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Private Client
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THE DEFINITIVE,
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STUDY GUIDE FOR THE LPC

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LPC BUDDY

Private Client

Colour Coding Guide	❖ Blue Text – Reference to statutes and case law. ❖ Green Text – Reference to textbook[1] paragraphs, workshop tasks[2] and other notes in this guide. ❖ Orange Text – Forms. ❖ Purple Text – Reference to Professional Conduct Rules or Principles.

[1] Textbook references are to the CLP Legal Practice Guides by CLP Publishing.

[2] References to Workshop tasks are to University of Law workshop tasks (which may be adopted by other LPC institutions). The content and structure of Workshops is subject to change at short notice and so task references should be treated as a general guide only.

1. Basic Will Drafting

Preliminary Considerations When Drafting a Will

❖ *Private Client: Wills, Trusts and Estate Planning, Chapter 11.1*[1]

Overview	❖ When drafting a will, a solicitor must consider: ➢ The **validity of the will**; ➢ Any **undue influence on the testator**; ➢ The identity of any **witnesses**; and ➢ Compliance with **Professional Conduct Obligations**. ❖ Each topic will be considered in detail below.

Requirements for a valid will	❖ When advising a client on preparing a will, the solicitor must bear in mind that, in order to create a valid will, the client must have:	
	Capacity	❖ I.e., they must be: ➢ **Over 18**, and ➢ Have the requisite **mental capacity** per the test in *Banks v Goodfellow* (1870) LR 5 QB 54. ▪ They must have had *"**soundness of mind, memory and understanding**"*, meaning that they must have understood: • **The nature of their act and its broad effects** (i.e., that they are writing a will and they know what it means); • **The extent of their property**; • **The moral claims** they ought to consider.
	Intention	❖ The testator must have intended to create a will. This requires the testator to have had both a "general" and "specific" intention: ❖ ➢ A general intention: the testator must have intended to **make a will** as opposed any other sort of document. ➢ A specific intention: the testator must have intended to **make the particular will in question**; the testator must know and approve its contents.

[1] NB: If you are looking for our comments on the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act 2013 (covered in para 11.1 in the textbook), we have included these our commentary on gifts to spouses in *Gifts in a Will – Drafting Considerations.*

<table>
<tr><td></td><td><u>Complied with the formalities of the</u> Wills Act 1837</td><td>❖ The will must be <u>in writing</u> and <u>signed by the testator</u>, or by some other person in his presence, under the testator's direction.

❖ It must appear that the testator, by signing the will, intended to <u>give effect to the will.</u>

❖ The signature must be made, or the testator must acknowledge that the signature is theirs, <u>in the presence of two or more witnesses</u>.

❖ <u>Each witness must either</u>:

➢ <u>Attest and sign</u> the will (i.e., confirm that they believe that the signature is that of the testator and sign the will); or

➢ <u>Acknowledge the testator's signature</u> in the presence of the testator.</td></tr>
<tr><td><u>Undue influence</u></td><td colspan="2">❖ The solicitor should also be mindful of undue influence.

❖ A will, or parts of a will, <u>will be invalid</u> if it was created as a result of:

➢ <u>Force or fear</u>: of actual or threatened injury;

➢ <u>Fraud</u>: e.g., being misled by some pretence;

➢ <u>Undue influence</u>: where the testator's freedom of choice was overcome by intolerable pressure, even though his judgement remained unconvinced.</td></tr>
<tr><td><u>Mistake</u></td><td colspan="2">❖ The solicitor should bear in mind that any words that are included in the will <u>without the knowledge and approval of the testator</u> will be <u>omitted</u> from probate.</td></tr>
<tr><td><u>Professional Conduct Obligations</u></td><td colspan="2">❖ The solicitor should also be mindful of their professional conduct obligations, in particular:

<table><tr><td>Para 3.1 CFS[2] / 4.1 CFF[3]</td><td>❖ You must only act for clients on <u>instructions from</u>:

➢ <u>The client</u>, or

➢ Someone properly <u>authorised</u> by them.</td></tr><tr><td>Para 4.1 CFS / 5.1 CFF</td><td>❖ You must properly <u>account to clients</u> for any financial benefit you receive as a result of their instructions <u>except</u> where the client has agreed otherwise.</td></tr><tr><td>Para 6.1 CFS / CFF</td><td>❖ Where a client proposes to make a <u>gift of "significant value"</u> to the solicitor or a member of their family, it may be appropriate to <u>refuse to act</u> unless the <u>client takes independent legal advice</u>.</td></tr></table></td></tr>
</table>

[2] *CFS: SRA Code of Conduct for Solicitors, RELs and RFLs*

[3] *CCF: SRA Code of Conduct for Firms*

		❖ This will normally give rise to an **own interest conflict**; per CFS/CFF Para 6.1, you **cannot act** in where there is an own interest conflict. There are ***no exceptions*** to that rule. ❖ The Codes of Conduct do not define when a gift will be of "significant value", however *Law Society Guidance: Preparing a will when your client is leaving a gift for you, your family or colleagues*[4] provides that you can *assume* that gifts will be considered "significant" if they are: ➢ A gift worth **more than 1% of the client's estate**; *or* ➢ A gift that **might become valuable at some point**, especially after the death of a client; *or* ➢ A gift that provides a benefit to an individual which is **more valuable than their relationship reasonably justified.**
Identity of witnesses[5]	❖ Any **gifts to a beneficiary will fail** if the beneficiary, or the beneficiary's spouse or civil partner, is **also a witness** to the will (s15 Wills Act 1837).	

[4] https://www.lawsociety.org.uk/topics/private-client/preparing-a-will-when-your-client-is-leaving-a-gift-for-you-your-family-or-colleagues

[5] Workshop 1, Prep Task 1; the witness looks like they might be the testator's husband (they have the same surname), in which case any gifts in the will to the husband will fail.

Will Drafting – Overview[1]

❖ *Private Client: Wills, Trusts and Estate Planning, Chapter 11*

Overview	❖ The following note provides an overview of matters that a solicitor should consider when advising a client in respect of, and when drafting, a will. ❖ Certain sections of a will require detailed consideration and are set out in separate notes.

Basic content of a will *Private Client: Wills, Trusts and Estate Planning, 11.2*	❖ A basic will should contain the following sections: ➢ Opening words or commencement; ➢ Revocation clause; ➢ Date; ➢ Appointment of executors; ➢ Provisions with regards the legacies and/or gift of residue; ➢ Directions and declarations; ➢ Administrative provisions (setting out the powers of the PRs); and ➢ Attestation clause.

Section	Contents	
Opening words *Private Client: Wills, Trusts and Estate Planning, 11.2.1*	❖ The will should include an opening clause ("commencement") to identify the testator and the nature of the document:	
	The will must include:	❖ The **full name and address** of the testator. ❖ A statement that the document **is the testator's "last will"** or "last will and testament". ➢ This helps demonstrate the testator had an **intention** to make a will (required to be valid). ➢ If the person has made or intends to make a will relating to overseas property, the will should **make clear to which assets it relates**[2].
	The will	❖ Details of the testator's **occupation**.

[1] Workshop 3, Workshop Task 3, Question 3

[2] Workshop 1, Workshop Task 1, Question 2 – the opening words do not make clear whether the will intends to apply to property in England and Wales only, or all property (the testator owns property on France).

	***may* include:**	➢ For identification. ❖ A statement of the **choice of law** governing succession to assets. ➢ This is relevant where the testator owns assets overseas; see notes on *Drafting Considerations Where a Testator and/or Assets are Located Overseas*. ❖ The **date**[3] [4]. ➢ This should be identifiable in the opening section or at the end. ➢ The absence of a date will not invalidate a will, however a failure to include it **can make proving which is the most recent will difficult** which can give rise to disputes as to which will is effective. ❖ A statement that the will is **made in expectation of a future marriage** or civil partnership and is not to be revoked by that taking place. ➢ s18 Wills Act 1837 provides that a will shall be revoked by a subsequent marriage ***unless*** it appears from the will that the marriage was in the contemplation of the testator when they made the will (s18(3)). ➢ Therefore, if the testator does not wish to have the will revoked by the future marriage / civil partnership, they **should include a statement in the will to that effect**.
Revocation clause[5] *Private Client: Wills, Trusts and Estate Planning, 11.2.2*		❖ This clause **expressly revokes all earlier wills** and codicils. ❖ In absence of an express revocation clause, a later will **impliedly revokes** earlier wills and codicils but ***only to the extent that the later will is inconsistent with the earlier provisions***. This can lead to unexpected consequences where some provisions of the earlier will remain binding on death. ❖ An express revocation clause **avoids the risk of an earlier will not being wholly revoked** by the current will.
Appointment of executors and trustees *Private Client: Wills, Trusts*		❖ There should be a clause **appointing the persons that the testator has chosen to administer the estate** (executors). ❖ If the testator fails to name their choice, administrators will be appointed who will take the grant in accordance with the order set out in Rule 22 Non-Contentious Probate Rules 1987.

[3] Workshop 1, Workshop Task 1, Question 2 – the opening words do not include a date.
[4] Workshop 3, Workshop Task 3, Question 3; the draft will does not include a space for a date.
[5] Workshop 3, Workshop Task 3, Question 3; the will does not contain a revocation clause.

and Estate Planning, 11.2.3

How many?[6]

- ❖ Maximum = Generally **4**
  - ➢ The will can **name any number** of executors, however only a **maximum of four** can apply for the grant.
- ❖ Minimum = **1**
  - ➢ However, there is a risk, if only one executor is named, that they **pre-decease the testator**, so it may be advisable to name a second executor, or a substitute for a sole executor.

Who to choose as executor?[7]

- ❖ The testator has a choice to appoint non-professionals, professionals (such as a solicitor), or banks or trust corporations.

	Pros	Cons
Non-professional.	❖ Allows someone whom the testator **trusts** to administer the estate. ❖ **Cheaper** if such persons agree not to charge.	❖ Administering an estate can be complex and hence the executor **may need to appoint a solicitor in any event** (with their fees being paid from the estate).
Solicitor	❖ Ensures the person administering the estate has the **necessary expertise**. ❖ Spares family and friends from administering the estate during a period of **bereavement**.	❖ **Fees**. ❖ The will must be drafted to account for the fact that most solicitors are **partnerships** or LLPs, meaning: ➢ It will be the **partners in the firm at the date of death** who are appointed as executors (as a partnership itself cannot be appointed); and ➢ The will must **account for any name**

[6] Workshop 3, Workshop Task 3, Question 3; the will provides for one executor alone; it may be safer to appoint additional executors.

[7] Workshop 1, Workshop Task 1, Question 2

				change, amalgamation, or conversion to an LLP.
		Banks / trust corporations	❖ Ensures the person administering the estate has the **necessary expertise**. ❖ Spares family and friends from administering the estate during a period of **bereavement**. ❖ Likely to be a company so **will not retire or die**.	❖ **Fees**. Usually a percentage value of the estate which can be expensive. ❖ A big firm may seem **large and impersonal** to the family.
	Trustees	❖ If the testator creates a trust of the estate, the **testator should appoint trustees** who will hold the property on trust for the beneficiaries named in the will. ❖ The trustees will often be the **same people** as the executors. ❖ If executors will be trustees, it is **sensible to appoint two** (as two trustees are required to give good receipt for the proceeds of sale of any land held in the trust). ❖ If a will **creates a trust for a minor**, then two trustees must be appointed by law[8].		
	Charging provisions.	❖ An executor or trustee is a fiduciary, and therefore they are **unable to profit from their office** unless authorised. ❖ s29 Trustee Act 2000 allows *limited* scope for a trustee to be provided with "reasonable remuneration", but only where the trustee is either: ➢ A **trust corporation**; or ➢ Is otherwise acting "**in a professional capacity**", is not a sole trustee, and has written consent of all co-trustees.		

[8] Workshop 3, Workshop Task 3, Question 3; the will appoints a sole trustee; there needs to be two because it is proposed that the assets will be held on trust for the minor grandchildren.

		❖ Where the clause provides for "reasonable remuneration", this will be objectively assessed and therefore the executor may **not** necessarily simply be able to charge their **normal charge-out rate** (*Pullan v Wilson* [2014] EWHC 126 (Ch)). ❖ With all this in mind, where it is envisaged that professional executors / trustees be appointed, it is **sensible to include an express charging provision**.
Legacies *Private Client: Wills, Trusts and Estate Planning, 11.2.4-11.2.7*	❖ The will should specify **how** the legacies and devises (i.e., gifts in the will) are to be **distributed**. ❖ A "legacy" is a gift of **personal property** which is not land, a "devise" is a **gift of land**. ❖ The drafting considerations in relation to these provisions are extensive and addressed separately in our note on *Gifts in a Will – Drafting Considerations*. ❖ In overview, however, a solicitor advising a person who is preparing a will should consider the following points:	
	For non-residuary gifts.	❖ Beneficiaries must be **clearly identified**. ❖ Regard should be had to the impact of the Gender Recognition Act 2004 (which can impact on gifts that are **described by reference to a person's gender**). ❖ The testator must consider whether gifts should be **outright** (**vested**) **or conditional** (**contingent**). ❖ The will should account for the **risk of a gift lapsing** (for instance by including **substitute beneficiaries**). ❖ The testator should consider where the **burden of taxes and debts will fall** depending on how the will is drafted. ❖ The testator must consider points specific to **gifts to certain types of beneficiaries**, such as: ➢ Imposing a **closing date for entry** into a class of beneficiaries; ➢ Various relevant points **specific to gifts to charities**; ➢ Efficient **use of the nil-rate band** and residents nil-rate band particularly where a **beneficiary will be a spouse**.
	Gifts of the residue.	❖ Provisions should be included to **avoid partial intestacy** (such as **substitutional gifts** and naming a **longstop beneficiary**).

		❖ A direction should normally be included as to the **payment of debts, expenses and legacies** to avoid the statutory order of s34 Administration of Estates Act 1925 applying. ❖ Consideration should be given as to whether or not the residue should be **gifted on trust**. ❖ There are specific **drafting considerations where the residue is gifted to more than one person**.
Directions and declarations of the testator's wishes *Private Client: Wills, Trusts and Estate Planning, 11.2.8*	❖ The will may include **declarations as to the testator's** "**wishes**", including:	
	A survivorship clause[9]	❖ A direction may be inserted that requires a **beneficiary to survive the testator by a minimum period of time** in order to inherit (commonly 28 or 30 days), or else a substitute provision will apply.
		Why include this?

❖ The clause gives the testator **more control** over the destination of their property. If no such provision is included, then the property will pass automatically under the terms of the ***deceased* beneficiary's will**.

❖ Inclusions of this can **avoid the administrative expense** of property being part of two different estates.

❖ Inclusion can also ***avoid* adverse IHT consequences**; for example:

- Assume that **Person A** (the testator) and **Person B** (the beneficiary) both have estates that are ***valued at the nil-rate band*** for the relevant tax year. **Person C** is a beneficiary under **Person B's** will.
- If **Person A** leaves their estate to **Person B**. There is no survivorship clause in **Person A's** will. **Person A** dies, and **Person B** unexpectedly dies a week after **Person A**.
- The result is that **Person B** will inherit the entirety of **Person A's** estate. **Person B's** estate at the date of their death will thus be **in excess** of their nil-rate band.
- **Person B** will therefore pay IHT on the value of their estate above the nil-rate band when it is passed to **Person C** under the terms of their will.

[9] Workshop 1, Task 1, Question 5 – there is no survivorship clause present.

			➢ It would have been more tax efficient, in such circumstances, for **Person A** to have left their estate (by way of a contingent survivorship clause) directly to **Person C**. ➢ **Person C** would still inherit both **Person A's** and **Person B's** estates, but as both estates would be separate, and valued the same as the nil-rate band, neither **Person A** nor **Person B** would pay IHT on death.
		Cons?	❖ Use of a survivorship clause will ***increase* the IHT payable** where: ➢ The deceased's estate is due to be **transferred to the deceased's** spouse; and ➢ Both the deceased and their spouse **die in quick succession**; ➢ With the result that the survivorship clause takes the **first spouse's assets *out of* the second spouse's estate**, such that the first spouse's nil-rate band is not transferred.
			Example ❖ **Spouse A** dies and leaves an estate of £425,000 to **Spouse B**, who has assets of £200,000. Assume **Spouse B** dies within a week of **Spouse A**. ❖ If **Spouse A** does not include a survivorship clause in their will, **Spouse B** will die with assets of £625,000. ❖ The value of the estate will be under the nil-rate band (£650,000) on the basis that **Spouse A** will have transferred their nil-rate band (£325,000) to **Spouse B**. ❖ If, in the same circumstances, **Spouse A** had included a survivorship clause which provided that **Spouse A's** children would inherit if **Spouse B** failed to survive **Spouse A** by 30 days, **Spouse A's** children would inherit £425,000 but **no nil-rate band would be**

			transferred, meaning IHT would be payable on £100,000.

❖ Use of a survivorship clause may also *increase* the IHT payable where **both spouses die** in circumstances where it is **uncertain who died first**:

- If this happens, s184 Law of Property Act 1925 provides that the **eldest spouse** is deemed to have died first, with the result that the younger spouse will inherit the elder spouse's estate.
- The **spousal exemption will apply**, so the transfer to the younger spouse is exempt for IHT purposes. However, the younger spouse will still **inherit the elder spouse's unused nil-rate band,** so if there is no survivorship clause, the younger spouse will benefit from £650,000 being taxed at 0%.
- By contrast, if there is a survivorship clause in the elder spouse's will, this will **transfer the elder spouse's estate to a third party** (say the children). The spouse exemption will not apply, and (ignoring any other available exemptions or reliefs) all sums over the elder spouse's nil-rate band of £325,000 will be immediately taxable.

❖ The length of any **survivorship period should not be longer than 6 months**, otherwise this will be treated as creating a **settlement *without* an interest in possession**:

- Interests in possession are taxed more favourably for the purposes of Inheritance Tax.
- A beneficiary of a trust is treated as having an "interest in possession" if they have an ***immediate* right to receive income** arising from a trust, or have use and enjoyment of property. s92 IHTA 1984 provides that the "immediacy" condition is still satisfied where there is a **survivorship clause** *providing* this **does not specify a period of more than six months.**

	What is to happen with the testator's body[10].	❖ The testator may wish to include a direction as to **how their body should be disposed of** (e.g., cremation / funeral). ❖ The testator may also wish to specify whether their **organs will be donated** on death. ❖ Such a direction will specify the testator's wishes, but **has no legal effect.**
Administrative provisions *Private Client: Wills, Trusts and Estate Planning, 11.2.9*	❖ The will should contain a wide range of provisions granting the **personal representatives' express powers** so that they can effectively administer the estate. ❖ These powers will tend to either **extend or modify the statutory powers** that are given to PRs. ❖ The range of powers to be included are set out in our note on *Administrative Provisions*.	
Attestation clause[11] *Private Client: Wills, Trusts and Estate Planning, 11.2.10*	❖ The attestation clause is the clause at the end of the will that **recites the applicable execution formalities** required for the document to take effect. ❖ For a will, this will provide **confirmation of compliance** with s9 Wills Act 1837 which requires: ➢ The testator to sign or acknowledge their signature in the **presence of two witnesses**; and ➢ The witnesses to sign (**or acknowledge**) the will **in the presence of the testator**. ❖ "Presence" includes presence by means of video conference or electronic transmission for a ***temporary period only***, for wills executed from 31 January 2022 – 31 January 2024 (reg 2 Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (SI 2020/952)). ❖ The presence of an attestation clause **raises the presumption of due execution**; i.e., it will be **presumed that the will has been executed in accordance with the formalities of the Act**, and the burden of proof will be on any party who seeks to disprove this.	

[10] Workshop 3, Task 3 – the draft will includes no direction as to what is to happen with the testator's organs.

[11] Workshop 3, Workshop Task 3, Question 4

Gifts in a Will – Drafting Considerations[1]

❖ *Private Client: Wills, Trusts and Estate Planning, Chapters 11.2-11.7*

Overview	❖ Gifts under a will can be divided into two categories:	
	Non-residuary gifts *Private Client: Wills, Trusts and Estate Planning, 11.2.4*	❖ A "non-residuary" gift is one that does not form part of the "residue" of the estate, i.e., what is left after all other gifts have been made. ❖ These may be: ➢ **Specific gifts**: i.e., gifts of specific items or pieces of land. The beneficiary will get **nothing in-place of the gifted item** (e.g., if the item is sold) unless the will provides for a substitution. ➢ **General gifts**: i.e., gifts of items which correspond *to a description* (e.g., "100 shares in Z plc"). If the testator does not own the item at death, it **must be obtained using funds from the estate**. ➢ **Demonstrative gifts**: i.e., gifts that are **general in nature but directed to be paid from a specific fund**, (e.g., *"I give £500 to X to be paid from my Nationwide savings account"*). If there is no account (or if the account contains less than £500) at death, the legacy is paid in whole or in part from the rest of the estate. ➢ **Pecuniary gift**: i.e., a gift of money (which might be specific, general, or demonstrative).
	Residuary gifts *Private Client: Wills, Trusts and Estate Planning, 11.2.4*	❖ A gift of the residue is a direction as to what is to happen with **the remainder of the estate** after all non-residuary gifts have been made. ❖ If a gift of the residue fails, it will **result in a partial intestacy**; i.e., the residue will be passed down in accordance with the intestacy rules.

Drafting considerations with regards to non-residuary gifts

❖ *Private Client: Wills, Trusts and Estate Planning, 11.2.4.-11.2.6*

Overview	❖ The following matters should be considered where a testator wishes to include **non-residuary gifts** in their will.

Drafting considerations which relate to *the beneficiaries*.
Private Client: Wills, Trusts and Estate Planning, 11.2.4.5

[1] Workshop 3, Workshop Task 3, Question 3

<table>
<tr><td><u>Beneficiaries must be clearly identified</u>.</td><td>
❖ Beneficiaries must be <u>clearly identified</u>, or the gift will <u>fail for uncertainty</u>.

❖ For non-residuary gifts, it is helpful to include the beneficiary's:
➢ Name;
➢ Address; and
➢ Relationship to the testator.

❖ It is the person who fits the description <u>at the date of the will</u> who is construed as the beneficiary (e.g., "my son's wife" will be the wife of the son at the date of the will, not the date of death).

❖ A gift to a person <u>by name</u> is a gift to that person <u>even if they change their name</u>.
</td></tr>
<tr><td><u>Impact of the</u> Gender Recognition Act 2004.</td><td>
❖ The Gender Recognition Act 2004 will impact upon attempts to make gifts to beneficiaries who are described by terms with reference to gender, for example, a gift to "my eldest daughter".

❖ For wills made on or after 4 April 2005, a transgender individual who has a <u>full gender recognition certificate</u> will be recognised for <u>all purposes</u> by their affirmed gender (the gender by which they wish to be known as opposed to their biological sex at birth) (s9(1)).

❖ This means that if a gift is made in a will by way of description by reference to gender, the fact that the beneficiary changes their gender subsequent to the will <u>can change the intended destination of the gift</u>.

<table>
<tr><td><u>Example</u></td><td>
❖ Barry, at the date of his will (made after 4 April 2005), has a daughter Josie, and an older son, Charlie.

❖ Barry makes a will and gifts his house to his "eldest daughter", envisioning that the house will pass to Josie.

❖ Subsequent to the will, Charlie changes their legal gender from male to female.

❖ If the will remains unchanged, when Barry dies, Charlie will fulfil the definition of "eldest daughter", and the house will pass to Charlie, not Josie.
</td></tr>
</table>
❖ In such circumstances, the beneficiary who has been impacted by the change (in the above example, Josie) can <u>apply to court</u> under s18 GRA 2004 for an <u>order to make a different disposition of the property</u>, which the court can make if it is satisfied that it is just to do so.

❖ s15 provides that a change of gender does not affect the distribution of property under a will that is made before 4 April 2005.
</td></tr>
<tr><td><u>The testator must consider</u></td><td>
❖ Contingent gifts (where conditions must be satisfied before the beneficiary is entitled to the gift) can be useful if the testator wishes:
</td></tr>
</table>

<table>
<tr><td><u>whether gifts should be outright (vested) or conditional (contingent).</u></td><td>

To <u>delay a gift</u> (e.g., until a beneficiary reaches sufficient maturity); or
For a gift to be <u>used for a specific purpose</u> such as a wedding gift.

❖ If a beneficiary dies before the contingency is satisfied, the gift will <u>pass to a substitute</u> (if provided in the will), or the residue.

❖ Alternatively, the testator can make a <u>“vested” gift</u> (i.e., there are no conditions and the beneficiary is entitled to the gift straight away).
</td></tr>
<tr><td><u>What happens if the gift lapses?</u>[2]</td><td>
❖ If a gift lapses, for instance because a beneficiary predeceases the testator, the gift:

Will pass to the <u>residue</u>;
<u>Unless</u> the will provides for a <u>substitute beneficiary</u>.

❖ It is therefore often sensible to draft to account for this.

❖ There is an exception for <u>direct descendants</u> (s33 Wills Act 1837), whereby if a gift to the testator’s child fails because they predecease the testator, but the child leaves an issue living at the testator’s death (i.e., the child’s direct descendants), then <u>the issue will take the gift</u>. This section can be <u>excluded by contrary intention in the will, which must be express</u>[3]<u>.</u>

❖ Where a beneficiary <u>kills</u> the testator; unless a contrary intention appears in the will, the beneficiary is <u>treated as having died immediately before the testator</u>, meaning the gift will pass to a substitutional beneficiary, or alternatively lapse (s33A Wills Act 1837).
</td></tr>
<tr><td><u>Where will the burden of taxes or debts fall?</u>[4]</td><td>
❖ The testator should be mindful of where the burden of tax and/or debts will fall, and that the way that the will is drafted can <u>disproportionately impact upon certain beneficiaries’ entitlements</u>.
<table>
<tr><td><u>Inheritance Tax</u></td><td>
❖ The default position is that any inheritance tax attributable to property passing under the will must <u>be paid from the residue</u>, unless the will varies these provisions (s211 IHTA 1984).

❖ This can significantly <u>reduce the sum available to the residuary beneficiaries.</u>

❖ The testator may choose to vary this, for instance by <u>stating that a gift is “subject to tax”</u>, in which case the tax burden falls to the beneficiary of that gift.

This can, however, have unintended consequences in terms of redistributing the tax burden.

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[2] Workshop 1, Prep Task; the gift of the grand piano will lapse because the beneficiary predeceases the testator.
[3] This applies in Workshop 3, Workshop Task 3, Question 3, however it is sensible to include a substitution in this scenario to ensure the testator’s wishes, that the gift be conditional on the grandchildren reaching the age of 21, are satisfied.
[4] Workshop 1, Workshop Task 1, Question 3

		➢ For instance, under s38 IHTA 1984, the value attributed to a specific gift for IHT purposes is the aggregate value of the gift plus the *"tax which would be chargeable if the value transferred equalled that aggregate"*. ❖ The following are not testamentary expenses, and as such the default position is any **IHT burden falls to the beneficiary:** ➢ Foreign property; ➢ Lifetime gifts; ➢ Property passing by survivorship; ➢ Trust property in which the deceased had a qualifying interest in possession. ❖ The testator should consider **maximising their available reliefs**[5]; these will be wasted if assets which are subject to relief are given to a beneficiary who is exempt (e.g., an asset that qualifies for Business Property Relief is gifted to a spouse).
	Debts	❖ If the creditor has charged specific assets, the beneficiary will take the asset **subject to the charge unless the will declares otherwise**. ❖ If the intention is for the asset to be passed without the burden of the debt attaching, the will should direct either that either: ➢ The specific gift will not be subject to the charge (e.g., "I leave my house to [X] free of mortgage"); or ➢ That the debts of the estate are to be paid from the residue.

Drafting considerations which relate to *certain types of beneficiary*. *Private Client: Wills, Trusts and Estate Planning, 11.2.5*	
Gifts to classes of beneficiary.	❖ Where gifts are made to a class of beneficiaries, it is sensible to **impose a closing date for entry into the class** to ease administration and ensure there is a limit on the extent to which any gifts to the class will be diluted. ❖ If the will is silent, common law "class closing rules" may operate to determine when membership of the class is to be ascertained, but it is generally advisable to **include an express clause to ensure certainty**.
Gifts to charities[6] [7].	❖ Gifts to charities must be **identified accurately** (e.g., by name, address, and registered charity number).

[5] Workshop 1, Task 1, Question 3

[6] Workshop 1, Task 1, Question 5; there is a gift to charity. This does not make provision for receipt by an unincorporated association, and the will does not contain provision for the charity being dissolved, amalgamated, or its objects changing.

[7] Workshop 3, Workshop Task 3, Question 3; the will should ideally include the charity's registration number and address.

		❖ Charities may be **constituted as unincorporated associations** (organisations set up through mutual agreement where people come together for a particular purpose), in which case the charity will **not be able to take good receipt of the gift** unless ***all*** members sign to accept receipt. The will may therefore authorise the executors to accept the receipt of **one authorised officer** of the charity. ❖ The will should be drafted to account for the risk that the charity may **dissolve, amalgamate, or change its objects** before the date of death, e.g., by providing: ➢ That the gift is to be used for the body's **general charitable purposes** (which may establish that the gift has not failed even if the organisation has changed, or allow the gift to pass to a similar charity performing the same work). ➢ That the executors may **choose a similar charity** to pay to if the original recipient charity has ceased to exist. ❖ If 10% or more of the estate is given to charity, the **whole estate will qualify for a reduced rate of IHT at 36%** (s209 and Sch 33 Finance Act 2012). If the intention is for 10% of the estate to be gifted to charity so that the estate will benefit from this, the charitable gift should be drafted so that **this is not a fixed sum** (otherwise there is a risk it will not be sufficient if the estate has increased in value by the date of death). The gift should instead be drafted as gifting "the **amount sufficient to entitle the estate to the reduced rate**".
Gifts to spouses.	**Civil partnerships**	❖ Note that wording a will to include "spouses" **does *not* apply to civil partners** unless the definitions clause in the will provides that the definition of "spouse" is extended to include these.
	Wills entered into before the Marriage (Same Sex Couples) Act 2013	❖ The Marriage (Same Sex Couples) Act 2013 does ***not*** impact upon private legal documents such as wills that **were made before the Act came into force** (on 13 March 2014). ❖ Therefore, reference in a will made before 13 March 2014 to "husband", "wife" or "widow" etc. refers **only** to persons in an ***opposite sex marriage***. ❖ Similar references in wills made subsequent to 13 March 2014 refer to opposite and same sex marriages, unless there is an express provision in the will to the contrary.
	Nil-Rate Band legacies[8] [9]	❖ A testator may seek to make a gift **equal to the full amount of their available nil-rate band** in order to maximise the amount that can be distributed without paying inheritance tax. ❖ This may be useful where the estate is to otherwise be transferred to an exempt person (because the nil-rate band would otherwise be "lost").

[8] Workshop 3, Workshop Task 1, Question 3

[9] Workshop 9, Workshop Task 1, Question 1

		❖ The gift will **need to be worded as a "formula"** which states that the amount payable is the **maximum** which can be paid without incurring a liability to inheritance tax. ❖ A fixed amount is inappropriate because the testator will not know what the nil-rate band will be on death, and the availability of their nil-rate band **may be used up by lifetime transfers** (PETs or LCTs) made after the date of the will. ❖ However, the risk of using a formula is that the amount transferred could end up being £0 if **other gifts exhaust the nil-rate band**. ❖ Nil-rate band legacies are less common now that a spouse's nil-rate band can be transferred to their surviving spouse. However, they may still be useful: ➢ Where the testator wishes to pass property to beneficiaries who are **not exempt from IHT** (such as the children) who may otherwise have to wait until the surviving spouse dies to inherit. ➢ To gift assets to **reduce the overall value of the surviving spouse's estate** to ensure the RNRB does not begin to taper (which will happen where the estate is worth £2m+). ➢ To gift assets to **reduce the value of the surviving spouse's estate** for the purpose of means testing care-home fees. ➢ To gift assets away from a spouse who **may not be financially responsible.** ➢ The nil-rate band may **increase in future** which may lead to a potential tax saving (though this is not guaranteed).
The Residence Nil-Rate Band (RNRB).	❖ There is a **nil-rate band for residential property** up to £175,000, that is available where a qualifying residential interest passes lineal descendants of the testator (child, grandchild, step-child, adopted child, foster child). ❖ To benefit from the RNRB, the deceased **does not have to make a specific gift** of the residence; it is sufficient for the **residence to pass *to a lineal descendant*** (along with other assets). If the gift is to both a lineal and non-lineal descendant, the value of the residence is divided proportionally. ❖ The RNRB **can be transferred to the spouse**, meaning the second spouse to die gets a total RNRB of £350,000. ❖ However, the RNRB **starts to taper** (i.e., it gets smaller) by £1 for every £2 that the estate is valued over £2 million. If a taxpayer is in that situation, they should **consider alternatives** to transferring to the spouse, including:	

	➢ The first spouse to die can **leave assets up to the value of the ordinary nil-rate band to a discretionary trust** for the benefit of the surviving spouse and their issue (i.e., the assets are taken out of the estate tax free, and held on trust). ▪ This will **reduce the value of the estate** so that that the RNRB does not taper when the surviving spouse dies, whilst the surviving spouse retains the use and enjoyment of the property). ➢ However, if the estate of the survivor is still likely to exceed the threshold, the first spouse to die will need to consider leaving an **interest in a residence to lineal descendants** in order to **get the full benefit of the RNRB on the death of the first spouse** (otherwise the alternative is that, on the death of the second spouse, the second spouse will get a lesser benefit from the RNRB). ➢ Ownership of the home could potentially be **divided between the surviving spouse and the children** (though if there is only one residence to which the RNRB can apply, this risks the residence, and hence the deceased spouse's RNRB, being **lost should the children run into financial difficulties**). ➢ One solution to mitigate that risk is for the first spouse to die to direct that the **interest to the children is an immediate post-death interest trust**, where the children are life tenants (and hence only entitled to use and enjoyment of the property), with the trustees empowered to appoint an interest in capital at their discretion. The property will be protected should the children run into financial difficulties, yet this preserves the RNRB. ➢ If the above is not an option, then the survivor may **consider making lifetime gifts** to reduce the estate below the taper threshold.

Drafting considerations with regards to a gift of the residue

❖ *Private Client: Wills, Trusts and Estate Planning, 11.2.7*

Overview	❖ The following matters should be considered where a testator wishes to include non-residuary gifts in their will:

What happens if a gift of the	❖ If a gift of the residue fails, the default position is that the **property will pass under the intestacy rules;** i.e.:	
	If there is a living spouse…	❖ The beneficiary spouse will receive: ➢ **Personal chattels**; and ➢ The **statutory legacy** (£322,000); and

residue fails?[10] [11]		➢ **Half of the residue**. ❖ The spouse **must survive for 28 days after the intestate** in order to inherit. ❖ The remaining property will then be distributed on the statutory trusts **amongst the children equally**, contingent upon them reaching 18, or marrying if sooner: ➢ If the **children die before the intestate**, the property will pass to the **grandchildren** (and to any great-grandchildren if the grandchildren have also predeceased the testator) contingent upon them attaining 18 or marrying if earlier. ➢ If the children **die after the intestate**, but before their contingency is satisfied, the **gift fails unless the child leaves an issue.** ▪ If the child leaves no issue, the person's share is distributed **as if they had never existed.** ▪ If the child leaves an issue, the child is treated as having predeceased the intestate, so the **estate is distributed to the issue (i.e., grandchildren) equally.**
	If there is no living spouse…	❖ If there is **no living spouse**, assets will be distributed to surviving individuals in the highest category in turn: 1. To the **Parents** ↓ 2. To "**whole-blood" brothers and sisters** (on the statutory trusts). ↓ 3. To "**half-blood" siblings** i.e., siblings which share only one parent with the deceased (on the statutory trusts). ↓ 4. To **grandparents** ↓ 5. To "**whole-blood" uncles and aunts** (on the statutory trusts). ↓ 6. To "**half-blood" uncles and aunts** i.e., the half-brother/sister of a parent (on the statutory trusts).

[10] Workshop 1, Prep Task; there is no substitutional provision in respect of the residuary gift, and one of the residuary beneficiaries has died. See also in relation to Workshop 1, Task 1, Question 4(a), (b) and (c): it is essential to ensure that the drafting of any substitutional provision is in accordance with the client's instructions. Consider carefully what any substitutional provisions, as drafted, provide for. What has the client told you that they want to happen in the event that a gift fails, and does the will achieve this?

[11] Workshop 3, Workshop Task 3, Question 3; the substitutional provision in the will is poorly drafted and is only triggered should *every* gift in the will fail.

	↓ 7. To **The Crown**/Duchy of Lancaster/Duke of Cornwall (*Bona Vacantia*).

❖ The testator may not desire this, and so it may be prudent to:

- ➢ **Include substitutional gifts** to cover the possibility of the primary gift failing; and/or
- ➢ **Include a "longstop" beneficiary** who will inherit if all other intended arrangements fail.

Direction as to payment of debts, expenses and legacies.

❖ The will should normally include a direction for the payment of all **debts, expenses and legacies to be made from the residue** *before* it is distributed to the beneficiaries.

❖ In the absence of such a direction, the statutory order set out in s34(3) Administration of Estates Act 1925 will apply, i.e.:

1. IHT Loan
2. Funeral and testamentary expenses.
3. Debts
4. Specific Gifts
5. Residue

Should the residue be left on trust?[12]

❖ The residue **should be held on trust** where:

The testator desires a trust be created.	❖ For example, where the testator wishes to create a **life interest**. ❖ An example of a life interest is where a beneficiary (e.g., a spouse) is granted **use of the testator's property during their lifetime** but, in the event of their death, the property will pass to a third party (e.g., the testator's children).
The beneficiary is under 18 at the death of the testator and the following circumstances apply:	❖ The testator **does not want a minor beneficiary's parent or guardian to give receipt** on the minor beneficiary's behalf. ❖ In such circumstances, there will need to be a **trust of the beneficiary's entitlement** until the beneficiary reaches 18 and can give a good receipt.
Contingent gifts are made.	❖ A contingent gift is where the **beneficiary only becomes entitled to property in the event of a particular circumstance occurring**; for example, a gift of £100,000 contingent on the beneficiary reaching 25. ❖ It is desirable to declare a trust where contingent gifts are made so that the **property be dealt with by trustees until the contingency**

[12] Workshop 3, Workshop Task 3, Question 3; the drafting contains conflicting provisions which purport to both give the estate outright to the wife, and to be held on trust. There is a further issue in that the drafting of the trust of the residue provides that the *children* and grandchildren will receive the estate contingent on reaching the age of 21, which does not reflect the testator's instructions.

		is satisfied. In particular, this can grant the trustees power to advance income and capital growth to the beneficiary. ❖ In absence of a trust, the beneficiary will not normally receive income or capital growth from the asset. Cash gifts will, as a result, be eroded by inflation.
Gifts to more than one person.	❖ With respect to the residue, unlike with specific gifts, it is **wiser to omit names and specific shares in the residue**. ❖ This is because: ➢ If **more beneficiaries join the class before death**, they will be excluded. ➢ If a named beneficiary predeceases the testator, their **share will pass by intestacy** (or, if the gift is to the testator's children, to their issue under s33 Wills Act 1837, and then intestacy) so a partial intestacy would not be avoided. ❖ Instead, it is advisable for the will to **refer to the class generally** as that which exists at the date of death (e.g., *"for such of my children as survive me and if more than one in equal shares"*). This ensures that there will only be a partial intestacy if the entire class predecease the testator.	