

CHAPTER 31

POWERS OF MAINTENANCE

1. SECTION 31 OF THE TRUSTEE ACT 1925

Part 1 of the Family Law Reform Act 1969

- 31-05** NOTE 36. ADD: The application of the statutory restrictions on accumulations is not affected by Perpetuities and Accumulation Act 2009 since the provisions of that Act do not apply to an appointment made in exercise of a special power created before that Act came into force: s.15(1)(b).

Modification or exclusion of section 31

- 31-06** NOTE 45. DELETE THE SECOND SENTENCE AND REPLACE BY: The statutory restrictions on accumulations apply to an instrument made before the provisions concerning accumulations in Perpetuities and Accumulations Act 2009 came into force on April 6, 2010 (see Perpetuities and Accumulations Act 2009, s.22; Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37)) and also to an instrument made on or after that date in exercise of a special power of appointment created before that date: ss.15 and 16, 21 and Sch.

Terms of the power

- 31-08** NOTE 51. AT THE END ADD: considered in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [33]–[38].

Circumstances to be considered

AFTER § 31-09 ADD A NEW PARAGRAPH AS FOLLOWS:

- 31-09A** Settlements and wills commonly amend section 31(1) in two ways. First, by the replacement of the words in section (1)(i) “as may in all the circumstances be reasonable” by “as the trustees in their discretion think fit”. The purpose of this amendment is to replace the constraints of an objective requirement of reasonableness by trustee discretion. This does not

mean that the trustees may act unreasonably in applying income for maintenance but rather that trustees may determine in exercise of fiduciary discretion what, if any, income should in their view properly be applied for maintenance taking relevant considerations into account and disregarding irrelevant considerations. Secondly, by the deletion of the proviso to section 31.^{54a} There are two objections to the proviso. The first is that the requirement that the trustees should have regard to age of the child and generally to the circumstances of the case is unnecessary since those are relevant considerations to the exercise of discretion which the trustees would have a duty to take into account apart from the proviso. The second is the unduly restrictive nature of the requirement for a proportionate application of income where the trustees have notice that more than one fund is applicable for maintenance. Notice of the availability of another fund for maintenance purposes is a relevant consideration to be taken into account as matter of exercise of discretion, but it may not necessarily be appropriate, even if practicable, for the trustees to be restricted by the requirement of proportionate application. The Law Commission has proposed that the above common amendments to section 31(1) should be put on a statutory basis in relation to all trusts howsoever established, excluding existing trusts, but including trusts in wills made before the proposed reform by testators who die after the proposed reform, and including trusts in advancements or appointments made after the proposed reform under powers conferred by existing trusts.^{54b}

Accumulation of income not applied for maintenance—section 31(2)

31–12 NOTE 68. AT THE END ADD: The Law Commission has considered but not proposed alteration of this rule, see LCCP No.191 (Supplementary) (2011) on *Intestacy and Family Provision Claims on Death: Sections 31 and 32 of the Trustee Act 1925*, paras 3.42 and 3.43.

NOTE 70. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), §§ 30–008 and 30–009.

Payment of income to adult beneficiaries with contingent interests

Adult beneficiary with vested interest

31–17 NOTE 87. DELETE THE SECOND SENTENCE AND REPLACE BY: The statutory restrictions on accumulations apply to an instrument made before the provisions concerning accumulations in Perpetuities and Accumulations Act 2009 came into force on April 6, 2010 (see

^{54a} See §§ 29–146 *et seq.*

^{54b} Law Commission Report on *Intestacy and Family Provision Claims on Death* (Law Com. No. 331, December 14, 2011), paras 4.78 to 4.97 and clauses 8 and 10 of clause 4 of draft Inheritance and Trustees' Powers Bill in Appendix A to the Report.

Perpetuities and Accumulations Act 2009, s.22; Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37)) and also to an instrument made on or after that date in exercise of a special power of appointment created before that date: ss.15 and 16, 21 and Sch.

Contingent interests and intermediate income

Testamentary gifts within section 175 of the Law of Property Act 1925

31–21 NOTE 95. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 30–006.

NOTE 96. AFTER THE REFERENCE TO *Theobald on Wills*, ADD: (not considered in 17th edn: see § 38–005 of that edn).

Other testamentary gifts

31–22 NOTE 2. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 38–003.

NOTE 4. ADD: *Beard v Shadler* [2011] EWHC 114 (Ch); [2011] W.T.L.R. 1147.

Pecuniary legacies

31–26 NOTE 19. DELETE THE REFERENCE TO THE PRACTICE DIRECTION AND REPLACE BY: CPR, Practice Direction, Pt 40A—Accounts & Inquiries, para.15.

NOTE 20. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 38–019.

31–28 NOTE 26. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), §§ 38–016 to 38–019.

NOTE 28. FOR THE REFERENCE TO *Theobald on Wills*, SEE NOW (17th edn), § 38–019.

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