

# Chapter 2: Contents of Wills and Administration of Estates

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## Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX syllabus:

- 3 Understand the main clauses commonly found in wills
- 4 Understand the circumstances in which gifts in a will might fail
- 7 Understand the role of personal representatives
- 8 Understand the different types of grants of representation
- 9 Understand when further affidavit evidence might be required on application for a grant of representation

## 2.1 Introduction



### Reading Dad's will

Megan and her mum have now found her dad's will in his filing cabinet under "Important stuff". Megan's dad didn't trust solicitors and wrote it himself. The will names Megan as executor and contains the following clauses:

*"I give my sheepdog, Shep, to my friend Brian Jones. I give £30,000 from my Nationwide Building Society account to my daughter Megan.*

*I give everything else to my wife."*

The will appears to have been properly signed and witnessed by two neighbours.

Unfortunately, Shep died several years ago, after the will was signed, and Megan's dad replaced him with a new sheepdog called Bryn. The Nationwide account has only £2,000 in it.

Many clients come into a solicitor's office wanting a simple will. Their wishes are clear, they think, and they want a short straightforward document without lots of legal mumbo-jumbo. It is the job of the lawyer to ask the right questions about their personal and financial circumstances. As a result, the clients will usually find that their circumstances require a more complicated document. Often they need to have their assumptions about what will happen when they

die challenged. An example is where a husband and wife both want wills but have only considered the possibility of the (older) husband dying before the wife.

This chapter will consider:

- the different types of gift which can be made in a will;
- issues to be considered when taking instructions;
- family provisions in a will;
- an outline of the procedures for applying for a grant of probate or letters of administration.

## 2.2 Gifts in wills

Before considering taking instructions, it is important to understand the different types of gift which can be made in a will. These are called **testamentary gifts**.

For the purpose of defining gifts in wills, it is important to remember the distinction between real and personal property. Real property consists of immovable property such as land and houses. The freehold estate in land is therefore real property. A gift of “land” includes freehold land only (i.e. **not** leasehold land). Everything other than freehold land is called personal property and includes, for example, the leasehold estate, cars or jewellery. A gift in a will of freehold land is called a “devise”. A gift of personal property is called a “bequest” or a “legacy”. There are different types of legacy and it is important to use the correct terminology. Legacies can be divided as follows.

### (1) Specific legacy

This is a gift of a particular thing which is identified; it must be clearly described in the will. For example “I give **my** three stone diamond engagement ring . . .” or “I give **my** Picasso painting . . .”.

### (2) General legacy

This is a gift of an unspecified item is called a general legacy. It is a gift of property which is not distinguished from other property of the same type or a gift of an item which the testator may or may not possess at the date of death but which could be purchased to fulfil the gift. For example, “I give **a** car . . .” or “I give **a** horse . . .”. A **pecuniary legacy** is a general legacy which is a gift of money out of the general estate. For example, “I give £1,000 to Jane . . .”.

### (3) Demonstrative legacy

A demonstrative legacy is a gift of a general nature but which is to be paid out of a specified fund rather than the general estate. For example, “I give £1,000 from my Barclays Bank account to . . .”. If the specified fund is inadequate to meet the legacy where, for example, the Barclays Bank account at the date of death contains less than £1,000, the balance of the legacy must be met from the residue of the estate.

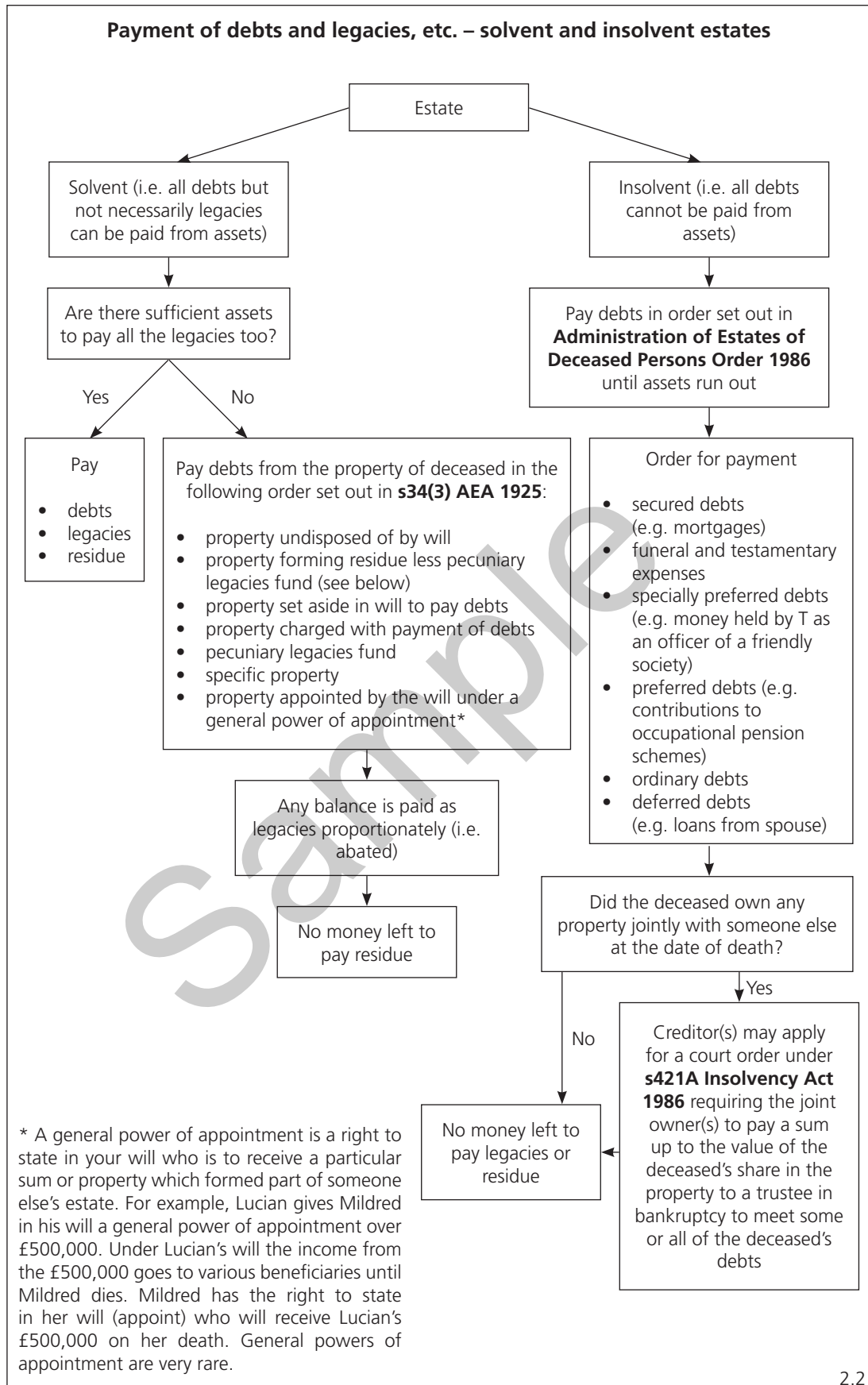
#### (4) **Residuary legacy**

The part of the estate which is left once all debts have been paid and all other gifts have been distributed is called the **residuary estate** or **residue** and is often referred to in the will as “my residuary estate”. Testators often leave a few small gifts to named individuals or charities. They usually leave the residuary estate to one person, for example, a spouse, and to children or grandchildren if the spouse fails to survive. The gift of the residuary estate is often the largest gift to be made in the will. Every will should include a clause dealing with the residue. A legal adviser who fails to include such a clause is likely to be professionally negligent.

The distinctions between the different types of gift are very important because the classification of the gift determines what happens to legacies made in a will when the estate does not have enough assets to pay all the testator’s debts and to pay all the gifts made in the will. The process of deciding which gifts should be paid and which should not, is called **abatement**.

The executors gather in the assets of the testator and ensure that all persons to whom the testator owes money are paid first (the creditors). It is only once all the creditors are paid that the beneficiaries referred to in the will can receive anything that is left.

The order in which debts, legacies and residue are paid depends on whether an estate is solvent or insolvent and is governed by the **Administration of Estates Act 1925 (AEA 1925)** and the **Administration of Estates of Deceased Persons Order 1986 (AEDPO 1986)** (see overleaf).



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