Report #10

POWERS OF MAINTENANCE AND ADVANCEMENT
1972

INSTITUTE OF LAW RESEARCH & REFORM

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POWERS OF MAINTENANCE AND ADVANCEMENT

INTRODUCTION

During the course of our study of the Rule against Perpetuities, we noted that the enactment of a "wait and see" statute (which we recommended) makes it desirable to examine the law of Alberta in relation to powers of trustees to make payments out of income to beneficiaries. During "wait and see" the property will normally produce income. The consensus is that the trustees of the property should have power to disburse income for the maintenance of the prospective beneficiaries; and quite apart from the situation created by "wait and see" legislation it is desirable to consider whether trustees' power to disburse income for maintenance should be wider than it now is. As well as this subject, we have examined the related topic of powers to make disbursements out of capital for the advancement of a beneficiary.

In July, 1971, after we had begun our study of these matters we learned from Professor Donovan Waters of the Faculty of Law of McGill University (whom we had retained as consultant on another subject) that he had prepared a Working Paper for the Ontario Law Reform Commission in November 1970 on Powers of Maintenance and Advancement. We have studied this Working Paper and obtained from it the utmost assistance. Professor Waters' examination of the rules of equity, of the statutes in various Commonwealth jurisdictions, his scholarly criticism and careful recommendations have aided us greatly. We are happy to acknowledge our indebtedness to his Working Paper and to the Ontario

Law Reform Commission for its generous permission to make use of it.

In the language of courts of equity, "maintenance" has to do with the power of a trustee to make payments out of income (or even capital) for the maintenance, support or education of a beneficiary. This power is especially important in the case of an infant beneficiary and may be desirable even in the case of an adult who is not yet entitled to outright payment of his share.

"Advancement" has reference to the power of a trustee to make payments out of capital to or on behalf of a beneficiary by way of anticipation of his share, and for the purpose of setting him up in life, or possibly to meet other needs.

Even in the absence of express provision or statutory power, the court of equity might authorize payments from income for the maintenance of an infant beneficiary, and in exceptional cases could even authorize payments out of capital for advancement. However this inherent power is so narrow that testators and settlors often give to trustees specific powers. Sometimes the provision is for the "benefit" of the beneficiary rather than merely for his maintenance or advancement. "Benefit" is a wider term than either of the others (Sheard and Hull, Forms of Wills, 3rd ed., 280-283). In a gift to issue alive at the death of the survivor of the testator and his wife, Mr. Sheard provides that the share of each living child shall be held by the trustee "and the income and capital or so much thereof as my Trustee in his uncontrolled

discretion considers advisable shall be paid to or applied for the benefit of such child until he or she attains the age of twenty-five years." This clause confers powers much wider than a mere power to pay maintenance out of income and to make advancements out of capital.

Frequently, however, the trust instrument does not confer powers to maintain or advance and in modern times statutory powers have appeared.

In Alberta the Trustee Act, R.S.A. 1970, c. 373, has two provisions which come from the territorial period (Trustee Ordinance 1903, 2nd sess., c. 11, ss. 24 and 25). Section 32 gives to trustees a discretion to make payments out of income for the maintenance or education of an infant beneficiary; and section 33 gives to them with the leave of the court, power to make payments for the same purposes out of capital; but there is no power to make payments by way of advancement as distinct from maintenance and education.

Sections 32 and 33 appear in Appendix A.

Additional provisions for sale of an infant's property to provide for his maintenance or education are found in the Infants Act, R.S.A. 1970, ss. 2-11. Moreover, the Public Trustee has power to pay out of property in his hands belonging to an infant, sums he deems necessary for maintenance and education of the infant, though where the value of the infants' share is over $10,000 the authority of the court is required (Public Trustee Act, R.S.A. 1970, c. 301, s. 8).

Some modern statutes, such as England's Trustee Act, 1925, give to trustees wider powers than does Alberta's Trustee Act. Section 31 gives discretion to make payments out of income not only for maintenance and education but for benefit as well, and an adult beneficiary is, in certain circumstances, entitled to have income paid to him.

Section 32 gives to trustees a discretion to make capital payments up to one-half of the beneficiary's share (excluding land) for his "advancement or benefit" and this provision is not confined to infants.

Sections 31 and 32 appear in Appendix B.

New Zealand and most of the Australian States have provisions that are based on, or modifications of, the English provisions. We shall have occasion to refer to some of them later.

This report will consider the widening of our provisions for maintenance from income and capital and then will consider provisions for advancement. It is desirable first however to examine the law on the question, "When does a gift carry income?".

Accordingly this report will deal with the following matters in order:

I. When does a gift carry income?
II. Powers of maintenance out of income.
III. Powers of maintenance and advancement out of capital.

I

WHEN DOES A GIFT CARRY INCOME?

We consider this question first because it is appropriate to confer on trustees a statutory power to make payments out of income only if the gift carries it.

Often the answer to the question depends on the construction of the instrument, but there are a number of rules which apply where the instrument makes no specific disposition of the income. These rules vary with the kind of gift, and in English law there are various kinds. One may be hard to tell from another, and words used to describe them may be imprecise or used in more than one sense. For example "vested" may mean vested in ownership (or interest) or it may mean vested in possession as well. Gifts are sometimes said to be deferred. This could mean deferred in possession but it could mean deferred in ownership as well--in other words, contingent. Again, a gift vested in ownership but defeasible may look like a contingent gift. The classification of future interest is complex; yet the placing of a gift in one category or another can have important practical consequences. Here we are interested in the different types of gifts in connection with the problem of entitlement to income.

It will be helpful to give examples of the commoner varieties of gift before discussing the question, "When does it carry income?".

A simple gift to A is said to be vested in him both as to ownership and possession and obviously he is entitled

to the income from the moment the testator dies. Many gifts however are more complex. It will help to set out some of the main kinds, because an understanding of them is necessary to an appreciation of the problem of entitlement to income:

(1) the gift to A may be vested in ownership but not yet in possession, e.g., gift in trust to pay the income to X for life and on his death to transfer the corpus to A. A's remainder is vested indefeasibly in ownership but not in possession until X dies,

(2) the gift to A may be vested in ownership but not in possession (as in (1)) and may be defeasible, e.g., gift in trust to pay the income to X for life and on his death to transfer the corpus to A but should A die in X's lifetime leaving issue, the issue shall take A's share. A's interest is vested but defeasible in the circumstances specified (Browne v. Moody, [1936] A.C. 635),

(3) the gift to A may be vested in ownership and possession but may be defeasible, e.g., gift to A but should he die before reaching the age of 25 the property shall go to B (in Bickersteth v. Shanu, [1936] A.C. 290, the Privy Council construed the gift as in this category, with the result that A was entitled to the income from the testator's death, though A was under 25),

(4) the gift to A may be contingent on an event or age, e.g., a gift to A on reaching 25 (Re Waines, [1947] 1 W.W.R. 880 (Alta. App. Div.)),

(5) the gift to A may be contingent on an event or age, as in (4) but with a further provision which defers possession to a later date, e.g., a gift to A on reaching 25, but payment to be made on X's death (Re Geering, [1962] 3 All E.R. 1043 is an example). This type of disposition is less frequent than the others.

In some of the above examples there is no doubt as to whether or not A receives the income before his gift falls into possession but in others there is. Indeed we shall see there has been great difference of opinion in cases where possession is "deferred" beyond the date of vesting in ownership, assuming of course that the income has not been specifically disposed of.

Entitlement to income can depend on whether the gift is of real property on the one hand or of personal property, or of mixed (real and personal) property on the other. Entitlement can also depend on whether the gift is residuary on the one hand or general or specific on the other; and sometimes it may depend on whether the gift is residuary on the one hand or general or specific on the other; and sometimes it may depend on whether the gift is contingent or vested.

We shall examine contingent gifts and then those that are vested. It will be convenient first to deal with

residuary contingent gifts. The leading case of Bective v. Hodgson (1864), 10 H.L.C. 656 (11 E.R. 1181) holds that a contingent residuary gift of real property does not carry the rents and profits. Seisin is deemed to be in the heir at law prior to vesting in the beneficiary and the former is entitled to the rents and profits. In other words there is an intestacy as to rents and profits until the demise becomes vested. In the case of personalty, however, or a residuary gift that is mixed realty and personalty, the rule is that income follows the principal as an accessory, and must be accumulated, so that if the gift vests, the beneficiary receives the accumulations (subject of course to any statutory restriction on accumulations).

A specific contingent devise, as might be expected, does not carry income. A specific or general contingent gift of personalty likewise does not carry income, though it will do so where the property has been segregated or where the gift is from a parent. It is important to remember that all these rules are subject to indications in the instrument of a contrary intention.

In England the rules were substantially changed by section 175 of the Law of Property Act so as to make contingent devises and bequests carry income, except in the case of a pecuniary legacy. This section is discussed in more detail later in this report.

Where the gift is vested, not only in ownership but in possession, it is obvious that it carries income, whether of realty or personalty and whether specific, general or residuary.

The type of case which has produced difficulty is that in which there is a vested gift of residue, whether indefeasible or defeasible, the possession of which is "deferred". A typical example is a disposition in which T gives an annuity out of residue to W and then directs that on her death the residue shall be paid to A, sometimes with a substitutionary gift to the issue of A should he die in W's lifetime. The problem arises where the annuity does not exhaust the income. Is A entitled to the surplus income during W's lifetime? (This income is called the "intermediate income".) Since the gift is vested in ownership one might think the answer is a simple 'yes', but the modern English cases say otherwise. The first is Berry v. Geen, [1938] A.C. 575. In that case the will said: "I give the whole of my property after the death of the last . . . annuitant . . . to the Congregational Union." Lord Maugham said that these words indicate that the Union was not to receive the surplus income accruing while any annuitant was alive. The remainder was vested and the dictum deals with the testator's intent as to income. Since he had expressly deferred payment there was an inference that he did not intend the residuary beneficiary to receive income accruing before that date. The result is of course an intestacy as to this intermediate income.

The next four cases deal with the same general type of disposition as that in Berry. In Re Oliver, [1947] 2 All E.R. 162, Jenkins J. formulated this proposition: a gift expressly limited to take effect on a future date does not carry the intermediate income. This is of course subject to an indication of contrary intention, and in Oliver the court found in the will something amounting to a direction that the income (or strictly speaking the accumulations thereof) should follow capital.

In Re Gillett, [1949] 2 All E.R. 893, the residuary gift was vested but defeasible. Payment was to be made on the death of the survivor of four annuitants. Roxburgh J. recognized that a contingent residuary gift of personal property carries income, as Bective v. Hodgson held, but added that this is not so where the gift is vested but deferred, whether defeasible or not. He recognized the seeming arbitrariness but thought that a defeasible gift is more like a vested gift than like a contingent one. Consequently the intermediate income not needed for the annuities went as on intestacy.

In Re Wragg, [1959] 2 All E.R. 717 there were annuities, and "after the death of my wife to divide the residuary estate among" seven named persons. The Court of Appeal cited Gillett with approval. On the wording of the will the residuary beneficiaries were to receive nothing until the wife's death. Hence there was an intestacy as to the intermediate income.

In Re Geering, [1962] 3 All E.R. 1043, the residuary gift was contingent on the beneficiary reaching 21, and then payment was deferred until the annuitant's death. Cross J. held: "When a gift of residue is expressly deferred to a future date, then whether it is vested or vested subject to being divested, or contingent, it does not prima facie carry the intermediate income." However a clause enabling trustees to make payments on expectant shares of the trust fund and the income thereof led the court to hold that the will negatived the general rule.

While Oliver, Gillett, Wragg, and Geering all deal with income from a residuary gift, Re McGeorge, [1963] 1 All E.R. 519 had to do with a devise of land and a pecuniary legacy. We consider it later in connection with section 175 of the Law of Property Act, 1925.

All of these cases are recent, and stem from the remark of Lord Maugham in Berry v. Geen in 1938. It is important to contrast the position in Canada. Three years before Berry the Supreme Court of Canada in Re Hammond, [1935] S.C.R. 550 considered a gift of one half of the residue to the testator's two sons, charged with annuities and distributable on the death of the testator's wife. In earlier proceedings, Re Hammond, [1934] S.C.R. 403, the court had held that the residuary gift gave the two sons a vested share subject to partial defeasance in favour of any one of nine named persons who might be living at the wife's death. Since the testator had not specifically disposed of the income apart from the annuities, the question now is whether the income follows the residue or goes on intestacy.

The case came from Ontario and Middleton J.A. wrote the judgment for the Court of Appeal ([1935] 1 D.L.R. 263). He quotes with approval the following passage from Wharton v. Masterman, [1895] A.C. 186:

> Where there is no express trust declared on the income of a trust fund, it follows the destination of and is an accretion to, the fund from which it is derived (unless there be words excluding that implication).

Middleton J. then held that Bective applies to the present case, though the gift here is vested but defeasible while that in Bective was contingent.

The Supreme Court adopted the view of Middleton J.A. The will contained an implied direction to accumulate the income until the wife's death and the accumulation was in favour of the two sons, and in any case both a vested gift, and an executory one which would vest on the widow's death, carry the income. Where there is no express trust of the income of a trust fund, it follows the destination of the trust fund and is an accretion to it. (We are not concerned here with the effect of the Accumulations Act and the disposition of the "released" income.) This decision goes in the opposite direction from the later English cases discussed above.

In Re Amodeo (1962), 33 D.L.R. (2d) 24, T left W an annuity, and "upon her death" to "divide the residue equally among my children living at my death, or if any be dead, to his child or children". The income exceeded the annuity. Earlier proceedings had held the interest of the children to be vested subject to being divested. The children argued that the income should be accumulated for them or their children but the Ontario Court of Appeal held there was an intestacy as to the income. In spite of the presumption against intestacy, the court applied Gillett and Wragg. Hammond was distinguished on the ground that the court there found a plain intention that no part of the estate should be undisposed of.

Then immediately came Re Watson. The testatrix gave H an annuity, and on his death the residue to a nephew, with a gift over to his widow and children should he predecease H. The latter contended that there was an intestacy as to the income not required for his annuity.

McRuer C.J. rejected this argument. There is no distinction between a contingent gift and a deferred vested gift. The latter as well as the former carries income in absence of provision to the contrary and Hammond so holds (35 D.L.R. (2d) 532). His Lordship carefully examined the English cases and Re Amodeo. "Re Oliver and Re Gillett which have been decided since Re Hammond, cannot be reconciled with the broad language used in the Hammond case." As to Amodeo, McRuer C.J. thought that it was based on the intention of the testator rather than on a rule that there is prima facie an intestacy as to intermediate income where vesting in possession is deferred, and added, "If I am wrong in the interpretation of the judgment in the Amodeo case, it is difficult for me to read it as not being in conflict with the Hammond case."

The Court of Appeal, in upholding the judgment below, found in the will an obligation on the trustee to accumulate the income both in the interest of H, the annuitant, and of the remaindermen. Then the court added: the decision "may also rest upon the principle that the accumulation of surplus income and of income thereon should be held to follow the principal from which it is derived as an accessory," citing Re Hammond (37 D.L.R. (2d) 370).

H appealed to the Supreme Court but without success ([1964] S.C.R. 312). The judgment is specifically based on the second ground taken by the Court of Appeal. The English cases are cited and clearly rejected. Judson J., speaking for the court said:

> I am not sure that I understand even now the logical basis for the distinction between contingent residuary bequests and future

> vested interests whether indefeasible or defeasible when surplus intermediate income is involved but I am certain that in 1935 the matter was settled as far as this Court is concerned in Re Hammond.

Re Power (1964), 48 W.W.R. 250 (B.C.) follows Watson. (The Supreme Court judgment is not cited, probably because it had been delivered only a few days before the judgment in Power.) Re Owens (1968), 66 D.L.R. (2d) 328 (Ont.) quotes the English cases with apparent approval, but that case had to do with the income released after 21 years by virtue of the Accumulations Act.

From Hammond and Watson it is clear that the recent English trend has not been adopted in Canada and in the case of a residuary gift, intermediate income that is not specifically disposed of prima facie follows capital, whether the gift is contingent, or vested, or vested but defeasible.

It is relevant here to note the changes made in England by section 175 of the Law of Property Act, 1925. It alters the common law by providing that the following dispositions shall carry income (subject to the Accumulations Act):

(1) A contingent or future specific devise or bequest of property, real or personal;

(2) A contingent residuary devise of freehold land;

(3) A specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory.

There is an exception where the income is "otherwise expressly disposed of". A "contrary intention" falling short of an express disposition is not enough to deprive the beneficiary of the income. This troubled Cross J. in Re McGeorge, already cited. In that case there was a devise and a pecuniary legacy. Then, "the devise and legacy shall not take effect until the death of my wife". Cross J. held that the gifts were vested in ownership (or interest) on the testator's death. However, the legacy does not carry income until the date fixed for payment; it is not within section 175. The devise does because section 175 of the Law of Property Act so states, though Cross J. thought this unfortunate. A gift to X at 30 means the testator intended X to have the income if he reached 30, but a gift to X after the death of A means the testator did not want X to have the income during A's lifetime unless he so directs. This is the distinction between an immediate gift on a contingency and a gift which is expressly deferred. The 1925 Act did not recognize this, because it was passed before the distinction was developed in Oliver and the cases following it. Thus the devisee is entitled to the income (but she cannot claim it now under section 31 of the Trustee Act, 1925 because the will shows a contrary intent).

A further comment on pecuniary legacies: one might argue that the language of section 175 includes them. The point arose in Re Raine, [1929] 1 Ch. 716. A pecuniary legacy was left to each of two infants, contingent on attaining 21 years. They contended they were entitled to maintenance out of the income, pursuant to section 31 of the Trustee Act. They could succeed only if the legacies carried intermediate income. They relied on section 175 which says:

"A contingent or future specific devise or bequest of property . . . shall . . . carry the intermediate income of that property from the death of the testator. . . ." The court held against them. Section 175 applies to a contingent bequest only if it is specific, and a pecuniary legacy is not. It is true that under the rules of Chancery and apart from statute the beneficiary of a contingent pecuniary legacy is entitled to have the interest used for his maintenance in three exceptional cases: (1) where the testator is a parent or stands in loco parentis to the infant, (2) where the legacy is directed to be set aside so as to be available for the beneficiary so soon as the contingency happens, (3) where the testator has shown in his will an intent that the infant be maintained out of the income. On the facts in Re Raine, none of the exceptions applied.

The holding in this case can be criticized. One can read section 175 as applying to every "contingent bequest" instead of applying only to a "contingent specific bequest". However, Eve J. thought that if Parliament wanted to make a general contingent legacy carry income, more appropriate language would have been employed. We observe here that we see no reason in policy why a provision like section 175 should not be extended to general legacies.

We have discussed this subject at legnth because legislation providing for maintenance of a beneficiary out of income should apply only to income to which the beneficiary is entitled. The above survey shows that in Canada an important type of gift, namely a residuary gift that is vested but deferred carries income, though it does not in England. If Alberta had a provision like section 175 of

England's Law of Property Act, 1925, but specifically extended to general legacies, then it is safe to say that nearly all gifts would prima facie carry income.

In England section 31 of the Trustee Act which provides for maintenance out of income, merely says the section applies where the gift carries the income and does not spell out the situations in which it does. We think it appropriate to enact that every gift shall carry income unless the income is "otherwise expressly disposed of", to borrow the phrase from England's section 175. Such a provision has the virtue of simplicity and we think it will operate fairly in nearly all cases. We realize that Cross J. in McGeorge criticized section 175 because he thought that there are cases where the instrument raises an inference that the income is not to go to the beneficiary but where the income is "otherwise disposed of" only inferentially and not specifically. We think that it is not unfair to require the testator to specify if he wishes the income to go elsewhere. We think too that a statutory provision that gifts carry income should not be confined to testamentary gifts as is section 175, but should extend to inter vivos dispositions as well.

We accordingly recommend:

RECOMMENDATION #1

> *ANY FUTURE DISPOSITION OF PROPERTY WHETHER CONTINGENT OR WHETHER VESTED INDEFEASIBLY OR DEFEASIBLY CARRIES THE INTERMEDIATE INCOME EXCEPT SO FAR AS SUCH INCOME, OR ANY PART THEREOF, MAY BE OTHERWISE EXPRESSLY DISPOSED OF.*

This recommendation in large measure follows section 175 of England's Law of Property Act 1925, though it is wider for it covers all future dispositions. We make no recommendation whether it should be a subsection of the section containing the recommendations we make below specifying the trustee's power to make payments out of income, or whether it should be a separate provision, possibly in the Wills Act or Trustee Act or both.

II

POWERS OF MAINTENANCE OUT OF INCOME

Apart from statute, a court of equity has inherent power to make an order for payment of income for the maintenance of an infant beneficiary. This power is, however, narrow. In Re Wright, [1955] 1 D.L.R. 213 (Ont.) a wealthy testator had as beneficiaries a sister and nephews and nieces or their issue. During the period prior to distribution he provided for quarterly payments of $150.00 to each beneficiary under 25 years of age and $300.00 quarterly to each one over 25. The trustees applied to increase these payments to three times the amount provided in the will. The income was more than ample. Gale J. considered whether he had the power, and pointed out that Chapman v. Chapman, [1954] A.C. 429 held that there are four exceptional cases where trustees may modify trusts, one of them being where "maintenance is ordered out of income directed to be accumulated". Gale J. added that, after a period of doubt, the exception was extended even to persons with only a contingent interest in the capital. He held that, though the beneficiaries were not in need, it was

proper to order the increased payments for those under 25, until reaching that age.

Ontario has no provision comparable to section 32 of Alberta's Trustee Act. It is a reproduction of section 26 of an English Act of 1860 called Lord Cranworth's Act (23 and 24 Vict., c. 145). Its purpose was to put in statutory form provisions commonly found in trusts. It was replaced in 1881 by a similar but broader provision and then in 1925 Parliament enacted section 31 of the Trustee Act which is much wider than Lord Cranworth's Act.

The following summary of Alberta's section 32 and England's section 31 shows how comparatively narrow Alberta's provision is. The sections are set out in full in Appendices A and B respectively.

Alberta, section 32

(a) The section applies where trustees hold property for an infant, and whether they hold it absolutely or contingently on his reaching age 18 (formerly 21), and only if the infant is entitled to the income.

(b) It gives to the trustees discretion to pay for maintenance or education of the infant, even though other funds are available or even though another person is bound to maintain the infant.

(c) Trustees are to accumulate the residue of income and hold it for those ultimately entitled to the property.

(d) Trustees may apply the accumulations as though they were income.

England, Section 31

(a) The section applies where property is held in trust for any person (not merely an infant). During infancy the trustees may apply the income for maintenance, education or benefit of the infant and after he reaches 18 (formerly 21) the trustees are required to pay the income to him until his interest is vested or fails or he dies (subsection (1)). There is a priviso that the trustee shall have regard to other income available for maintenance (proviso to subsection (1)).

(b) During infancy the residue of income shall be accumulated (subsection (2)), and (i) on reaching 18 it shall be paid to him if his interest in the income is vested or in the case of real property if he is entitled to the fee simple, (ii) in other cases the trustee shall hold the accumulations as an increase to the capital.

(c) The section applies to a contingent interest only if the trust carries intermediate income, and also to future and contingent legacies by a parent if under the general law the legacy carries interest, and in such case the interest rate is 5% for maintenance of the legatee (subsection (3)).

(d) The section applies to vested annuities just as it applies to income from property, and accumulations are held for the annuitant (subsection (4)).

(e) The section is prospective in operation (subsection (5)).

In many respects England's section 31 is an improvement on Alberta's section 32, though as Lord Evershed said, its form and language make it hard to construe (Re Vestey [1950], 2 All E.R. 891 at 897). Both Manitoba and Prince Edward Island have enacted it in substance.

In formulating our views we have obtained great assistance from Professor Waters' careful analysis of England's section 31 and of provisions in New Zealand and those Australian states which have enacted legislation based on England's section 31.

The object of giving to trustees a statutory power to make payments out of income for maintenance and the like is to confer on them the power that the testator probably would have given them had the point occurred to him. It should not be so wide as to enable the trustees to dispose of income in a way to defeat the testator's intention. On the other hand it should be wider than our section 32. We have mentioned that this section reproduces an English provision of 1860, which has been replaced by the much wider section 31 of the Trustee Act, 1925. Specifically our section 32 should be extended in the following ways.

First, it should apply where property is held in trust for anyone, and not merely for an infant.

Second, it should apply to any interest whatsoever, whether vested or contingent and whether absolute or liable to be divested, and not merely to property held absolutely

or contingently on the beneficiary attaining 18 years of age.

Third, it should enable the trustee in his discretion to make payments out of income for an infant, and in the case of a person over 18 to make payments to him, or in cases like that of a spendthrift, to his family.

Fourth, the purposes for which the trustee may disburse income should be wider than "maintenance or education". In England the purposes are "maintenance, education or benefit" during infancy. The term "benefit", whether used by itself as in the modern Variation of Trusts legislation (Alberta Trustee Act, section 37), or in conjunction with other terms as it is in England's section 31 (and also in England's section 32, which permits trustees to make payments out of capital for the "advancement or benefit" of a beneficiary), is wider than any of the other terms (Pilkington v. I.R.C. [1964], A.C. 612 per Lord Radcliffe).

While there was a difference of opinion as to the wisdom of widening the present purposes, the prevailing view is that "benefit and advancement" should be added. For present purposes, advancement can be described as setting a person up in life. One can argue that inclusion of "benefit" renders the other terms unnecessary. We think however it is best to include them all.

RECOMMENDATION #2

(1) WHERE ANY PROPERTY IS HELD BY A TRUSTEE IN TRUST FOR ANY PERSON FOR ANY INTEREST WHATEVER, WHETHER VESTED OR CONTINGENT

OR LIABLE TO BE DIVESTED, THE TRUSTEE MAY IN HIS DISCRETION

(i) IN THE CASE OF AN INFANT PAY TO THE PARENT OR GUARDIAN OR PERSON HAVING CUSTODY OR CONTROL OF THE INFANT, OR OTHERWISE APPLY FOR HIS MAINTENANCE, EDUCATION, BENEFIT OR ADVANCEMENT; OR

(ii) IN THE CASE OF ANY BENEFICIARY NOT AN INFANT AND NOT IMMEDIATELY ENTITLED TO PAYMENT OF THE INCOME, PAY TO THAT BENEFICIARY OR ON HIS BEHALF FOR HIS MAINTENANCE, EDUCATION, BENEFIT OR ADVANCEMENT;

THE WHOLE OR ANY PART OF THE INCOME OF THE PROPERTY HELD IN TRUST AS AFORESAID.

(2) THE POWER CONFERRED BY THIS SECTION MAY BE EXERCISED WHETHER OR NOT THERE IS ANY OTHER PROPERTY OR FUND APPLICABLE FOR THE SAME PURPOSE OR ANY PERSON BOUND BY LAW TO PROVIDE FOR THE BENEFICIARY; BUT THE POWER CONFERRED BY THIS SECTION IS SUBJECT TO ANY PRIOR INTERESTS OR CHARGES AFFECTING THE PROPERTY.

Subsection (2) requires no comment; the first clause is found in our present section 32, and the second part, though it would be implied in any event, is found in England's section 31.

We considered whether to add as subsection (3) a specific provision applicable to a married beneficiary whereby the trustee might make payments to the spouse or issue of the beneficiary. We think that subsections (1) and (2) are amply wide to permit payments to someone other than the beneficiary and on his behalf.

Disposition of Accumulated Income

The next matter is that of accumulated income. We begin by considering a question that is perhaps collateral to the one just raised, but one which must be considered at some point. It is the question whether a direction to accumulate operates to prevent the trustee from exercising the discretion to make payments for maintenance, etc. The problem can be shown by considering a contingent gift at age 30 with the direction to accumulate income in the meantime and to pay the capital and accumulations to the beneficiary at the age of 30. Does the provision previously recommended enable the trustees to order maintenance from the income? Professor Waters thinks it does. It will be recalled that our recommendation gives to the trustees the discretion both during a minority and afterwards. Professor Waters says, "A direction to accumulate would then not oust that statutory power to maintain, unless the testator or settlor went on to make it clear his beneficiary is to have nothing at all after attaining 21 [now 18] and until the contingency occurs." We agree that a direction to accumulate should not oust the statutory power to maintain, and in a later recommendation make specific provision to that effect.

If the gift were vested instead of contingent, and accompanied by a direction to accumulate until the beneficiary attains the age of 30, then Saunders v. Vautier would apply, and the beneficiary could call for the capital on attaining majority. If our Report on that subject is adopted, then however, the power to maintain would continue not only through minority but during the later continuance of the trust.

Turning now to the main question, namely, the distribution of accumulations, it is desirable to provide (a) for investment of accumulations and then (b) for disposition of accumulations. The former creates no problem; our section 32 is satisfactory.

The matter of disposition of accumulated income is more difficult. Our section 32 says that accumulations follow capital. This is sound as a general or residual rule, but there are special cases which should be provided for. England's section 31(2) says that where the accumulations are vested in the beneficiary during infancy, he is entitled to them on attaining majority. The actual provision is however complex and has caused difficulty. The section then provides that in other cases income follows capital.

We think there should be provision

(a) that accumulations of income vested in an infant beneficiary should be paid to him on attaining majority,

(b) that where the income is not vested in the beneficiary until after he attains majority, then accumulations should be paid to him at that later date,

(c) that in the case of a defeasible gift and where the beneficiary dies before defeasance has occurred, the accumulations at his death should go to his estate,

(d) that in all other cases accumulations should follow capital.

RECOMMENDATION #3

(1) THE TRUSTEE SHALL ACCUMULATE THE RESIDUE OF INCOME BY WAY OF COMPOUND INTEREST BY INVESTING IT AND THE RESULTING INCOME THEREOF FROM TIME TO TIME IN AUTHORIZED INVESTMENTS.

(2) THE TRUSTEE SHALL HOLD ACCUMULATIONS AS FOLLOWS:

(i) WHERE THE BENEFICIARY IS ENTITLED TO PAYMENT OF THE INCOME WHEN HE ATTAINS MAJORITY, FOR HIM AT THAT TIME;

(ii) WHERE THE BENEFICIARY IS ENTITLED TO THE PAYMENT OF THE INCOME AT A TIME SUBSEQUENT TO ATTAINING MAJORITY, THEN FOR HIM AT THAT TIME;

(iii) WHERE THE BENEFICIARY IS VESTED OWNER OF THE PROPERTY FROM WHICH THE INCOME COMES, BUT HIS INTEREST IS SUBJECT TO DEFEASANCE, AND HE DIES PRIOR TO DEFEASANCE, AND WHETHER OR NOT HIS DEATH CAUSES DEFEASANCE, FOR HIS PERSONAL REPRESENTATIVE AS PART OF HIS ESTATE;

(iv) IN ALL OTHER CASES THE TRUSTEE SHALL HOLD THE ACCUMULATIONS AS AN ACCRETION TO THE CAPITAL OF THE PROPERTY FROM WHICH THE ACCUMULATIONS AROSE.

We turn now to several miscellaneous and comparatively minor items. It is customary to have a provision such as our present 32(3) which permits trustees to apply accumulations

for maintenance, etc., as if they were income from the current year. Professor Waters has suggested, too, a provision that trustees may apply income or accumulations for past maintenance, etc. We think this sound. Another provision (e.g., England's section 31(4)) makes the maintenance provision apply to a vested annuity. Professor Waters has also recommended a provision like England's section 69(2) making the trustee's powers subject to a contrary intention expressed in the instrument. The last provision is one making the section or sections prospective.

The following recommendation embodies the above items:

RECOMMENDATION #4

(1) THE TRUSTEE MAY AT ANY TIME, IF IT APPEARS EXPEDIENT, PAY OR APPLY THE WHOLE OR ANY PART OF SUCH ACCUMULATIONS AS IF THE SAME WERE PART OF THE INCOME ARISING IN THE THEN CURRENT YEAR.

(2) THE TRUSTEE MAY PAY OR APPLY INCOME OR ACCUMULATIONS FOR PAST MAINTENANCE, EDUCATION, BENEFIT OR ADVANCEMENT OF THE BENEFICIARY.

(3) THIS SECTION [RECOMMENDATIONS 2-4] EXTENDS TO A VESTED ANNUITY IN LIKE MANNER AS IF THE ANNUITY WAS THE INCOME OF PROPERTY HELD BY A TRUSTEE IN TRUST TO PAY THE INCOME THEREOF TO THE ANNUITANT FOR THE SAME PERIOD FOR WHICH THE ANNUITY IS PAYABLE, AND ACCUMULATIONS MADE DURING THE INFANCY OF THE ANNUITANT SHALL BE HELD IN TRUST FOR THE ANNUITANT ABSOLUTELY.

(4) THIS SECTION SHALL HAVE EFFECT IF AND SO FAR ONLY AS A CONTRARY INTENTION IS NOT EXPRESSED IN THE INSTRUMENT, IF ANY, CREATING THE TRUST, AND SHALL HAVE EFFECT SUBJECT TO THE TERMS OF THAT INSTRUMENT, AND TO THE PROVISIONS THEREIN CONTAINED, PROVIDED THAT A DIRECTION TO ACCUMULATE SHALL NOT CONSTITUTE A CONTRARY INTENTION.

(5) THIS SECTION DOES NOT APPLY WHERE THE INSTRUMENT, IF ANY, UNDER WHICH THE INTEREST ARISES, CAME INTO OPERATION BEFORE THIS SECTION TOOK EFFECT.

III

POWERS OF MAINTENANCE AND ADVANCEMENT OUT OF CAPITAL

The term 'advancement' as generally used, describes a payment made on account of the portion of a beneficiary for the purpose of establishing him in life. It is sometimes provided for in wills, and the Intestate Succession Act provides for advances to children.

Earlier we have recommended payments out of income by way of advancement, though historically the term 'advancement' was used in connection with a prepayment of capital rather than income.

Alberta's Trustee Act had no provision permitting trustees to make payments by way of advancement out of capital. Section 33 allows them, with leave of the court, to use capital for maintenance or education of an infant, but not for advancement or benefit. So it is with the Infants' Act and the Public Trustee Act which we mentioned earlier.

Section 33 is taken from a British Columbia Act of 1888 (c. 37, s. 1). We have not traced it further back. British Columbia still has it. Saskatchewan, like Alberta, has retained it since the Territorial Period. The North West Territories still has it while Newfoundland and the Yukon have adopted it.

Section 33 may seem to bear a resemblance to England's section 32 but they are really quite different. The latter is a broad provision permitting trustees to make payments out of capital by way of "advancement or benefit". The latter term of course widens greatly the scope of the section. Moreover, the power to make advances is not confined to beneficiaries who are infants. The power extends to contingent and defeasible gifts. Consent of the court is not required, but payments cannot be made out of real property and payments are limited to one-half of the presumptive or vested share of the beneficiary.

Two provinces in Canada have adopted England's section 32 with variations--Manitoba (R.S.M. 1970, c. T60, s. 32) and Prince Edward Island (1956, c. 44). Manitoba specifically includes maintenance and education with advancement and benefit and requires a court order before the trustees may make any payment out of capital.

We considered at length whether to recommend an advancement section along the lines of England's section 32. Our section 33 could be expanded or replaced by a section to give Alberta a true advancement provision. As it is section 33 is a supplement to our section 32, for it can be invoked only when income is not sufficient to pay for the maintenance or education of an infant.

The prevailing view in the Institute is in opposition to an advancement section on the lines of England's section 32. There was an opinion in favour of such a provision provided approval of the court were required. This however was a minority view. The majority thought that trustees' power to disburse capital on behalf of a beneficiary should be narrowly circumscribed; that in Alberta trustees should not have the wide discretion they have under England's section 32 and to give it to them would be to enable them to alter the trust. The contrary view was that trustees should be given wider discretion than they now have, and that a section like England's section 32 is not any wider than the type of clause now found in well drawn wills. This view was in the minority.

We do however favour the widening of section 33 in one important particular. At present, it is confined to the case of an infant beneficiary, and infancy now ends at 18. We recommend that the section be extended without reference to age, but that no change be made in the purposes for which payments from capital may be made. That is to say, the purposes will still be maintenance or education. The latter often continues beyond age 18, and the need for maintenance may well extend indefinitely, as in the case of the sick.

The following recommendation is in effect section 33, but extended beyond the beneficiary's minority.

RECOMMENDATION #5

(1) WHERE

(a) ANY PROPERTY EITHER REAL OR PERSONAL IS HELD BY TRUSTEES IN TRUST EITHER ABSOLUTELY OR CONTINGENTLY, AND

(b) THE INCOME ARISING FROM THE PROPERTY IS INSUFFICIENT FOR THE MAINTENANCE AND EDUCATION OF THE BENEFICIARY,

THE TRUSTEES BY LEAVE OF A JUDGE OF THE SUPREME COURT, TO BE OBTAINED IN A SUMMARY MANNER, MAY SELL AND DISPOSE OF ANY PORTION OF SUCH REAL OR PERSONAL PROPERTY AND PAY THE WHOLE OR ANY PART OF THE MONEY ARISING FROM THE SALE, TO THE GUARDIANS, IF ANY, OF THE BENEFICIARY OR OTHERWISE APPLY IT FOR OR TOWARDS THE MAINTENANCE OR EDUCATION OF THE BENEFICIARY.

(2) WHERE THE WHOLE OF THE MONEY ARISING FROM THE SALE OF THE REAL OR PERSONAL PROPERTY IS NOT IMMEDIATELY REQUIRED FOR THE MAINTENANCE AND EDUCATION OF THE BENEFICIARY THEN THE TRUSTEES

(a) SHALL INVEST THE SURPLUS MONEYS AND THE RESULTING INCOME THEREFROM FROM TIME TO TIME IN PROPER SECURITIES,

(b) SHALL APPLY SUCH MONEYS AND THE PROCEEDS THEREOF FROM TIME TO TIME FOR THE EDUCATION AND MAINTENANCE OF THE BENEFICIARY, AND

(c) SHALL HOLD ALL THE RESIDUE OF THE MONEYS AND INTEREST THEREON NOT REQUIRED FOR THE EDUCATION AND

MAINTENANCE OF THE BENEFICIARY FOR THE BENEFIT OF THE PERSON WHO ULTIMATELY BECOMES ENTITLED TO THE PROPERTY FROM WHICH SUCH MONEYS AND INTEREST ARISE.

1 June 1972

W. F. Bowker
R. P. Fraser
G. H. L. Fridman
Wm. Henkel
W. H. Hurlburt
H. Kreisel
J. D. Payne
W. A. Stevenson

by _____
CHAIRMAN

_____
DIRECTOR

NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this report.

APPENDIX A

Sections 32 and 33 of the Alberta Trustee Act, R.S.A. 1970

32.(1) Where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of 18 years or on the occurrence of any event prior to his attaining that age, the trustees may at their sole discretion pay to the guardians, if any, of the infant, or otherwise apply for or towards the maintenance or education of the infant, the whole or any part of the income to which such infant is entitled in respect of the property, whether there is any fund applicable for the same purpose or any other person bound by law to provide for such maintenance or education or not.

(2) The trustees shall accumulate all the residue of the income by way of compound interest by investing it and the resulting income thereof from time to time in proper securities for the benefit of the person who ultimately becomes entitled to the property from which such accumulation arises.

(3) Notwithstanding subsections (1) and (2), the trustees at any time if it appears to them expedient may apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

33.(1) Where

(a) any property either real or personal is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of 18 years or on the occurrence of any event prior to his attaining that age, and

(b) the income arising from the property is insufficient for the maintenance and education of the infant,

the trustees by leave of a judge of the Supreme Court, to be obtained in a summary manner, may sell and dispose of any portion of such real or personal property and pay the whole or any part of the money arising from the sale, to the guardians, if any, of the infant or otherwise apply it for or towards the maintenance or education of the infant.

(2) Where the whole of the money arising from the sale of the real or personal property is not immediately required for the maintenance and education of the infant then the trustees

(a) shall invest the surplus moneys and the resulting income therefrom from time to time in proper securities,

(b) shall apply such moneys and the proceeds thereof from time to time for the education and maintenance of the infant, and

(c) shall hold all the residue of the moneys and interest thereon not required for the education and maintenance of the infant for the benefit of the person who ultimately becomes entitled to the property from which such moneys and interest arise.

APPENDIX B

Sections 31 and 32 of England's Trustee Act, 1925

31.(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is

(a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education; and

(ii) If such person on attaining the age of twenty-one years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances

of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

(2) During the infancy of any such person, if his interest so long continues, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall hold those accumulations as follows:--

(i) If any such person--

(a) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(b) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

32.(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that--

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

(3) This section does not apply to trusts constituted or created before the commencement of this Act.