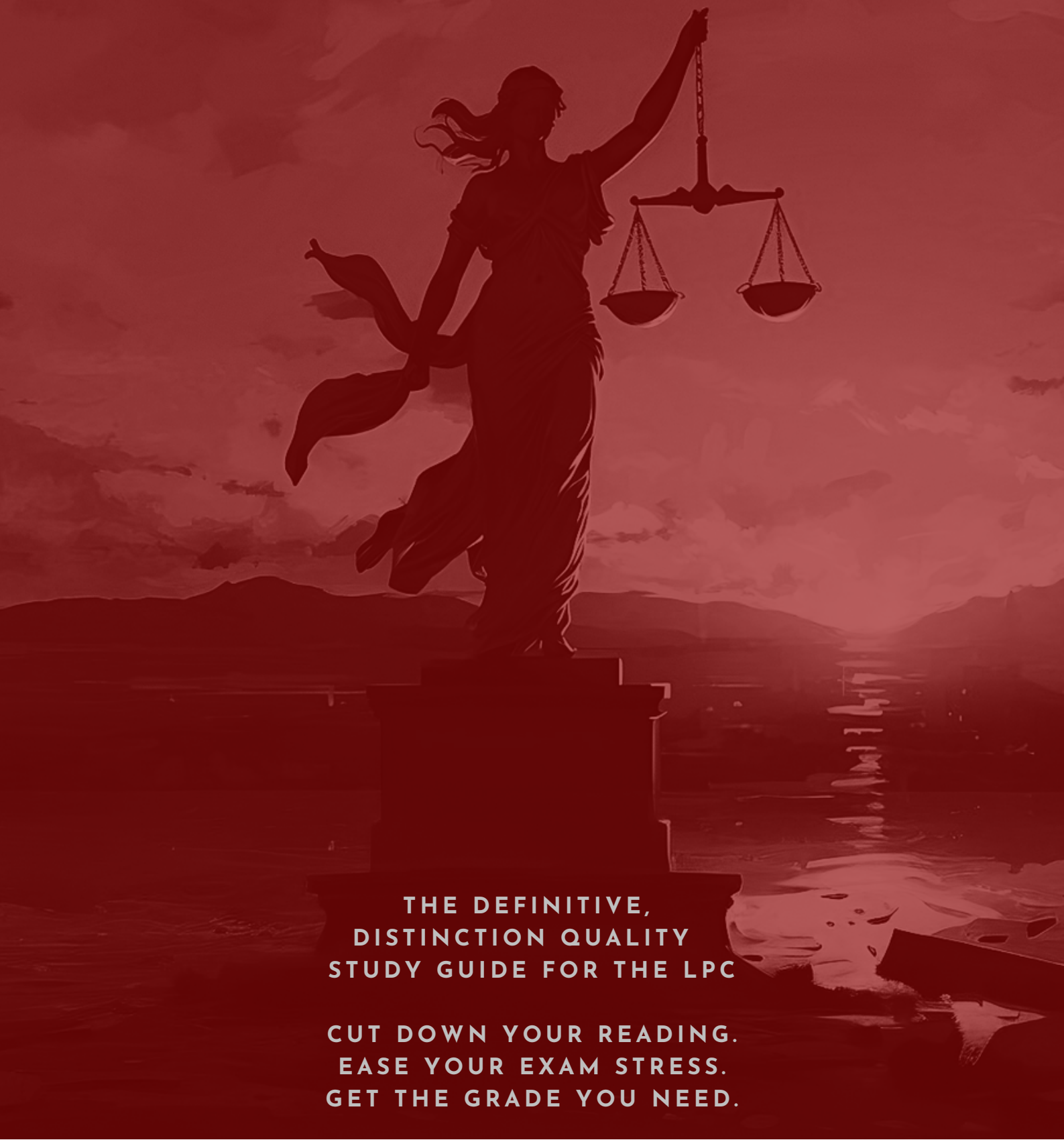
LPC BUDDY

Wills & Administration of Estates

2023 / 24



THE DEFINITIVE,
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Wills & Administration of Estates

Requirements for a Valid Will	p.1-6
Revocation and Alterations	p.7-8
Failed Gifts	p.9-12
Property Which Does Not Pass by Will or Intestacy	p.12-14
Personal Representatives	p.15-21
Applying for the Grant of Representation	p.22-27
The Contents of the Application for the Grant of Representation	p.28-34
Procedure for Payment of Inheritance Tax	p.35-42
Caveats and Citations	p.43-44
Consequences of the Death of a Personal Representative	p.45-46
Administration of the Estate and the Order of Asset Distribution	p.47-52
The Intestacy Rules	p.53-56
Powers of the Personal Representatives	p.57-60
Missing Beneficiaries	p.61-63
The Inheritance (Provision for Family and Dependents) Act 1975	p.64-68
Calculating Inheritance Tax on Lifetime Chargeable Transfers	p.69-74
Calculating Inheritance Tax on Death	p.75-85
Estates and Capital Gains Tax and Income Tax	p.86-89
Conduct Issues and Wills	p.90-92

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

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[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

Requirements for a Valid Will[1]

❖ *Legal Foundations, 29.4*

Overview	❖ In order to create a valid will, the testator (i.e., the person who makes the will) must have: ➢ **Capacity;** ➢ **Intention;** and ➢ **Complied with the Formalities of the** Wills Act 1837.

Capacity *Legal Foundations, 29.4.1*	❖ For a will to be valid, the testator must have had capacity to create the will ***at the time they execute the will.*** ❖ This means that the testator must have: ➢ Been **over 18;** and; ➢ Had the requisite **mental capacity** per the **test** in *Banks v Goodfellow* (1870) LR 5 QB 54.

The *Banks v Goodfellow* **Test**	❖ The testator must have *"soundness of mind, memory and understanding".* ❖ This means that the testator must have understood: ➢ **The nature of their act and its broad effects:** ▪ They must understand that they are making a will, and what that entails. ➢ **The extent of their property:** ▪ They must have a general awareness of the extent and nature of their estate, though they need not recollect every individual item. ➢ **The moral claims they ought to consider.** ▪ The testator must have regard to moral duties towards people who might be expected to be included in the will, such as family members or dependents. ▪ The testator must have ***considered*** such claims, but it is open to the testator to then ignore these.

Presumption of Capacity	❖ There is a **presumption** that the testator **had capacity** if: ➢ The will is **rational on its face**; and ➢ There is **no evidence that the testator showed signs of mental confusion** before executing the will. ❖ However, if there is anything to put the testator's capacity in doubt, the personal representatives (PRs) will have to **prove capacity.**

[1] Introduction to Professional Practice, Wills Workshop 1, Prep Task 1, Question 1

<table>
<tr><td></td><td>❖ If the testator lacked capacity at the time they executed the will, the will is <u>void</u>. Property will pass, in such circumstances, either under the terms of the last valid will, or the intestacy rules (if there is no valid will).</td></tr>
<tr><td><u>Intention</u>

<u>Legal Foundations, 29.4.2</u></td><td>❖ The testator <u>must have intended to create a will.</u> This has two component elements:

<table>
<tr><td><u>General intention.</u></td><td>❖ The testator must have had “general intention” to make the will.

❖ That is, the testator must have intended to <u>make a will</u> as opposed to any other sort of document.</td></tr>
<tr><td><u>Specific intention.</u></td><td>❖ The testator must also have had “specific intention”.

❖ That is, the testator must have intended to make <u>the particular will</u> in question. In other words, the testator must <u>know and approve its contents.</u></td></tr>
</table>

<table>
<tr><td><u>Presumption of Intention</u></td><td>❖ It is presumed that the testator had the requisite intention if they:
➢ Had <u>capacity</u>; and
➢ <u>Executed the will</u>, having <u>read it.</u>

❖ However, that presumption does not apply in two circumstances:

➢ <u>Where the testator is blind or illiterate, or someone else signed the will on their behalf.</u>
▪ In such circumstances, the probate registrar will require <u>evidence to demonstrate the testator’s intention</u>.

▪ This may, for example, take the form of a statement at the end of the will confirming that the will was read over to the testator, or read by the testator, and that they knew and approved its contents.

➢ <u>There are “suspicious circumstances” surrounding the drafting of the will</u>.
▪ For example, if the will has been prepared by someone who is a major beneficiary under the will.

❖ Where the presumption does not apply, the executor must <u>prove</u> that the testator did actually know and approve the contents of the will.</td></tr>
</table>
</td></tr>
<tr><td><u>Force, fear, fraud, undue influence and Mistake</u>[2]</td><td>❖ If a testator has both <u>capacity</u> and <u>intention</u>, the only other ground on which a will may be challenged is on the basis that it is invalid due to <u>force, fear, fraud, undue influence</u>, or <u>mistake</u>.</td></tr>
</table>

[2] Introduction to Professional Practice, Wills Workshop 1, Prep Task 1, Question 3(a)

Legal Foundations, 29.4.2.2	**Force, fear, fraud, or undue influence.**	❖ A will, or parts of a will, will be invalid if it was created as a result of: ➢ **Force or fear**: of **actual** or **threatened** injury. ➢ **Fraud:** e.g., being misled by some pretence. ➢ **Undue influence:** where the testator's freedom of choice was overcome by **intolerable pressure**, even though their judgement remained unconvinced. ❖ A person who seeks to challenge a will on the basis of undue influence must prove that the above circumstances are the case. ❖ Note that this requirement of proof is **different** to gifts made during the donor's lifetime[3]: ➢ If a donor makes a **lifetime gift** in circumstances which require explanation (for example, because it is large in comparison to the donor's other assets), there is a ***presumption* of undue influence,** meaning the ***lifetime*** gift will fail ***unless*** the recipient can provide the court with a satisfactory explanation as to why the gift was made. ➢ By contrast, if the gift is made by will, the person seeking to challenge the will must *prove* undue influence (etc.).
	Mistake	❖ Any words that have been included in the will without the **knowledge and approval** of the testator will be omitted from probate. ❖ This does **not** cover situations where the **testator *misunderstood* the legal meaning of the words used**. In this case, the mistaken words, are **not** omitted. ❖ The court may interpret the words used in a way which allows it to give effect to the testator's intention.

Formalities	**A will must be...**	**Comment**
s9 Wills Act 1837 *Legal Foundations, 29.4.3*	**In writing, and signed.**	❖ The will must be: ➢ **In writing**; and ➢ **Signed**, either: ▪ By the testator or ▪ By some other person in the testator's presence, and under their direction. ❖ There are **no restrictions** on the materials on which the will can be written, or the type of wording. The will can be, for instance, typed,

[3] Introduction to Professional Practice, Wills Workshop 1, Prep Task 1, Question 3(b)

		handwritten, in Braille, or in shorthand. It **does not have to be written on paper.** ❖ The will must be signed either by, or under the direction of the person making the will.
	It must appear that the testator intended to give effect to the will.	❖ It is not enough for the will to be signed; it must appear that the testator, by signing the will, **intended to cause the will to take effect.** ❖ This might be ambiguous if, for example, the testator was to place an unsigned will in an envelope and write on the envelope *"The last will and testament of... [Name]".* It is doubtful that the name on the envelope would be regarded as a signature which the testator intended would give effect to the will.
	The testator's signature must be witnessed.	❖ The testator's signature must be made, or the testator must acknowledge that the signature is theirs, ***in the presence of two or more witnesses.*** ❖ "Presence" requires both mental and physical presence; that is: ➢ **Mental presence:** the witnesses must have *"consciousness of what is going on",* that is they should be able to say with truth, *"I know that this testator or testatrix has signed this document"* (*Brown v Skirrow* [1903] P 3). It is not necessary for the witnesses to know that the document ***is*** a will, or its ***contents***. ➢ **Physical presence:** the witnesses must be able to *see* the testator signing the will; there must be an unobstructed *"line of sight"* between the witness and the testator (*Casson v Dade* (1781) 1 Bro C C 99). This means that a will can be validly executed ***even if the witness and the testator are not in the same room*** as each other (e.g., if they are witnessing through a window). ❖ If one of the two witnesses does not witness the signing or acknowledgement, **the will shall be considered invalid.**
	Each witness must either attest and sign the will, or acknowledge the testator's signature.	❖ Each witness must either: ➢ **"Attest and sign the will":** ▪ The witness must confirm that they believe that the **signature is that of the testator** and sign the will. ➢ **Or, "acknowledge the testator's signature":** ▪ The witness must **acknowledge that it is *the testator's* signature** that appears on the document.

		➢ **"In the presence of the testator":** ▪ The witnesses' attestation, or acknowledgement, must be done "in the presence of the testator". As above, "presence" requires there to be: • A ***"line of sight"*** (*Casson v Dade* (1781) 1 Bro C C 99); and • A ***"consciousness of what is going on"*** (*Brown v Skirrow* [1903] P 3). ❖ If the witness, or their spouse, are **beneficiaries under the will**, the will remains valid, though **any gifts to the witnesses will fail**.

Remote Witnessing (via Video-link)

Overview		❖ The Law Society traditionally did **not** consider remote witnessing (i.e., via video link) to be permissible. ❖ Due to the Covid-19 Pandemic, the Government, therefore, legislated to amend the definition of *"presence"* in the Wills Act 1837 to include ***"presence by means of videoconference*** *or other visual transmission"* (The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 (SI 2020/952). ❖ However, this definition only applies to wills executed between: ➢ **31 January 2020;** and ➢ **31 January 2024.** ❖ After 31 January 2024, any will made must be **physically signed and witnessed** in accordance with the requirements outlined above. ❖ Remote presence is also not sufficient if a will is being signed ***on behalf of a testator***; the amendment only applies where the will is being signed ***by the testator themselves***.
	Procedure for Remote Witnessing	❖ The steps that the parties must undertake to witness a will remotely are set out in the Government's *Guidance on making wills using video-conferencing, UK Government* – 25 July 2020[4]: ➢ The witnesses **must see the will being signed in real-time**. ➢ The testator must **physically sign** the will or acknowledge an earlier physical signature.

[4] https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing

		➢ Electronic signatures are **not permitted**. ➢ The testator will **date the will** with the date of their signature. ➢ The will must then be **taken or posted to the witnesses**. ➢ The witnesses must **physically sign the will in the virtual presence of the testator** and, if possible, in the **virtual or physical presence of the other witness**. ➢ The witnesses will **sign with the date on which they are signing**, which may be different from the date on which the testator signed and the date on which the other witness signed. ➢ The will is **executed only when EVERYONE has signed.** ▪ So, if the testator dies before all signatures have been added, the will cannot take effect. ❖ The guidance provides that if people can make wills in the **conventional way**, they should **continue to do so**.
	Attestation Clause	❖ It is desirable (but not essential) that, where a will has been witnessed remotely, the **attestation clause be amended to confirm that remote witnessing took place** and that the necessary formalities were complied with. ❖ If the attestation clause is not so amended, the witnesses are likely to have to provide **witness statements as to what occurred**.

Revocation & Alterations

❖ *Legal Foundations, 29.4.4-29.4.5*

Overview	❖ The following note considers the circumstances in which a will will be either: ➢ **Revoked** (i.e., cancelled); or ➢ **Altered** (i.e., the terms of the will are changed).

Revocation *Legal Foundations, 29.4.4*	❖ A will will be revoked in **three circumstances**:	
	Where there is a later will or codicil. s20, Wills Act 1837	❖ If a will, or a codicil, is created after a will, this will **revoke the earlier will in whole or in part.** ❖ A codicil is an addition or supplement to a will. ❖ The revocation may be **invalid** if it is conditional upon a particular event which does not happen.
	Where there is a marriage subsequent to the will[1]**.** s18, Wills Act 1837	❖ A marriage which occurs **after the will is made** automatically revokes the will unless it appears from the will that the marriage was **in the contemplation of the testator when they made the will** (s18(3)). ❖ This may be the case if, for example, the testator was **already engaged** at the time they made the will. ❖ The will may also **expressly** provide that it is made in contemplation of a future marriage.
	Where the will is destroyed. s20 Wills Act 1837	❖ The will will be revoked if it is **destroyed** *"by burning, tearing or otherwise destroying the same"*: ➢ **By the testator;** or ➢ **In the presence of the testator,** by the **testator's direction;** ➢ With the **intention of revoking the will.** ❖ This means that: ➢ **Physical destruction** is necessary. Merely crossing out or writing the words "revoked" across the will is **not sufficient**. ➢ Destruction **by another in a different room** will **not** revoke the will even if it is at the testator's direction. ➢ ***Intention*** is also necessary. Accidental destruction will **not** result in the will being revoked.
Alterations	❖ The basic rule is that alterations to a will are **invalid unless** ➢ They are **made *before* the will is executed;** or	

[1] Introduction to Professional Practice, Wills Workshop 1, Prep Task 2; Workshop Task 1

Legal Foundations, 29.4.5	➢ They are ***executed like a will*** (in other words, this must be witnessed, and the **initials** of the testator and witnesses are **in the margin** beside the alteration). ❖ Where an alteration is made which is **invalid**, the **original wording** of the will will stand. However, if the original wording can no longer be read, the will will take effect as if the **words have been obliterated.** ❖ If a testator makes a later codicil to the will, the original will is **republished on the *date of the codicil***, which may affect the description of beneficiaries.

Failed Gifts

❖ *Legal Foundations, 29.5*

Overview	❖ Gifts made under a will may "fail"; in other words, the recipient beneficiary **will not receive the property** as intended. ❖ The reasons why a gift can fail, and the consequences of this, are set out below.

Ademption *Legal Foundations,* 29.5.1.2	❖ A gift will fail where it has been "adeemed". This is where the specific item bequeathed **no longer exists** at the time of the testator's death. ❖ A gift can be adeemed in two circumstances:	
	Where the testator *no longer owns* the property when they die.	❖ A gift will fail if the testator **no longer owns the property** that is the subject of the gift at the time of their death. ❖ This applies where property is replaced; if a specific gift is made (for example, "my car", or "my watch"), there is a presumption that the testator meant to bequeath only the asset they owned **at the date of the will** and not the replacement. ❖ So, if a will is made, and the asset referred to is sold and a replacement is bought, the replacement will not be gifted. The gift will be adeemed and will fail.
	Where an asset changes in *substance rather than name or form*.	❖ A gift may be **transformed or altered after the making of a will**. If an asset changes in such a significant way that it **no longer exists in the form described in the will** at the testator's death, the gift will be adeemed. ❖ For instance, if the testator bequeaths some shares which they subsequently sell, and they use the proceeds to buy shares in a different company, the shares would be a change in substance and the gift will be adeemed. ❖ However, if the testator owns shares in a company and the company is taken over, or the company name changes, the gift will have merely **changed in substance, and not form**, and will **not** be adeemed.
Lapse *Legal Foundations,* 29.5.2	❖ A gift will "lapse" where a **beneficiary dies *before* the testator**. ❖ If the beneficiary dies *before* the testator, the gift will fail ***unless***: ➢ The will is worded as passing the gift to the **holder of a particular office or class**; or ▪ If that is the case, the gift passes to the *office-holder,* or *class* as constituted at the time of death.	

<table>
<tr><td></td><td>

The testator has included a "substitutional gift";

The will can specify that, if the intended recipient of the gift (X) dies before the testator, the gift instead passes to a substitute (Y). If the will does so, the gift will not lapse but will pass to Y.

❖ If the above exceptions do not apply, where a gift lapses, this will either:

Fail and fall into residue; or
If the gift is to a direct descendant of the testator (i.e., child, grandchild, and so on) who dies before the testator, the gift will pass to the issue of the intended recipient (s33 Wills Act 1837).

The person's "issue" is their direct descendants; so, children, grandchildren, great-grandchildren, and remoter descendants. This includes adopted children, but does not include step-children.

<table>
<tr><td>Interpretation of the will.

Legal Foundations, 29.5.2.2</td><td>❖ With regards gifts to people, a will is construed on the date it is made.

❖ This means that a gift to the "eldest son of X" is a gift to the eldest son at the date of the will. The gift will lapse if the eldest son at the time the will was made dies prior to the testator.

❖ The gift does not pass to the eldest son at the time of the testator's death (who would have been the second eldest son at the time the will was made).</td></tr>
<tr><td>Determining whether a beneficiary has died before the testator.</td><td>❖ If a beneficiary and testator die at the same moment (e.g., in a car crash), the law assumes that the oldest died first (s184 LPA 1925).

❖ Therefore, where the testator is older than the intended beneficiary, the beneficiary will be treated as surviving the testator and so the beneficiary's estate will inherit the gift.</td></tr>
<tr><td>Gifts to joint beneficiaries.</td><td>❖ Gifts to joint beneficiaries will not lapse unless all beneficiaries die, unless the gift contains words of severance (e.g., "to A and B in equal shares").

❖ If words of severance are included, if A or B dies, the gift lapses.</td></tr>
</table>
❖ Note that a gift does not fail where a beneficiary dies after the testator; in those circumstances, the intended gift will pass to the beneficiary's estate and will be passed on in accordance with the terms of the beneficiary's will (or the intestacy rules, if the beneficiary died without a will).
</td></tr>
<tr><td>A beneficiary or the beneficiaries' spouse/civil</td><td>❖ Any gifts to a beneficiary will fail if either the beneficiary, or the beneficiary's spouse or civil partner, is also a witness to the will (s15 Wills Act 1837).</td></tr>
</table>

<table>
<tr><td><u>partner is a witness to a will.</u>

Legal Foundations, 29.5.3.2</td><td></td></tr>
<tr><td><u>Disclaimer</u>

Legal Foundations, 29.5.3.3</td><td>❖ “Disclaimer” is where a beneficiary <u>refuses a gift</u>.

❖ Subject to a contrary intention in the will, a person who <u>disclaims their entitlement</u> will be treated as having <u>predeceased</u> the testator (s33A Wills Act 1837).

❖ This means that:
➢ If the intended beneficiary is a <u>direct descendant</u>, the gift will <u>pass to their issue.</u>
➢ Otherwise, the gift will <u>pass into the residue.</u></td></tr>
<tr><td><u>Forfeiture</u>

Legal Foundations, 29.5.3.4 – 29.5.3.5</td><td>❖ The gift will fail if the beneficiary <u>unlawfully kills the testator</u> (s1, Forfeiture Act 1982).
➢ This applies to cases of both <u>murder</u> and <u>manslaughter</u>.

➢ This <u>does not</u> apply, however, where a killer is <u>insane</u> per the meaning of the McNaghten rules. (i.e., where “…the party accused was labouring under such a defect of reason, <u>from disease of the mind</u>, as <u>not to know the nature and quality of the act he was doing</u>, or as not to know that what he was doing was wrong” (M’Naghten [1843] UKHL J16)).

<table><tr><td><u>Relief from forfeiture.</u></td><td>❖ In cases of manslaughter or assisted suicide, the killer may apply within <u>3 months of conviction</u> for <u>relief from forfeiture</u>.

❖ The court has discretion to <u>modify or disapply the forfeiture rule</u> under the Forfeiture Act 1982 if the <u>justice of the case</u> requires this.

❖ The time limit is strict and the court has <u>no discretion to extend</u>.

❖ The time runs from the point of <u>sentence</u> and not, if this is earlier, when the court accepts a defendant’s plea (Challen v Challen [2020] EWHC 1330 (Ch)).</td></tr><tr><td><u>Consequences of forfeiture.</u></td><td>❖ The consequences of forfeiture are the same as for “disclaimer” above, i.e., a person who <u>forfeits their entitlement</u> will be treated as having <u>predeceased</u> the testator (s33A Wills Act 1837).

❖ This means that:
➢ If the intended beneficiary is a <u>direct descendant</u>, the gift will <u>pass to their issue.</u>
➢ Otherwise, the gift will <u>pass into the residue.</u></td></tr></table></td></tr>
</table>

If the gift fails, and there is no residuary device or bequest…	❖ If the gift **lapses or fails** and there is **no residuary devise or bequest**, the gift will pass to those entitled on **intestacy**. ❖ "The residue" is what is **left in the testator's estate after specific gifts**. A residuary device or bequest is a direction as to **what to do with that remaining property**. If there is no residuary device or bequest, and the gift fails or lapses, the gift will pass in accordance with the intestacy rules. ❖ This will be the case if, for example, the terms of the will **do not say** "remainder to person X". ❖ A gift will also pass **under the intestacy rules** if it lapses or fails and it is ***already a part of the general residue.***

The effect of divorce. *Legal Foundations,* 29.5.3.1	❖ The effect of a gift will alter by divorce which occurs ***subsequent to the will.*** ❖ If the testator divorces after the will is made, this will cause any provisions of the will which envisage the testator's spouse surviving them to act **as if the spouse had died before the will was made** (s18A Wills Act 1837). ❖ This means that, if there is a gift to a spouse, who subsequently divorces the testator, and: ➢ **There is no substitutional provision:** ▪ The gift will fail and will **fall into residue**. ➢ **There is a substitutional provision:** ▪ The substitutional provision will apply. ▪ E.g., *"I leave all my property to my husband, however if my husband dies before me, my property shall pass to my children equally"*. In such circumstances, the gift passes to the children.