



## Protecting copyright and Artist's Resale Right after death

Throughout this document we will be referring to the Artist's Resale Right Regulations 2006 ("the Regulations"), a copy of which is available under the Resale Right section of our website at [www.dacs.org.uk](http://www.dacs.org.uk).

### 1. Why is it important to make a Will?

Your copyright is a valuable asset from which income may be derived after your death. Copyright in artistic works currently lasts for 70 years from the death of the creator. If you retain the copyright in your works throughout your life then you have the ability to pass the copyright to whomever you wish on your death. In order to ensure that your copyright passes in accordance with your wishes on your death it is important to make a clear provision in your Will regarding copyright and who you would like to inherit it (including the right to receive royalty payments). The recipients of the assets which form the subject of your Will are called 'beneficiaries'.

By virtue of the Regulations, Artist's Resale Right lasts for as long as the copyright in the work. In the UK this right currently only applies to living artists and will not apply to the beneficiaries of deceased artists in the UK until 2012. However, beneficiaries of deceased artists whose works are still protected by copyright can receive royalties from sales that take place in a number of other qualifying countries, including France, Germany and Italy where the right already applies to works of living and deceased artists. It is therefore important to make a specific provision in your Will now regarding to whom you wish to pass your Artist Resale Right. It is important to remember that copyright and Artist's Resale Right are two distinct assets and should be referred to separately, even if the beneficiary is the same.

### 2. What happens to copyright after my death?

You can choose to leave your copyright to whomever you wish. You may choose to leave the copyright in all of your artwork to one person or to an institution such as a gallery or a museum. Alternatively you may leave the copyright in certain specified works to different individuals or to specify the percentage share of copyright that different named individuals are entitled to. Where you have a Will but have not made a specific bequest in relation to your copyright, different rules will apply. These rules are outlined in a flow chart at appendix 1 of this fact sheet.

### 3. Who benefits from Artist Resale Royalties after my death?

The rules set out in this section apply to artists who died on or after 15 February 2006. Only art work which is protected by copyright will qualify for a resale royalty. Additionally, the Regulations provide that only a "qualifying body" or a "qualifying individual" can benefit from the resale right. A qualifying body is a named charity (bearing the meaning set out in section 7(4) of the Regulations) and a qualifying individual is determined by nationality. Beneficiaries who are nationals of the UK, any other state within the European Economic Area (EEA) or a number of other countries are entitled to receive resale royalties. A full list of qualifying nationalities is available on the DACS website at [www.dacs.org.uk/arr](http://www.dacs.org.uk/arr). Provided that you make a provision to pass your resale royalties to a qualifying body or a qualifying individual the royalty can be paid to that body or person in accordance with your wishes.

Where you have a Will but have not made a specific bequest in relation to the Artist's Resale Right, different rules will apply. Firstly, where a bequest is made in relation to copyright and it is reasonable to interpret that bequest as including ARR then the royalties will pass to the person or body entitled to copyright provided that they are a qualifying body or qualifying individual. Where this is not the case, royalties may pass to a residuary beneficiary (provided that they are a qualifying body or individual) and failing this they will pass in accordance with the UK intestacy rules. These rules are set out in a flow chart which is available on the DACS website at appendix 2 of this fact sheet.

### 4. What happens if I don't make a Will?

If you are domiciled in the UK and you do not make a Will then the assets which you own in your sole name, including all real and personal property, money, art work, copyright and resale royalties, will pass to your next of kin in accordance with the rules of intestacy. (Broadly speaking, a person is domiciled in the country where they have their permanent home, but note that under English Law it does not have the same meaning as nationality). These rules dictate how and to whom your estate will be distributed and as such this may not be in accordance with your wishes. A flowchart setting out the English rules of intestacy is available on our website at appendix 3 of this fact sheet.

There is an exception to questions 3 and 4: different rules apply in relation to the Artist's Resale Right where an artist died on or before 14 February 2006 (before the Regulations came into force). Rather than passing in accordance with your Will or the intestacy rules, the royalties will pass in accordance with the rules set out in sections 16(2)(a)-(c) of the Regulations. Under section 16(2)(a), where the artist owned the copyright in the work immediately before his/her death, Artist's Resale Right is deemed to be transmitted to the person who inherits the copyright provided that this person is a "qualifying body" or "qualifying individual" (see above). Where the artist did not own the copyright immediately before his/her death or where the artist was one of a number of joint authors different rules apply.

## **5. Are there any potential pitfalls I should be aware of before making my Will?**

The content of your Will should be tailored to your individual circumstances and it is therefore highly advisable that you consult a solicitor who will be able to advise you on how best to deal with your estate. We have set out a list of a number of issues that you may wish to consider, with particular emphasis on copyright and the Artist's Resale Right. This is by no means intended to constitute an exhaustive list of everything that you need to consider when managing your estate:

- A common mistake in making a Will is failing to comply with the formal requirements necessary to make a Will legally binding. Unfortunately, this could not only mean that your estate may not pass in accordance with your wishes but it may lead to disputes after your death. To ensure that your Will is valid you should engage a solicitor to draft your Will on your behalf. Alternatively, a number of trade unions offer a free Will writing service to their members.
- If you already have a Will but your intentions have changed since it was drafted then you will either need to revoke your existing Will and create a new one or to add a codicil to your existing Will. Again, there are certain formalities which you must comply with and you should therefore consult a solicitor in these circumstances. Now that the Regulations have come into force it would be worth seeking advice on whether to amend your existing Will in order to deal with Artists Resale Right explicitly.
- It is important to make those in charge of managing your estate (your executors) aware if you have assigned (sold) the copyright in any of your artwork. This may be particularly relevant for illustrators and photographers who often work to commission and may have assigned the copyright in their works under the terms of their commission agreement. A comprehensive list outlining who owns the copyright in all of your works could prove invaluable to your executors when they come to manage your copyright.
- It is important to note that the physical artwork that you create and the copyright embodied in it are two distinct entities. This means that making a provision to leave a specific artwork to an individual or organisation does not mean that they will be entitled to the copyright embodied in it (although in certain limited circumstances this may be the case). As is set out under question 4 above, where an artist has not made a Will, entitlement to resale royalties can also follow the entitlement to copyright in certain circumstances.
- To ensure that copyright passes in accordance with your wishes you should make specific bequests in relation to your works by naming the individuals or organisations that you want to benefit from the copyright embodied in them. If you are not leaving all of your copyright to one individual you should make it clear who is entitled to the copyright in certain works or whether you would like all of your copyright to be split between certain individuals, and if so in what percentages.
- Even though the Artist's Resale Right will not apply to the beneficiaries of deceased artists in the UK until 2010 at the earliest, it is important to make a provision in relation to the right in your Will now. As mentioned in section 1, beneficiaries of deceased artists whose works are still protected by copyright can also receive royalties from sales that take place in a number of other qualifying countries (including France, Germany and Italy) where the right already applies to works of living and deceased artists.
- Even if your work has not yet reached the qualifying threshold to generate a resale royalty (currently 1000 Euros or approximately £900) it is still important to make a provision in your Will in relation to the Artist Resale Right as your work may reach this threshold in the future.
- You can only leave your Artist Resale Right to a "qualifying individual" or "qualifying body" (see the definition contained in section 3).
- You should ensure that you have made a provision in your Will for the possibility that a beneficiary may die before you do. For instance, if you are leaving your copyright to 'x', your Will should state who will be entitled to the copyright in the event that 'x' dies. This avoids uncertainty and will help to ensure that your assets pass in accordance with your wishes.

- You will have to appoint executors to administer your Will. These are the people who will take on the responsibility of carrying out your wishes and administering your estate after your death and as such you should give this careful consideration. Executors are responsible for gathering together all of the assets of the estate and paying any debts, taxes, funeral expenses etc. from the money in the estate. Commonly appointed executors include relatives, friends, solicitors or accountants. Where the estate is large and complex and the extra expense is justified, banks and trust corporations may also be appointed as executors.

**Please refer to the attached flowcharts for further information:**

Flowchart 1 - Who will benefit from my copyright after death?

Flowchart 2 - Who will benefit from Artist's Resale Right royalties generated in the UK after my death?

Flowchart 3 - Who will benefit from Artist's Resale Right royalties generated overseas after my death?

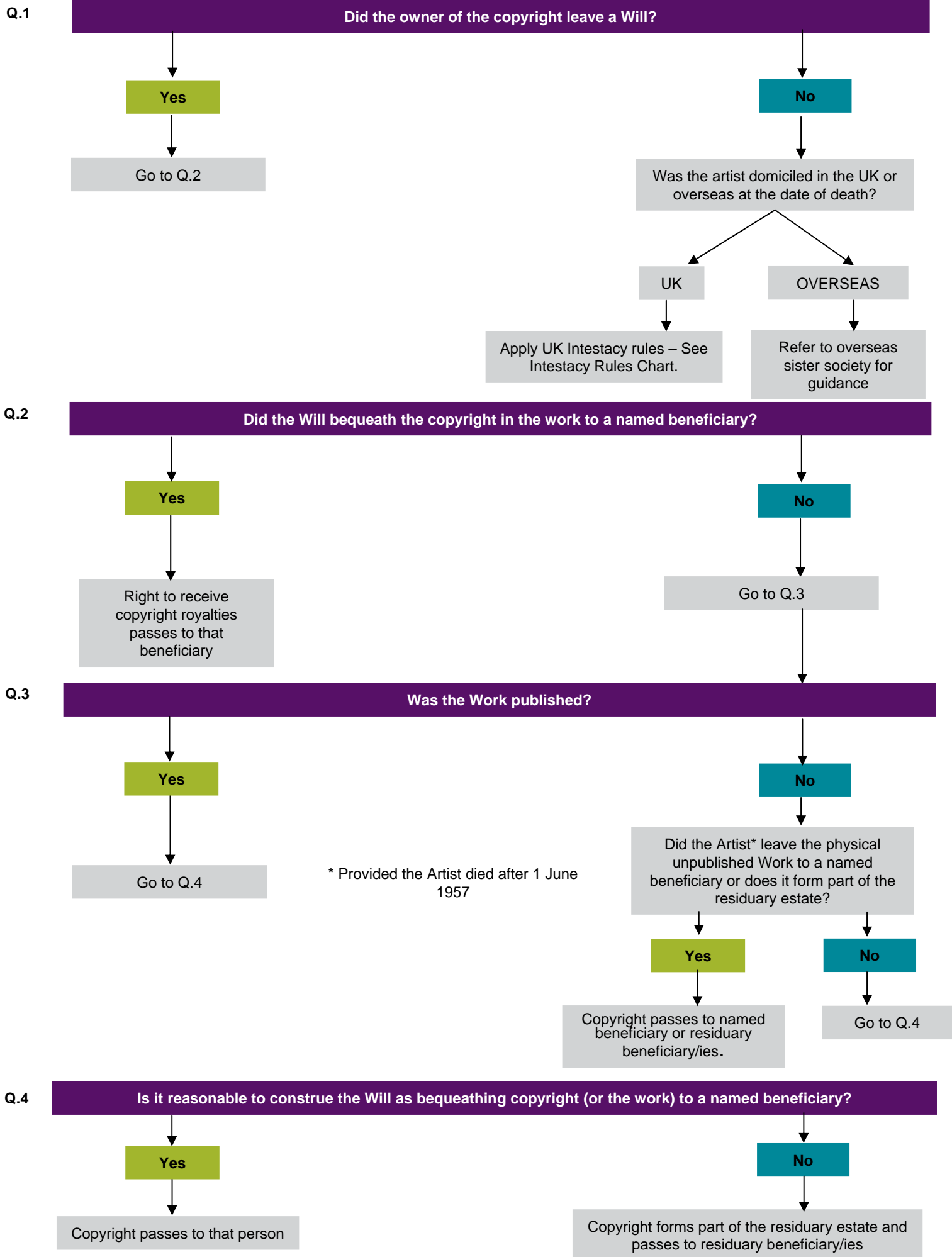
Flowchart 4 - The Artist's Resale Right and the English Rules of Intestacy (Diagram 1)

Flowchart 5 - The Artist's Resale Right and the English Rules of Intestacy (Diagram 2)

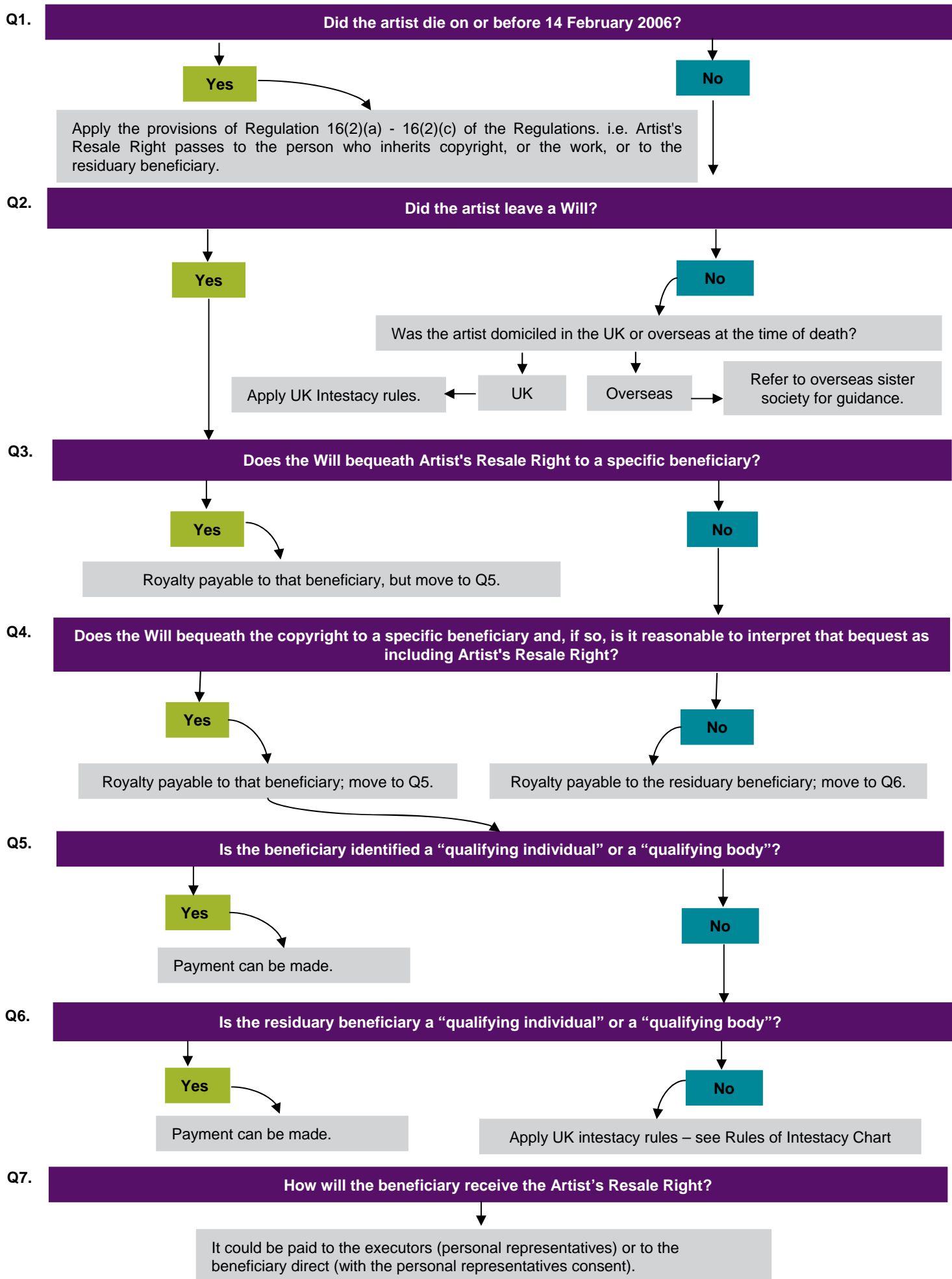
The content of this fact sheet and all attached flowcharts is of benefit interest only and is not an exhaustive explanation of all matters concerning copyright or Artist Resale Right after death. This fact sheet is not intended to apply to specific circumstances. It is provided for guidance only and is based on the law as it stands at October 2009. The contents of this fact sheet should not therefore be regarded as constituting legal or other advice and should not be relied upon as such. You are advised to seek specific and specialist advice in relation to your own specific circumstances.

The flowcharts attached to this factsheet have been reproduced with the kind permission of Farrer & Co. LLP

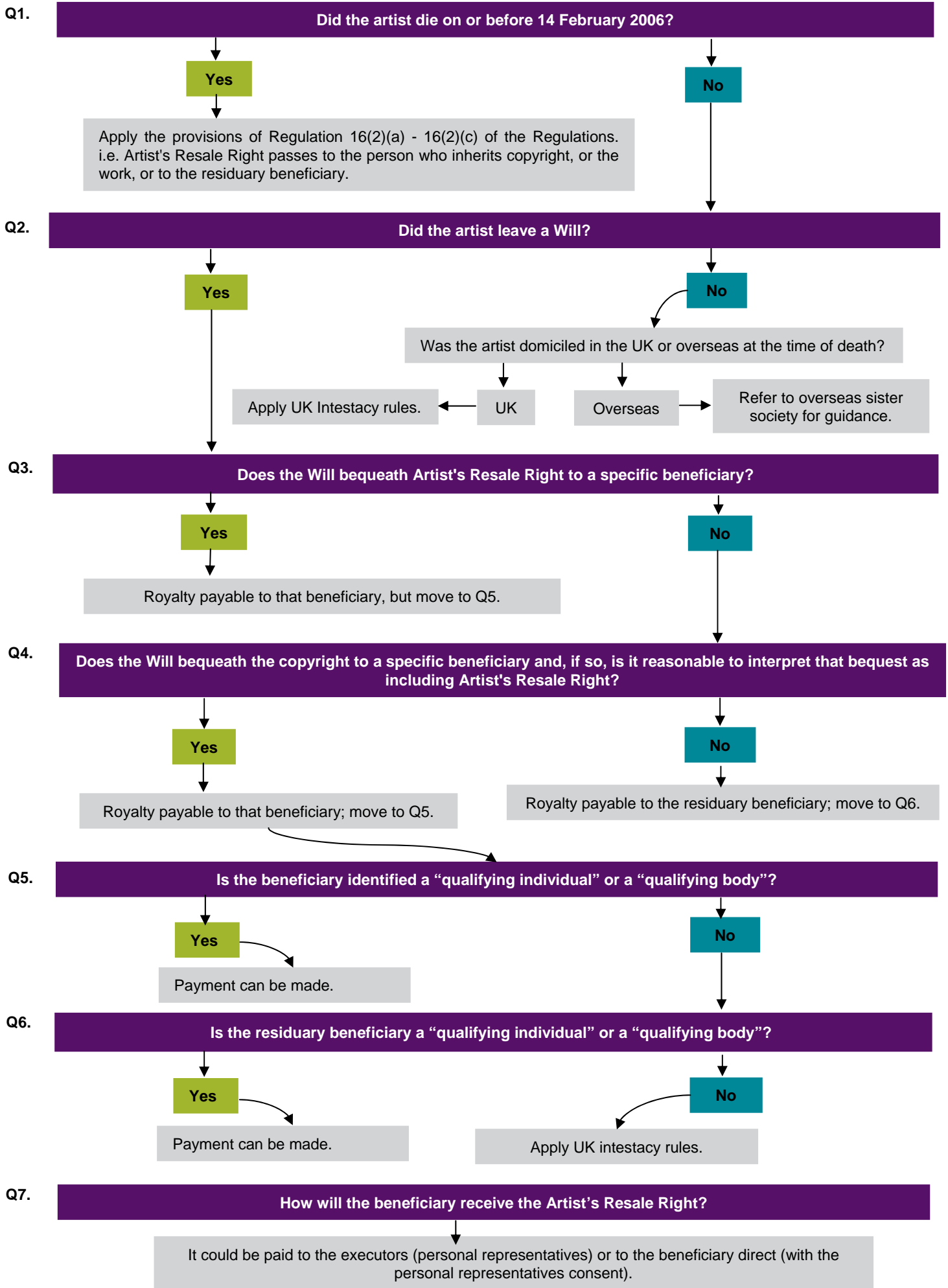
# Flowchart 1: Who will benefit from my copyright after my death?



## Flowchart 2: Who will benefit from Artist's Resale Right royalties generated in the UK after my death?



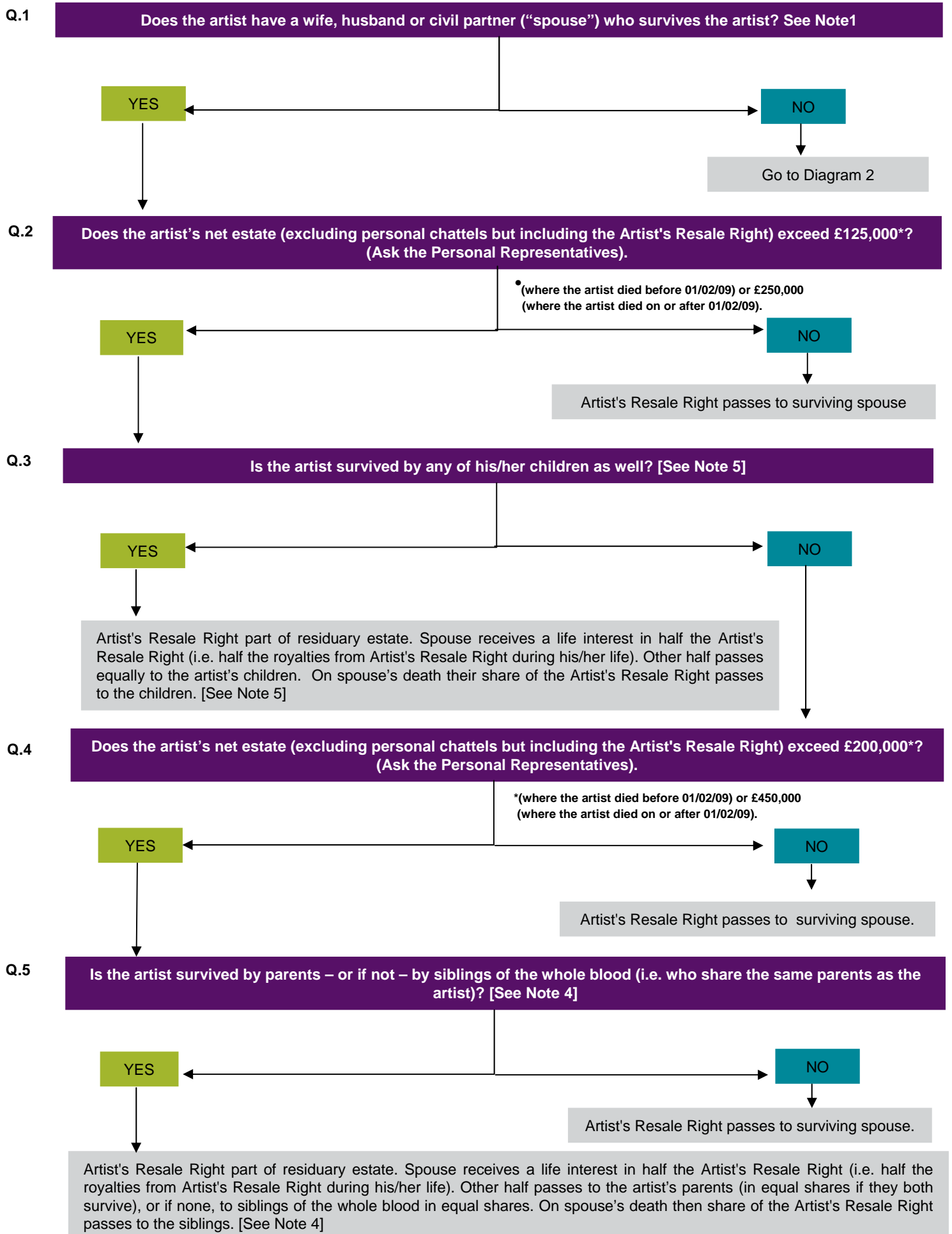
### Flowchart 3: Who will benefit from Artist's Resale Right royalties generated overseas after my death?



## Flowchart 4: The Artist's Resale Right and the English Rules of Intestacy

### Diagram 1

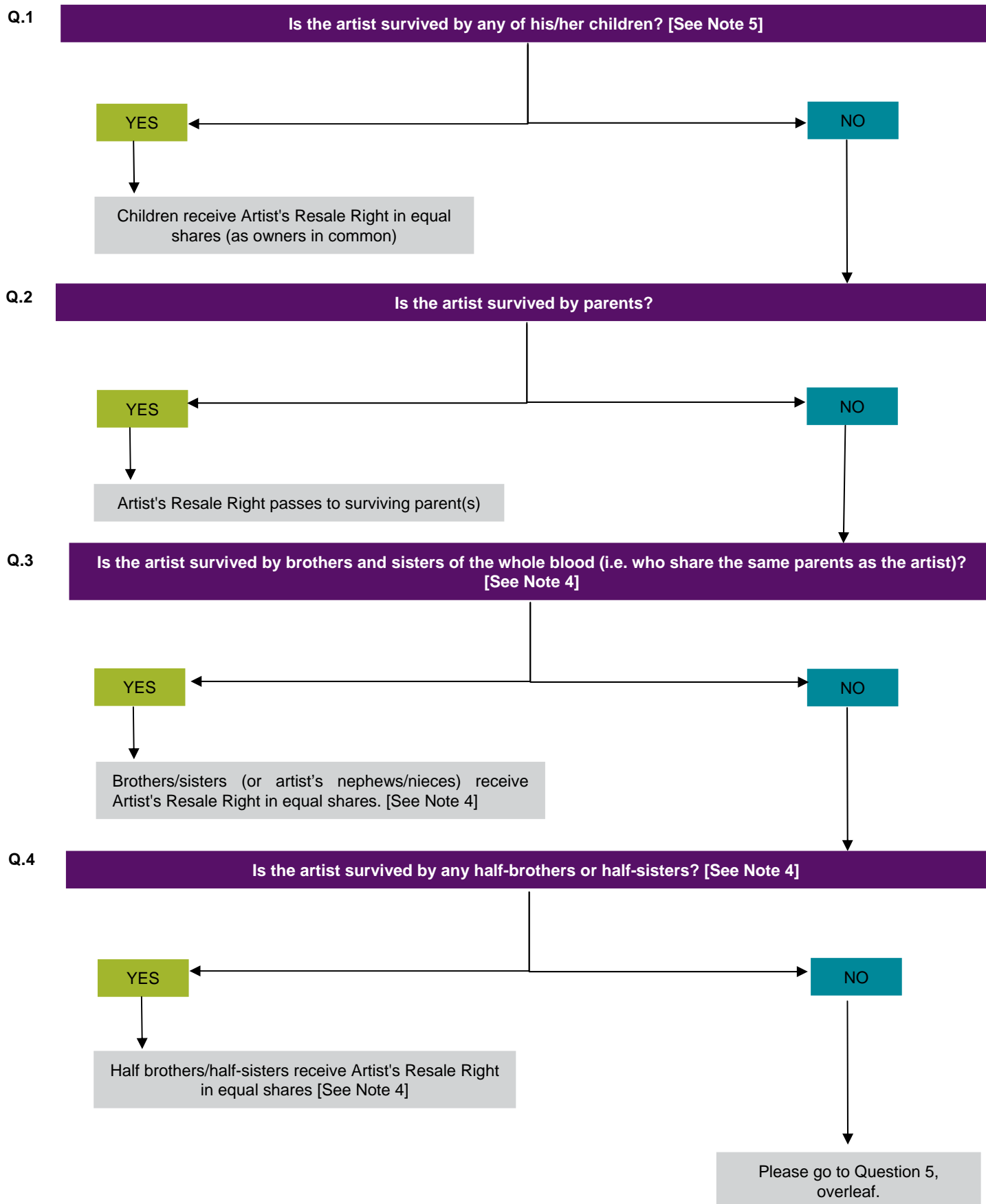
Refer to the diagrams below if the artist was domiciled in the UK at the time of his/her death and the artist did not leave a Will.



## Flowchart 5: The Artist's Resale Right and the English Rules of Intestacy

### Diagram 2

Where the artist's wife, husband, or civil partner does not survive the artist.



Continued...

Q.5

Is the artist survived by grandparents?

YES

Artist's Resale Right passes to grandparents

NO

Q.6

Is the artist survived by uncles and aunts of the whole blood? [See note 6]

YES

Uncles/Aunts (or artist's first cousins) receive Artist's Resale Right in equal shares. [See Note 6]

NO

Q.7

Is the artist survived by uncles and aunts of the half blood? [See Note 6]

YES

Uncles/Aunts of half blood (or their children) receive Artist's Resale Right in equal shares. [See Note 6]

NO

Artist's Resale Right passes to the Crown as bona vacantia

## Notes to accompany Flowcharts 4 & 5

### **Note 1**

Only legally married spouses and registered civil partners qualify. Co-habitees and so-called “common law spouses” do not.

### **Note 2**

“Children” includes adopted, legitimated and illegitimate children (the latter only if the death occurred on or after 4 April 1988).

### **Note 3**

If any children die before the artist leaving children, those children (i.e. the artist’s grandchildren) will take their share.

### **Note 4**

If any siblings have died before the artist their children (i.e. the artist’s nephews and nieces) will take their share

### **Note 5**

If any children have died before the artist, their children (i.e. the artist’s grandchildren) will take their share.

### **Note 6**

If any uncles and aunts die before the artist, their children (i.e. the artist’s first cousins) will take their share.