009 onwards).[298]

Neither the Family Law Reform Act 1987 nor the Human Fertilisation and Embryology Act 1990, considered below, have retrospective effect in the sense that those Acts do not apply to children born as a result of assisted reproduction techniques, and in particular the determination of parenthood, prior to their respec-

291 Adoption and Children Act 2002 s.87(1).
292 *Re JC Druce Settlement* [2019] EWHC 3701 (Ch) at [28].
293 See Dicey & Morris, paras 20-118 and following, and Supplement; Cheshire & North, pp.1170 and following.
294 Law Com. No.118, para.12(1).
295 *Re M (Child Support Act: Parentage)* [1997] 2 F.L.R. 90 at 92.
296 Family Law Reform Act 1987 s.27(1).
297 Human Fertilisation and Embryology Act 1990 s.49(3) and (4).
298 Human Fertilisation and Embryology Act 2008 s.57(1) and (2).

tive commencement dates as highlighted above.[299] However, s.29(3) of the 1990 Act, which is essentially replicated in the 2008 Act,[300] provides that where the statute applies then "references to any relationship between two people in any enactment, deed or other instrument or document (whenever passed or made) are to be read accordingly". It is clear from this wording that the 1990 Act applies to wills and codicils whenever made and may therefore be relevant in construing wills predating the 1990 Act where assisted reproduction has taken place after its coming into force.[301] The same is true of the 2008 Act.

### Family Law Reform Act 1987

**30-086** By s.27 of the Family Law Reform Act 1987, it was provided that a child born in England and Wales on or after 4 April 1988 as a result of the artificial insemination of a woman who was at the time of the insemination a party to a marriage[302] and who was artificially inseminated with the semen of a person other than her husband, shall be treated in law as the child of the parties to the marriage (and not the child of any other person) unless it is proved that the husband did not consent to his wife's insemination. Thus, the husband of the child's mother is presumed to be the father of the child even though it could be established that he was not genetically related to the child. Where the presumption is rebutted, the sperm donor could still be the legal father of the child. This provision does not have effect in relation to children carried by women as a result of artificial insemination effected on or after 1 August 1991 (the date the Human Fertilisation and Embryology Act 1990 came into force).[303] Nothing in s.27 of the Family Law Reform Act 1987 shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting the right to succeed to any such dignity or title.[304]

### Human Fertilisation and Embryology Act 1990

**30-087** The parentage provisions (ss.27–29) of the Human Fertilisation and Embryology Act 1990 are broader in their effect. They apply in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs or their artificial insemination, on or after 1 August 1991 until 4 April 2009.[305] They dictate the parentage of children for all purposes, including any references to a relationship between two people in any enactment, deed or other instrument or document, whenever passed or made.[306] However, they do not affect succession to any dignity or title of honour: in this respect, there is a similar exclusion to that contained in the Family Law Reform Act 1987.[307]

By s.27 of the 1990 Act, where a woman is carrying or has carried a child as a

[299] *Re M (Child Support Act: Parentage)* [1997] 2 F.L.R. 90.
[300] Human Fertilisation and Embryology Act 2008 s.48(5).
[301] See further in the context of inter vivos settlements, Lewin, paras 7-065 onwards.
[302] Being a marriage which had not at that time been dissolved or annulled. The marriage could even be void, provided that (as was presumed) at the time of insemination both or either of the parties reasonably believed that the marriage was valid: Family Law Reform Act 1987 s.27(2).
[303] Human Fertilisation and Embryology Act 1990 s.49(4). In such a case, the provisions of the Human Fertilisation and Embryology Act 1990 ss.27–29 would apply.
[304] Family Law Reform Act 1987 s.27(3).
[305] Human Fertilisation and Embryology Act 1990 s.49(3).
[306] Human Fertilisation and Embryology Act 1990 s.29(1)–(3).
[307] Human Fertilisation and Embryology Act 1990 s.29(4). For Scotland, see s.29(5).





result of an embryo or sperm and eggs being placed in her, she, and no other woman, is to be treated as the mother of the child. Thus, where an embryo is created by fertilising in vitro an egg collected from another woman with the recipient's partner's (or donated) sperm, and the embryo implanted in the recipient, the latter will be the mother of the resulting child although she is not genetically related to that child. The provision applies whether or not the woman was in the United Kingdom at the time of the treatment in question.[308] It will no longer prevail if the child is the subject of an adoption order,[309] or a parental order pursuant to s.30 of the Human Fertilisation and Embryology Act 1990.[310]

Section 28(2) and (3) determine who will be treated as the father of a child born as a result of assisted reproduction techniques using sperm other than that of the mother's husband or partner. They do not apply to any child who by virtue of the rules of common law is treated as the legitimate child of the parties to a marriage, or to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter(s).[311] Where a man has given consent to the use of his sperm pursuant to para.5 of Sch.3 to the 1990 Act (in other words, he is an anonymous donor of sperm), he is not to be treated as the father of any resulting child.[312] Nor can a man be treated as a father where his sperm has been used posthumously, or an embryo has been created during his lifetime but then used following his death.[313] Section 28 applies whether or not the woman was being treated in the UK, although the reference to licensed treatment services in s.28(3) has been held to limit the application of that provision.[314]

**30-088** By s.28(2),[315] the husband of a woman in whom an embryo or sperm and eggs are placed or who is artificially inseminated shall be treated as the father of any resulting child (although his sperm has not been used) unless it is shown that he did not consent to the placing in her of the embryo or sperm and eggs or her insemination. It is not therefore enough for a husband to rebut the presumption of paternity which arises from the child being born during his marriage to the mother by means of negativing the genetic link (by blood tests). He will also have to show that he did not consent to the treatment of his wife which resulted in her pregnancy. Section 28 of the 1990 Act is broader than its predecessor (s.27 of the Family Law Reform Act 1987) in that it applies to all assisted reproduction techniques, not merely artificial insemination.

Where no man is treated as the father of the child by reason of s.28(2), s.28(3) provides that where the embryo or sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her

[308] Human Fertilisation and Embryology Act 1990 s.27(3).
[309] Human Fertilisation and Embryology Act 1990 s.27(2).
[310] This provision is intended to provide for an expeditious transfer of parentage where a surrogacy arrangement has occurred and all relevant parties are willing to give effect to the intentions behind the initial agreement.
[311] Human Fertilisation and Embryology Act 1990 s.28(5).
[312] Human Fertilisation and Embryology Act 1990 s.28(6)(a).
[313] Human Fertilisation and Embryology Act 1990 s.28(6)(b).
[314] Human Fertilisation and Embryology Act 1990 s.28(8); see *U v W (Attorney General Intervening)* [1998] Fam. 29, on which see below.
[315] References to marriage in this provision are to a marriage subsisting at the time (unless a judicial separation order is in force) but void marriages are included if either or both of the parties reasonably believed at the time that the marriage was valid: Human Fertilisation and Embryology Act 1990 s.28(7).

and a man together by a person to whom a licence applies,[316] the creation of the embryo not being brought about by the sperm of that man, that man shall nevertheless be treated as the father of any resulting child. Thus, a man who is neither married to the mother nor genetically related to the child can be the father by virtue of this provision. After initial difficulty from an over-literal interpretation of s.28(3),[317] the courts seem to have settled on a test of joint enterprise (for the woman to conceive and give birth) in determining whether treatment services have been provided for the woman and the man together.[318] Section 28(3) has no application where the fertility treatment has taken place outside the jurisdiction of the Human Fertilisation and Embryology Authority, as it cannot then comprise treatment by a licensed person.[319]

**Human Fertilisation and Embryology Act 2008**

**30-089** The parentage provisions in the Human Fertilisation and Embryology Act 2008 are very similar to the 1990 Act. They apply in relation to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or their artificial insemination, from 5 April 2009.[320]

The mother of the child is defined under s.33 of the 2008 Act in an identical manner to that set out in the equivalent provision of the 1990 Act.[321] The word is not tied to gender, so an individual registered as female at birth who subsequently transitions to live in the male gender will nonetheless be registered as the child's mother, as the interference with the individual's art.8 rights under the Convention is justified by the legitimate aim of establishing a coherent and certain scheme of birth registration.[322]

The identity of the father or other parent under the 2008 Act is determined in ss.35–47 of the 2008 Act. Where the mother is married to or in a civil partnership with a man at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination and the creation of the embryo was not brought about with the sperm of the other party to the marriage or civil partnership, the man is nonetheless treated as the father of the child unless it is shown that he did not consent to the assisted fertilisation.[323] This also parallels the position under the 1990 Act.

**30-090** Further, under s.42 of the 2008 Act, another woman may be the other parent where the mother was a party to a civil partnership with another woman or a marriage with another woman at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination.[324] Again, this will not be the case where that woman did not consent to the assisted fertilisation.

In the event that no man is treated as the father of the child under s.35, there are

316 That is, a person licensed to provide treatment services, to store gametes and embryos or to carry out research by the Human Fertilisation and Embryology Authority: Human Fertilisation and Embryology Act 1990 s.17(2).
317 *Re Q (Parental Order)* [1996] 1 F.L.R. 369, 372.
318 *Re B (Parentage)* [1996] 2 F.L.R. 15; *U v W (Attorney General Intervening)* [1998] Fam. 29.
319 *U v W (Attorney General Intervening)* [1998] Fam. 29.
320 Human Fertilisation and Embryology Act 2008 s.57(1).
321 Human Fertilisation and Embryology Act 2008 s.33. See para.30-087.
322 *R. (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; [2020] 2 All E.R. 813. See also Gender Recognition Act 2004 s.12.
323 Human Fertilisation and Embryology Act 2008 s.35.
324 Human Fertilisation and Embryology Act 2008 s.42.





similar provisions to those in s.28(3) for a man to nonetheless be treated as the father of the child.[325] Equivalent provision is made for a woman to be treated as the other parent of the child even where s.42 does not apply.[326] Both where this is the case and where s.42 applies to determine the identity of the other parent, the child is legitimate.[327]

Where a person is to be treated as mother, father or parent of a child under the 2008 Act, that person is to be treated in law as having that status for all purposes.[328] As with the 1990 Act, references to any relationship in any enactment, deed or other instrument or document (whenever passed or made) are to be read accordingly, which obviously includes a will.[329] However, nothing in the 2008 Act affects the devolution of any property limited (expressly or not) to devolve along with any dignity or title of honour.[330]

## 9. STEP-CHILDREN

**30-091** Step-children may take under the description of children if there is enough in the will, construed with the aid of any admissible extrinsic evidence, to show that they were so intended.[331]

## 10. GIFTS TO CHILDREN

**Children by a first and subsequent marriage**

**30-092** "Children" prima facie includes children by a first and subsequent marriage[332] even though such a marriage is not in the contemplation of the testator. Even where there was an express reference to a present or any future husband, children by a former husband were not excluded.[333] But there may be an intention to exclude the children of a first marriage.[334] For instance, a gift to the children of A and B, who to the testator's knowledge are married, will not include the children of A by a former marriage.[335]

**Grandchildren**

**30-093** A gift to the children of a living person will not go to his grandchildren, though he may have only grandchildren living at the date of the will and the testator's death.[336] If, however, the gift is to the children of a person deceased, who had only grandchildren living at the date of the will, the grandchildren will take, and they

325 Human Fertilisation and Embryology Act 2008 ss.36 and 37.
326 Human Fertilisation and Embryology Act 2008 ss.43 and 44.
327 Human Fertilisation and Embryology Act 2008 s.48(6).
328 Human Fertilisation and Embryology Act 2008 s.48(1).
329 Human Fertilisation and Embryology Act 2008 s.48(5).
330 Human Fertilisation and Embryology Act 2008 s.48(7).
331 *Re Jeans* (1895) 72 L.T. 835; compare *Re Davidson* [1949] Ch. 670; *Re Connolly* (1964) 47 D.L.R. (2d) 465.
332 *Barrington v Tristram* (1801) 6 Ves. 345; *Critchett v Taynton* (1830) 1 R. & M. 541; *Andrews v Andrews* (1884) 15 L.R.Ir. 199.
333 *Pasmore v Huggins* (1855) 21 B. 103; *Re Pickup's Will* (1861) 1 J. & H. 389.
334 *Stavers v Barnard* (1843) 2 Y. & C.C. 539; *Lovejoy v Crafter* (1865) 35 B. 149.
335 *Re Lewis* [1937] 1 All E.R. 556.
336 *Moor v Raisbeck* (1841) 12 Sim. 123.

in distribution of the estate for one reason will not be effective if the delay is caused by another reason.[37] Even if there is no gift over, however, time will be of the essence of the condition if it is not possible to place all parties in the same position as if the condition had been strictly complied with. A testator directed his trustees to hold his house after the death of his wife W on trust for B subject to the payment by B of £800 within six months of the testator's death. The sum paid was then to form part of the residuary estate, in which W had a life interest. B having failed to comply with the condition within six months of the testator's death, or indeed during W's lifetime, it could not be performed by payment within six months of W's death.[38]

In computing the time within which a condition must be performed, the inclusion of the day of the testator's death depends upon the circumstances.[39]

A settled legacy was given to an infant on his attaining the age of 24, provided that he was not a Roman Catholic at the date of the death of the testatrix or if he were a Roman Catholic at her death, should cease to be a Roman Catholic within 12 months after her death; such legacy being payable until he should, after her death, become a Roman Catholic. The infant's baptism into the Roman Catholic Church did not forfeit the legacy. He was intended to be given the opportunity to decide, once he had attained 21, whether he would be a Roman Catholic or not.[40]

In the recent case of *Naylor v Barlow*,[41] a gift was given to the testator's daughter on condition that they paid a specified sum of money to the testator's other children by a certain date. The daughters did not know of the time limit until after it passed; and the gift failed because the payment had not been made in time.

### Ignorance of condition

**33-012** A condition subsequent not performed owing to the ignorance of the legatee of its existence nevertheless works a forfeiture, where the property is given over, whether in the case of personalty or realty.[42] But this does not apply where the devisee is the heir, who has a title independent of the will.[43] So where there is a clause forfeiting a legacy, if not claimed within a given time, the forfeiture takes effect, if the legacy is not claimed, though the legatee received no notice of the legacy or of the death of the testator, and though the forfeiture is in favour of the executor.[44]

see *Re Porter* [1975] N.I. 157 at 162–163. For time limits in the exercise of an option see para.23-005.

37 *Re Selinger* [1959] 1 W.L.R. 217.

38 *Re Goldsmith* [1947] Ch. 339.

39 *Lester v Garland* (1808) 15 Ves. 248; *Re Figgis* [1969] 1 Ch. 123 (where the authorities are considered).

40 *Re May* [1917] 2 Ch. 126; *Patton v Toronto General Trust Corp* [1930] A.C. 629; *McCausland v Young* [1949] N.I. 49; *Blathwayt v Cawley (Baron)* [1976] A.C. 397 at 426, 427 and 435. The infant in *Re May* attained 24 and was still a Roman Catholic; it was held that he forfeited the legacy, *Re May* [1932] 1 Ch. 99. See also *Re Wright* [1937] 158 L.T. 368.

41 *Naylor v Barlow* [2019] EWHC 1565; [2019] W.T.L.R. 981.

42 *Porter v Fry* (1672) 1 Vent. 197; *Carter v Carter* (1857) 3 K. & J. 617; *Hodges' Trusts* (1837) 16 Eq. 92; *Astley v Earl of Essex* (1847) 18 Eq. 290; *O'Higgins v Walsh* [1918] 1 I.R. 126.

43 *Doe d. Kenrick v Lord Beauclerk* (1809) 11 East 657; *Doe d. Taylor v Crisp* (1838) 8 Ad. & E. 778; *Murphy v Broder* (1875) I.R. 9 C.L. 123.

44 *Burgess v Robinson* (1817) 3 Mer. 7; *Tulk v Houlditch* (1813) 1 V. & B. 248; *Powell v Rawle* (1874) 18 Eq. 243; *Re Lewis* [1904] 2 Ch. 656; *Re Tighe* [1944] I.R. 166.





It has been held that the filing of a bill for the administration of the estate before the time appointed is equivalent to a claim by the legatees, though they may not be parties to the suit.[45] But when the gift was to persons who should within a year establish their title as next-of-kin, an order made shortly after the testator's death on originating summons directing inquiries as to the persons entitled was held not to let in next-of-kin who made no claim within the year.[46]

A person who is ignorant of the existence of a will containing a name and arms clause cannot be said to refuse or neglect to comply with it.[47]

The operation of this rule is demonstrated by the decision in *Naylor v Barlow*,[48] in which a distinction was drawn between (a) a beneficiary who failed to fulfil a condition because they did not know about it in time (as was the case in that instance; the court noted that the testator could have made the condition contingent on notification of the time limit but had not, such that the gift failed); and (b) a beneficiary for whom fulfilling the condition was physically impossible.[49]

### Minors

Minority is an excuse for not performing a condition requiring residence,[50] but **33-013** not a condition requiring the legatee to assume a name or arms.[51] But a minor cannot be said to "refuse or neglect" to perform a condition.[52] It has been held that a gift over if the testator's daughter married a Roman Catholic ought, on construction, to be confined to marriage under 21.[53]

### How far condition may be performed in testator's lifetime

Sometimes a condition may be performed in the lifetime of the testator. Thus a **33-014** condition as to marriage with consent, whether precedent or subsequent, is satisfied by the consent of the testator to a marriage in his lifetime.[54] A condition requiring the testator's daughters to settle their interests under their mother's marriage settlement was performed by their having done so in the lifetime of the testator.[55] A gift over on bankruptcy prima facie includes a bankruptcy which takes place before[56] or after[57] the date of the will and is subsisting at the testator's death, notwithstanding strong words of futurity. But though prima facie words of futurity

45 *Tollner v Marriott* (1830) 4 Sim. 19.

46 *Re Hartley* (1887) 34 Ch.D. 742.

47 *Re Quintin Dick* [1926] Ch. 992; *Re Hughes* [1943] Ch. 296.

48 *Naylor v Barlow* [2019] EWHC 1565; [2019] W.T.L.R. 981 at [18]–[22].

49 See para.33-061 for the consequences where a condition is impossible.

50 *Parry v Roberts* (1871) 19 W.R. 1000; *Partridge v Partridge* [1894] 1 Ch. 351.

51 *Doe d. Luscombe v Yates* (1822) 5 B. & Ald. 544; *Bevan v Mahon-Hagan* (1893) 31 L.R.Ir. 342.

52 *Re Edwards* [1910] 1 Ch. 541.

53 *Re McKenna* [1947] I.R. 277; though this is doubtful.

54 *Clarke v Berkeley* (1716) 2 Vern. 720; *Parnell v Lyon* (1813) 1 V. & B. 479; *Wheeler v Warner* (1823) 1 S. & St. 304; *Tweedale v Tweedale* (1878) 7 Ch.D. 633; *Re Park* [1910] 2 Ch. 322.

55 *Re Grove* [1919] 1 Ch. 249.

56 *Manning v Chambers* (1847) 1 De G. & S. 282; *Seymour v Lucas* (1860) 1 Dr. & Sm. 177; *Trappes v Meredith (No.2)* (1870) 10 Eq. 604; 7 Ch. App. 248; see *West v Williams* [1899] 1 Ch. 132.

57 *Yarnold v Moorhouse* (1830) 1 R. & M. 364; *Metcalfe v Metcalfe* [1891] 3 Ch. 1.

in a will speak from the date of the will, and not from the death of the testator, this prima facie meaning may be excluded by the context.[58]

Where a gift was liable to be forfeited if the legatee took the veil, and she did so in the testator's lifetime, the gift failed.[59] But where the gift was liable to be forfeited "ipso facto" if any child at any time became a convert to the Roman Catholic religion, it was held that the clause only contemplated forfeiture after the testator's death.[60] The words "ipso facto" were held to be of considerable force, because they clearly contemplated that the person was to be in possession of some right which was to determine immediately upon the happening of the particular event. If the testator learned that his child had converted to Catholicism during his lifetime, he could have made a new will.

### Apportionment of condition

**33-015** Where a testator directs that if a certain sum should be applied in favour of A, A should apply a sum of different amount in favour of B, the condition will be compulsory on A only if the whole of the sum in question is applied in his favour and the condition will not be apportioned.[61]

## 5. PARTICULAR CONDITIONS

### (a) Age of Majority

**33-016** The expressions "full age", "infant", "infancy", "minor", "minority" and similar expressions are to be construed by reference to the provision that a person attains full age on attaining the age of 18.[62] This construction applies, in the absence of a definition or of any indication of a contrary intention, if the will was made after 1969 (and a will or codicil executed before 1970 is not treated as made after 1969 by reason only that it was confirmed by a codicil executed after 1969).[63]

The construction of any expression specifying a particular age (for example, "21") is not altered by the Family Law Reform Act 1969.[64]

### (b) Conditions as to Residence

**33-017** A condition requiring a beneficiary to "live and reside" in[65] or "occupy"[66] a mansion house, or to continue to reside in Canada,[67] is too vague to be enforced, and is void for uncertainty. But such conditions if framed with sufficient particularity can

58 *Re Chapman* [1904] 1 Ch. 431; [1905] A.C. 106 (marriage without consent): cf. *Re Fentem* [1950] 2 All E.R. 1073 (no context).
59 *Re Hewitt* [1926] Ch. 740.
60 *Re Evans* [1940] Ch. 629.
61 *Caldwell v Cresswell* (1871) 6 Ch.App. 278; *Fazakerley v Ford* (1831) 4 Sim. 390.
62 Family Law Reform Act 1969 s.1: the construction of a statutory provision where it is incorporated in and has effect as part of a will is not altered by s.1 if the construction of the will is not affected by that section, s.1(4) and Sch.3.
63 Family Law Reform Act 1969 s.1(7).
64 See Ryder, (1971) 24 *Current Legal Problems* 157 at 158–160; Cretney, (1970) 120 N.L.J. 144 at 145.
65 *Fillingham v Bromley* (1823) T. & R. 530; *Re Johnston* [1986] N.I. 229.
66 *Re Field* [1950] Ch. 520.
67 *Sifton v Sifton* [1938] A.C. 656.





be made effectual.[68] Thus, a gift over if the legatee ceased permanently to reside in a certain house,[69] or a condition requiring a legatee to take up permanent residence in England,[70] is valid. And a gift of a house on condition that the legatee made it his home and did not allow X to set foot therein was held not void for uncertainty or for impossibility.[71]

A condition requiring a person to "reside and dwell" in a mansion house has been held good against a person who declared her intention not to live there at all.[72]

A condition requiring children to reside away from one or other of their parents is contrary to public policy (namely, separating children from their parents) and is accordingly void.[73]

#### *What residence implies*

A condition of residence imports personal presence, but it may be satisfied by keeping up an establishment at the house and visiting it occasionally without passing the night there.[74] **33-018**

A condition defeating an estate if the taker refuses or neglects to reside in a mansion house does not apply to a minor, who cannot be said to refuse or neglect to reside.[75] Nor does absence from home on military or naval duty amount to a refusal or neglect to reside.[76] A gift over on the legatee *voluntarily* ceasing to make a named house her permanent home would not take effect where the legatee moved in compliance with a legal duty, such as (historically) on a woman joining her husband in a new matrimonial home.[77]

A condition requiring a person to provide a home for another is void for uncertainty, unless, perhaps, the provision is to be "free of cost or charge". In the absence of a gift over the provision of the home will be regarded as precatory rather than as being subject to a condition: in either case the testator's intention is ineffective.[78]

#### *Effect of s.106 of the Settled Land Act 1925*

The effect of s.106 of the Settled Land Act 1925 upon conditions as to residence was that the tenant for life of settled land might sell and enjoy the income of the proceeds of sale notwithstanding the condition,[79] but if he did not sell or lease under **33-019**

68 *Re Wright* [1907] 1 Ch. 231; *Re Wilkinson* [1926] Ch. 842; *Re Talbot-Ponsonby* (1937) 54 T.L.R. 33; *Re Piper* (1946) 62 T.L.R. 618; *Re Coxen* [1948] Ch. 747; *Re Gape* [1952] Ch. 743.
69 *Re Coxen* [1948] Ch. 747: for the effect of a reference to the opinion of trustees see para.33-059.
70 *Re Gape* [1952] Ch. 743.
71 *Re Talbot-Ponsonby* (1937) 54 T.L.R. 33; *Re Waring's W.T.* [1985] N.I. 105.
72 *Dunne v Dunne* (1855) 7 D.M. & G. 207.
73 *Re Boulter* [1922] 1 Ch. 75.
74 *Walcot v Botfield* (1854) Kay 534; *Tagore v Tagore* (1874) 1 Ind.App. 387; *Re Moir* (1884) 25 Ch.D. 605; see *Wynne v Fletcher* (1857) 24 B. 430; *Re Wright* [1907] 1 Ch. 231; *Re Coxen* [1948] Ch. 747.
75 *Parry v Roberts* (1871) 19 W.R. 1000; *Partridge v Partridge* [1894] 1 Ch. 351.
76 *Re Adair* [1909] 1 I.R. 311.
77 *Re Wilkinson* [1926] Ch. 842; cf. *Re Hodson* (1948) 92 S.J. 271 (removal to a mental home).
78 *Re Brace* [1954] 1 W.L.R. 955.
79 *Re Paget's Settled Estates* (1885) 30 Ch.D. 161; *Re Richardson* [1904] 2 Ch. 777; *Re Adair* [1909] 1 I.R. 311; *Re Acklom* [1929] 1 Ch. 195; *Re Patten* [1929] 2 Ch. 276; *Re Orlebar* [1936] Ch. 147; *Re Burden* [1948] Ch. 160; see *Re Edwards' Settlement* [1897] 2 Ch. 412; *Re Davies* [1932] 1 Ch. 530.