Understanding the STEP provisions – Part 2

In this month’s CPD paper we will consider the STEP (Society of Trust and Estate Practitioners) provisions in detail. We will specifically be looking at the 2nd edition of the STEP provisions as this is the most up to date version. Last month we considered only the standard provisions, so this month’s paper will discuss the special provisions.

WHY ARE THE SPECIAL PROVISIONS SEPARATE?

It is possible to only incorporate the standard STEP provisions into a will and these provide sufficient administrative powers in most cases and are general enough to suit pretty much every client’s needs. The special provisions are kept separate from the standard provisions because they, as their name suggests, are slightly more specialised. They may not suit every testator’s needs. The special provisions shouldn’t ever be ignored though, we would just encourage all will drafters to carefully consider the effect of each special provision before incorporating them in each will to ensure there is no conflict with the client’s wishes.

As with the standard provisions, it is perfectly fine to pick and choose which special provisions apply. If the drafter is choosing to exclude certain provisions the will needs to make it clear exactly which provisions are being excluded, for example:

“The standard provisions and the special provisions of the Society of Trust and Estate Practitioners (2nd edition) shall apply to this will with the exclusion of special provisions [state which provisions are excluded]”

THE SPECIAL PROVISIONS

We will now examine the special provisions in detail. This section should be read alongside a copy of the STEP provisions, which can be found here: https://www.step.org/sites/default/files/Comms/SSP2_rebrand.pdf

14. Borrowing

This provision grants trustees the power to borrow money for any purpose. Any borrowed funds are treated as trust property. Under the general law trustees only have very restricted powers to borrow and cannot borrow money to invest. The power granted by the STEP provisions extends this power to borrow so that trustees can ‘gear up’ the trust by borrowing funds for the purpose of investment. Obviously such a power comes with an element of risk to the trust fund, so it can be excluded if the testator wishes to restrict the trustees.

15. Delegation

Trustees have statutory powers to delegate. They can individually delegate some or all of their functions by way of a power of attorney under section 25 of the Trustee Act 1925, which helpfully provides a basic
template for such a delegation. Trustees may also collectively delegate their authority by appointing agents. These statutory powers of delegation are subject to some fairly complex restrictions, found in sections 12 to 15 of the Trustee Act 2000. These include restrictions on who may act as agents, for example disallowing a beneficiary from acting as an agent.

This provision varies the statutory provisions and provides that a trustee may delegate any of their functions to any other person. The restrictions mentioned above don’t apply to a delegation made under this provision. This delegation must be done in writing. The provision further protects the delegating trustee from responsibility for the delegate’s defaults as long as the trustee exercised reasonable care when selecting and supervising them.

16. Supervision of company

This provision absolves a trustee of their usual duty to make enquiries into the conduct of a company in which they are interested. This differs from the common law position that states that where a trust fund holds a controlling shareholding in a company they have a duty of care that compels them to make enquiries about the companies’ management.

17. Powers of Maintenance: deferring income entitlement to 21

It is very important when including bereaved young person’s trusts in wills that this provision is carefully considered. This provision directly relates to the operation of section 31 of the Trustee Act 1925 also referred to as the ‘statutory power of maintenance’, so an understanding of what this statutory power does is necessary background to understanding the effect of special provision 17 and when it should be excluded.

The statutory power of maintenance, if unamended, must be split into two parts as the effect is different for beneficiaries under 18 and over 18. For beneficiaries who are under 18 this power allows trustees discretion over the income of the trust fund and allows them to pay or apply the trust income to or for the benefit of the minor as long as this is for their ‘education, maintenance or other benefit’. Since they have discretion, trustees may also accumulate the income and add it to the capital of the fund.

Once a beneficiary reaches 18 this discretion is extinguished. From this point onwards and until the beneficiary obtains a vested interest the trustees must pay all of the income to the beneficiary. They can no longer opt to accumulate it or apply it only at their discretion.

Failing to consider section 31 can cause a problem for bereaved young person’s trust. If when the testator dies the beneficiary is over 18 but under 25 then the interest created for them is not a BYPT but an Immediate Post Death Interest (IPDI) as they are taking an immediate entitlement to income on the testator’s death. Some commentators even believe that this can happen if the beneficiary becomes 18 within 2 years of the testator’s death due to how the reading back provisions of section 144 of the Inheritance Tax Act 1984 apply.

Provision 17 makes a small amendment to section 31. It pushes back the age at which a beneficiary gains their entitlement to the income from 18 to 21, allowing trustees a longer period of discretion over the trust income. Of course, this can still cause issues for a BYPT, but only if the beneficiary is 21 or over at the time of the testator’s death.
The way to avoid this issue is to expressly amend section 31 in the will itself by including wording within the gift to the bereaved young person clearly stating that the trustees shall retain discretion over the income for the full duration of the trust. As the powers provided by the will always take precedence over the STEP provisions this means there should be no need to exclude provision 17, but for clarity we would still suggest doing so.

18. Minors and beneficiaries without capacity: powers over trust capital

In last months paper covering the standard provisions we discussed provision 6 which dealt with powers over trust income. This provision mirrors that but deals with trust capital instead.

Where trustees may apply the capital of a trust fund for the benefit of a minor, they can do this by paying it to the minor’s parent or guardian on the minor’s behalf and accept their receipt. They may also pay capital to the minor directly if they are at least 16. Otherwise the trustee’s usual powers to apply capital for the maintenance, education, or other benefit of the minor apply as standard. Furthermore, the trustees are not obliged to make any enquiries about the use of the capital unless they are aware of suspicious circumstances that call for enquiry.

If a beneficiary lacks mental capacity and there is no property & financial affairs LPA in place the trustees may apply capital for their benefit at their discretion, subject to restrictions imposed by a Deputy or the Court. Where an incapacitated person can’t give a valid receipt, the trustee may pay a legacy to such person who appears to have the appropriate care and financial responsibility for them. As with paying capital to a minor’s parents, the trustees have no duty to enquire about the use of the capital.

19. Absolute discretion clause

Under section 11 of the Trusts of Land and Appointment of Trustees Act 1996 trustees have a statutory duty to consult with beneficiaries before exercising any of their functions in relation to land. They are only required to consult with beneficiaries who are not minors and who are not mentally incapable and who have an interest in possession in the land.

Provision 19 excludes this duty to consult with the beneficiaries, allowing the trustees to exercise their functions at their absolute discretion. Trustees will often consider the wishes of any beneficiaries under the trust, but if this provision applies they can choose not to give effect to their wishes. This doesn’t overrule their duty to act fairly between the beneficiaries or in the best interests of the trust though.

A common clause in an IPDI trust over property directs that the trustees cannot sell the trust property without the life tenant’s permission. If this wording is present in the trust then it takes precedence over this provision, the result being that the trustees must consult with a life tenant before selling the land.

20. Appointment and retirement of trustees

This provision allows a trustee to be appointed even if they are not resident or connected with the UK.

It also allows a trustee to retire even if as a result there is only one trustee left acting. This varies the usual restriction under section 39 of the Trustee Act 1925 which allows a trustee to retire without making a new appointment only if after their retirement there will be at least two trustees or a trust corporation left.

21. Powers relating to income and capital
This provision overrides the trustees’ duty to balance the interests of various beneficiaries interested in the same property. This provision also extends the trustees’ powers of investment by allowing them to purchase wasting assets and assets which will produce little to no income.

22. Powers to appropriate at value at time of death

A trustee’s powers of appropriation were discussed in last month’s paper. This special provision builds off of this and allows a trustee to appropriate assets at the value they held at the time of the testator’s death not at the time that the appropriation actually takes place. Remember that there can be a substantial period of time passing between the death and the actual distribution of the estate. Trustees must take reasonable care in obtaining valuations.

The rule established in Robinson v Collins [1975] 1 WLR 309 is that an appropriation takes place at the value of the time of the appropriation not the death, so this provision varies this. This will have an effect on the beneficiary when they come to disposing of an inherited asset and it needs to be determined what value they acquired the asset at for calculating their Capital Gains Tax (CGT) liability.

23. Relationships unknown to trustees

Trustees may distribute the trust fund based on what information they actually know, even if there are other unknown beneficiaries who exist but whose relationship has not been disclosed to the trustees. This may happen where the will refers to a wide class of beneficiaries by their relationship to the testator.

CONCLUSION

This overview of the standard provisions has hopefully given readers a deeper appreciation of the administrative provisions required to administer an estate or trust and the usefulness of the STEP special provisions. Hopefully readers take away from this the need to critically consider the effect of each special provision before including them in their wills.

Important Reminder:

These notes are produced solely for the benefit of SWW members when completing the February 2020 CPD test to gain 1 hour of structured CPD towards their annual quota. The notes do not represent legal advice and no reliance can be made on the content of the notes in any or individual specific client circumstances. Having read the notes members should cement their understanding by considering further reading around the subject – cases details can be found by searching the case references using BAILII or GOOGLE.