The Law Commission

Consultation Paper No. 118

The Law of Trusts
Delegation by Individual Trustees

HMSO

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DELEGATION BY INDIVIDUAL TRUSTEES

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THE LAW OF TRUSTS

DELEGATION BY INDIVIDUAL TRUSTEES

PART I

INTRODUCTION

1.1 In this Consultation Paper we discuss the question: in what circumstances should a trustee be entitled to delegate his powers and duties by appointing an attorney to act on his behalf? We also consider the procedure which would be appropriate to implement any delegation and the constraints which should be applied.

Delegation by Trustees

1.2 It is of the essence of a trust that the settled property is vested in the trustee as owner, but that he holds it on behalf of others.[1] As trustees hold property of others, they are treated in some respects as agents. In particular they are subject to the general rule that an agent may not in his turn further delegate the powers conferred on him, unless he is authorised to do so by the trust instrument or the law. In this Consultation Paper we are seeking views about the extent to which the law should confer a general authority to delegate.

1.3 Clearly, there will be circumstances in which it is inconvenient or impossible for a trustee to discharge his

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1. The trustee can himself be a beneficiary, in which case he fills two distinct and separate roles.

duties personally. He may be ill, out of the country or engaged in a way which temporarily leaves him no time for his fiduciary duties. However, a trustee will often have been carefully and specifically chosen for his particular expertise, probity or relationship to the beneficiaries. It therefore does not follow that, if he is temporarily unable to carry out his duties, the person who appointed him would consider a substitute chosen by the trustee to be equally satisfactory. Yet the alternative of the trustee resigning may be equally unacceptable.

1.4 It is already possible for a trustee to delegate his powers and duties by power of attorney.[2] We are therefore now considering whether any changes should be made to the present arrangements.

Statutory Provisions

1.5 The power of delegation was first put on a permanent statutory basis in 1926,[3] and although it was revised in 1971[4] we are not aware that in general trust cases many difficulties have been encountered. However, there is one particular case which proved inconvenient for many years. Land held by more than one person as co-owners must be held on trust for sale,[5] and on occasions where there were two

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2. A power of attorney is a formal appointment of an agent by deed. The document not only delegates powers to the attorney, but defines the limits of those powers.

3. Law of Property Act 1922, s.127A, inserted by Law of Property (Amendment) Act 1924, Sched. 5, para. 8, replaced by Trustee Act 1925, s.25; para. 2.3 below. There had previously been legislation authorising delegation by trustees "engaged on war service": Execution of Trusts (War Facilities) Acts 1914 and 1915.

4. Powers of Attorney Act 1971, s.9; para. 2.4 below.

5. Law of Property Act 1925, s.34.

co-owners, one wished to delegate his powers to the other, or purported to do so. Typically, such cases involved a family home owned by the couple who occupied it. Delegation by one owner to the other was not possible because the Act authorising trustees to delegate did not allow one trustee to empower his sole co-trustee to act on his behalf.

1.6 This apparent inconvenience was overcome by a new statutory provision in 1985.[6] However, this is couched in such wide terms that the earlier legislation is almost superseded, although not repealed. Those earlier provisions contained a number of safeguards for beneficiaries, which are not repeated in the new legislation. It is for consideration whether freedom to delegate without safeguards is appropriate in all cases and this review addresses this concern.

1.7 The 1985 legislation, which allows a trustee to create an enduring power of attorney which continues to be effective even after he ceases to have mental capacity, fits awkwardly with an earlier provision which was nevertheless not repealed. That provided that a trustee for sale of land, who becomes incapable of exercising his function by reason of mental disorder, is to be discharged before the legal estate is dealt with.[7] In this connection, the authors of research into some aspects of the use of enduring powers of attorney, recently carried out for the Lord Chancellor's Department,[8] noted that in general solicitors took the view that the application of the Enduring Powers of

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6. Enduring Powers of Attorney Act 1985, s.3(3); paras. 2.17 et seq below.

7. Law of Property Act 1925, s.22(2).

8. By Professor Stephen Cretney and Messrs Gwynn Davis, Andrew Borkowski and Roger Kerridge of the Faculty of Law, Bristol University.

Attorney Act procedure in the case of trustees was one of its more unsatisfactory features. They concluded that the law in this area was confused.[9]

1.8 For convenience, we shall use these abbreviations later in this Paper:

"The 1925 Act": the Trustee Act 1925 (as amended);

"The 1971 Act": the Powers of Attorney Act 1971;

"The 1985 Act": the Enduring Powers of Attorney Act 1985.

Other Common Law Jurisdictions

1.9 Since 1908,[10] statutory provisions allowing trustees to delegate have been enacted in many common law jurisdictions.[11] Section 25 of our 1925 Act, sometimes in its original form before amendment by the 1971 Act,[12] provides the model for the legislation in many overseas jurisdictions. This applies in the case of Northern Ireland,[13] Manitoba,[14] New Brunswick[15] and, although only in the case of a trustee absent on war service, British

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9. In relation to the research, this was a side issue.

10. Trustee Act 1908 (N.Z.), ss.103-105.

11. But not all; there is, e.g., no such provision in the Republic of Ireland.

12. Paras. 2.3-2.5 below.

13. Trustee Act 1958 (N.I.), s.26; Powers of Attorney Act 1971 (N.I.).

14. Trustee Act (Man.), s.38.

15. Trustees Act (N.B.), s.6.

Columbia.[16] Trustees who foresee that they will be physically infirm also come within the provisions covering Queensland[17] and Western Australia.[18] The 1971 Act revisions to the 1925 Act have met approval abroad. They have been recommended for adoption in Ontario[19] and South Australia,[20] and they were compared favourably with the existing provisions in New South Wales.[21] When overseas provisions vary from our own, and offer interesting alternatives to consider when assessing reforms to our law, they are noted in the body of this Paper.

1.10 In recent years, enduring powers of attorney[22] have also been introduced in many common law jurisdictions. Although there is considerable variation between the statutory schemes which they have adopted, our extension of enduring powers to cover delegation by trustees[23] is, so far as we are aware, unique. We know of no case in which the problem highlighted by the Walia decision concerning

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16. Trustee Act 1979 (B.C.), s.14.

17. Trusts Act 1973 (Qld.), s.56.

18. Trustees Act 1962 (W.A.), s.54.

19. Ontario Law Reform Commission, Report on the Law of Trusts (1984), pp.56-57.

20. South Australia Law Reform Committee, Relating to Powers of Attorney (1981). However, that Report was principally concerned with enduring powers of attorney, and it was suggested that the reform of the provision relating to trustees - Trustee Act 1936 (S.A.), s.17 - should only proceed when there was occasion to amend that Act.

21. New South Wales Law Reform Commission, Working Paper on Powers of Attorney (1973), para. 118.

22. Also known in the United States as durable powers of attorney.

23. 1985 Act, s.3(3).

co-owned property[24] has arisen or been identified in another jurisdiction,[25] so there cannot be surprise that the legislation it provoked has not been repeated elsewhere.[26]

Scope of this Paper

1.11 The effects of delegation of a trustee's powers are often considered in relation to trusts of land. That is an important area in which the rules apply, but we should emphasise that in this Consultation Paper we are concerned with trusts generally. Similarly, although many trusts are formally established in trust deeds or wills, trusts may arise in other ways.[27] We are concerned with all forms of trust, except where the discussion is expressly restricted.

1.12 Our concern here is with the exercise of trustee powers by individual trustees. Trustees as a body can delegate

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24. Paras. 2.12-2.14 below.

25. In some jurisdictions, the legal position will be different. E.g., in Victoria it is still possible to have a legal tenancy in common.

26. Nevertheless, discussion after the enactment of our 1985 Act does not address the point: Newfoundland Law Reform Commission, Working Paper on Powers of Attorney (1987); Australia Law Reform Commission, Enduring Powers of Attorney (1988), for the Australian Capital Territory; Ireland Law Reform Commission, Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (1989); Law Reform Commission of British Columbia, Report on the Enduring Power of Attorney: Fine-tuning the Concept (1990); Law Reform Commission of Victoria, Enduring Powers of Attorney, Discussion Paper (1990).

27. E.g., where a trust is implied by the law relating to resulting or constructive trusts.

some of their functions and there is a limited statutory provision which governs this.[28] The view has recently been expressed that these powers are not wide enough and that they do not, e.g., take account of the ways in which expertise in management is now available to many trustees.[29] We recognise these concerns, but we consider that entirely different issues are raised, on the one hand, by a single trustee seeking to delegate his responsibility to join in taking decisions and, on the other, by the entire body of trustees transferring some or all of the functions which may be central to the purpose for which the trust was established. It seems unlikely to be satisfactory to attempt to deal with both sets of disparate issues simultaneously and we have therefore confined our attention in this Consultation Paper to delegation by individual trustees.

1.13 A comprehensive review of trustees' powers and duties was published in 1982 by the Law Reform Committee who made numerous recommendations.[30] We understand that no final decision has yet been taken about the implementation of that Report and it seems unlikely that there will be any resulting legislation in the immediate future. This Consultation Paper deals with an aspect of the law which the Report did not cover[31] and can therefore be seen as supplementing it.

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28. Trustee Act 1925, s.23.

29. D. J. Hayton, Developing the Law of Trusts for the Twenty-first Century (1990) 106 L.Q.R. 87.

30. Twenty-third Report: The Powers and Duties of Trustees (Cmnd. 8733). This included consideration of aspects of the powers which trustees enjoy to delegate as a body: paras. 4.16-4.28.

31. There is one small overlap on the question of the continuing responsibility of a trustee who grants a power of attorney.

Issues

1.14 The first main issue relating to general trusts which we address in this Consultation Paper is whether it is appropriate to circumscribe the delegation powers of trustees by rules intended to safeguard the beneficiaries. If the conclusion is that the powers should be limited, then the nature and extent of the safeguards need to be determined.

1.15 We recognise that the case for safeguards may disappear when the beneficiaries are also the trustees of the trust. An exception from some or all of any general safeguards may then be appropriate. We therefore examine the possible terms of a special scheme to cover some or all of those cases.

1.16 The second principal issue which we consider is when and in what circumstances a power of attorney granted by a trustee should survive the trustee's mental incapacity. The extension of trustees' powers to delegate by the 1985 Act permitted the use of enduring powers of attorney in most cases, but it is open to question whether such widespread use is appropriate.

Structure of this Paper

1.17 In Part II of this Paper we summarise the present law on the use of powers of attorney by trustees and we highlight points for consideration. In Part III we raise issues for consideration later in the Paper. In Part IV we examine the possible reform options relating to general trustee powers. Part V outlines a possible special scheme which could apply where the trustees are also the beneficiaries of the trust. Part VI summarises our provisional proposals for rules to authorise delegation,

first by trustees generally and secondly under the special scheme.

PART II

SUMMARY OF THE PRESENT LAW

2.1 It is one of the general principles of equity that trustees, having voluntarily agreed to act as such, cannot delegate the exercise of their powers and duties,[1] unless in the trust instrument the settlor expressly authorises them to do so. The rationale stems from the idea that delegation constitutes a betrayal of the settlor's wishes because he has chosen that particular individual to act as his trustee.

2.2 At common law, exceptions to the general principle have been recognised. First, a trustee was permitted to employ another to perform wholly mechanical acts of administration, involving no exercise of judgment.[2] Secondly, and by way of further exception to the general principle, a trustee was permitted to transact business through an agent, where that agent had particular skills in relation to the business transacted.[3] However, the employment of the attorney must,

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1. If the trustee did attempt to delegate the management of the trust to another person, he nevertheless retained the duty to manage and was therefore liable for that person's defaults: Turner v. Corney (1841) 5 Beav. 515 at p.517.

2. See A.G. v. Scott (1749) 1 Ves. Sen. 413; In re Hetling and Merton's Contract [1893] 3 Ch. 269. This state of affairs led to the enactment of section 23 of the Trustee Act 1925, with which this Consultation Paper is not concerned as it provides for delegation by trustees as a body.

3. The case of Speight v. Gaunt (1883) 9 App. Cas. 1 recognised that a trustee was not bound himself to transact business for which he might be ill qualified and so might fail to secure the most favourable terms for the trust. See also Learoyd v. Whiteley (1887) 12 App. Cas. 727.

in accordance with Speight v. Gaunt, be compatible with the "proper and ordinary course of business" and in appointing the attorney the trustee must exercise the same prudence in relation to the trust property as he would in relation to his own.[4]

2.3 Statutory exceptions were contained in the 1925 Act[5] which, though primarily intended to be a consolidating measure, in fact made significant changes to the law governing delegation of trustee powers. In particular, section 25 allowed the trustee to delegate all his powers by means of a power of attorney. Section 25, prior to amendment by the 1971 Act, provided that a trustee who intended to remain out of the United Kingdom for a period exceeding one month could, by power of attorney, delegate all the trusts vested in him.

2.4 Section 9 of the 1971 Act amended the provisions of section 25, by extending the trustee's ability to delegate, while retaining the thread of the equitable principle that complete delegation of trustee functions should be possible only in specific circumstances. In particular, section 9 recognised that a trustee might legitimately be temporarily unable to attend to trust affairs for a reason other than absence abroad and allowed delegation in other circumstances.

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4. Ex. p. Belchier (1754) Amb. 218, per Lord Hardwicke L.C. See also Speight v. Gaunt (1883) 9 App. Cas. 1 per Earl of Selborne L.C. at pp. 4 and 13.

5. Re-enacting Law of Property Act 1922, s.127A, which never came into force.

2.5 Section 25, as amended, provides that a trustee[6] may, by power of attorney, delegate the exercise of his powers and duties for a period not exceeding twelve months,[7] but not to his sole co-trustee (unless a trust corporation).[8] He must give notice of creation of the power and the reason for the delegation to each person entitled to appoint new trustees and to his cotrustees.[9] The donor remains liable for the acts and defaults of the attorney.[10] Special protection[11] is given in some stock transactions; those in whose books the stock is inscribed or registered are not affected by notice of any trust even though its existence is

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6. "Trustee" includes a personal representative: 1925 Act, s.25(8).

7. Ibid., s.25(1).

8. Ibid., s.25(2). "Trust Corporation", disregarding those designated for limited purposes only, includes (Law of Property (Amendment) Act 1926, s.3(1); Supreme Court Act 1981, s.128; Public Trustee Rules 1912, r.30, (as amended)):

   (1) the Official Solicitor, the Treasury Solicitor, the Solicitor to the Duchy of Lancaster;

   (2) the Public Trustee;

   (3) certain corporations. They must be incorporated in the European Community, be empowered to undertake trust business in England and Wales, have at least one place of business in the United Kingdom, and possess a constitution which complies with rules either as to incorporation, minimum issued share capital or be a member of a group in which another company possesses a constitution meeting the above criteria.

9. 1925 Act, s.25(4).

10. Ibid., s.25(5).

11. In addition to the general protection afforded to those dealing with attorneys against the revocation of the powers without their knowledge: Powers of Attorney Act 1971, s.5.

apparent on the face of the power.[12] Powers of attorney granted under section 25, like all other powers of attorney,[13] do not survive the mental incapacity of the donor.

2.6 Section 10 of the 1971 Act introduced a short statutory form of general power of attorney.[14] It provides that a power of attorney given under that section operates to confer on the attorney - or, if more than one, on the attorneys jointly or jointly and severally -[15] authority to do on behalf of the donor anything which the donor can lawfully do by an attorney.[16] The form has proved popular and is widely used. The section does not apply to functions which the donor has as a trustee, personal representative, tenant for life or statutory owner.[17]

2.7 Before the commencement of the 1985 Act, a trustee could delegate to an attorney the exercise of his powers and duties in the following circumstances:

(a) Where the instrument creating the trust specifically authorises the delegation;

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12. 1925 Act, s.25(7). A company registered in England and Wales is prohibited from entering notice of any trust on its register of members: Companies Act 1985, s.360.

13. Except a power coupled with an interest, which is irrevocable while the interest subsists: Walsh v. Whitcomb (1797) 2 Esp. 565; a power of attorney given as security and expressed to be irrevocable: 1971 Act, s.4; and an enduring power: 1985 Act, s.1(1)(a).

14. Set out in the First Schedule to the 1971 Act.

15. The power must specify which.

16. 1971 Act, s.10(1).

17. Ibid., s.10(2).

(b) Where all beneficiaries are sui juris they may together give trustees powers not authorised by the trust instrument.[18] This would include the beneficiaries giving a trustee's attorney authority to delegate in a way not authorised by the trust instrument or statute;

(c) Under section 25 of the Trustee Act 1925.

Trusts for Sale of Land

2.8 Because of the provisions relating to co-ownership of land,[19] probably the most common form of trust relating to land is the statutory trust for sale of land which arises whenever land is owned by two or more people. This is the position where, for example, a husband and wife together beneficially own land; they are both trustees and beneficiaries. The general rules which we set out above still apply but, for the reasons which follow, do not fit very happily into this situation.

2.9 Section 22(2) of the Law of Property Act 1925 provides that on the mental incapacity of a trustee for sale of land a new trustee shall be appointed in his place or he shall be otherwise discharged from the trust before any dealing with that land. The appointment by the trustee of an attorney otherwise than by an enduring power[20] will not avoid the inconvenience caused by the trustee's subsequent mental

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18. Halsbury's Laws of England, 4th ed., vol. 48, (1984), para. 911; Underhill and Hayton, Law of Trusts and Trustees, 14th ed., (1987), p.415; Lewin on Trusts, 16th ed., (1964), p.728.

19. Law of Property Act 1925, ss.34-36.

20. See paras. 3.17-3.21 below.

incapacity because on that incapacity the power of attorney will be revoked automatically.

Enduring Powers of Attorney

2.10 Section 25 was often unsuitable for providing delegation powers in the common husband and wife co-ownership case. One partner could never appoint the other (who was necessarily the sole co-trustee) as attorney. If each appointed a third party, say one of their children, as a precaution against the onset of senility, the very difficulty which they wished to guard against would, by automatic revocation of the power on mental incapacity, nullify this precaution.

2.11 The position under section 10 of the 1971 Act was less clear in relation to trustees for sale who were, themselves, the beneficial owners. A statutory general power of attorney was thought by some to be valid in these circumstances notwithstanding the provision that the section does not apply to the functions which the donor has as trustee.[21] It was argued that the limitation did not apply because, in those circumstances, the function which was

21. 1971 Act, s.10(2).

performed by an attorney of a joint owner was not a trustee function, but a function performed as a beneficial owner.[22]

2.12 The position was clarified by the case of Walia v. Michael Naughton Ltd.[23] Three individuals, P, M, and A were the registered proprietors of freehold property. By a general power of attorney, expressed to be "in accordance with section 10 of the Powers of Attorney Act 1971", A appointed M to be his attorney. A transfer[24] to the defendant was executed by P and M personally and by M as attorney of A. The defendant contracted to sell the property to the plaintiffs before the transfer to it had been registered at H.M. Land Registry. The solicitor for the purchaser plaintiffs refused to accept the transfer to the defendant as being valid, saying that the power of attorney should have been under section 25 of the 1925 Act, and that good title had not therefore been made.

2.13 Counsel for the defendant submitted that the transfer was made by the three registered proprietors expressly as

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22. Emmet on Title, 18th ed., (1983), p.280, stated: "Nevertheless, it is considered that two or more persons who are solely entitled at law and in equity may appoint an attorney to convey the legal estate, and that a purchaser from an attorney so appointed who conveys for the joint tenants as beneficial owners cannot object to the validity of the appointment on the ground that it is made by trustees for sale." See also The Conveyancer, (1977), vol. 41, pp.369 - 371, where Dr. Farrand states that whilst "the precise defect attributable to using an inappropriate general power of attorney is that the instrument of transfer will not have been effectively executed by both the joint vendors", the defect could be cured on registration of the conveyance at the Land Registry.

23. [1985] 1 W.L.R. 1115. For brevity, we refer to this case as "Walia".

24. Expressed to be made by P, M and A "as beneficial owners".

beneficial owners and, accordingly, a power of attorney under section 10 was an appropriate power.[25] It was argued that the provision of section 10(2) that the section does not apply to the functions which the donor has as trustee was itself inapplicable because the function which was performed by the three transferors on the transfer was not a trustee function but a beneficial owner function.

2.14 Judge John Finlay, Q.C., sitting as a High Court judge, rejected counsel's submission. He held that:[26]

> "the power of attorney in the section 10 form is not appropriate to entitle the donee to execute on behalf of the donor a transfer in which the transferor, whether or not he is purporting to transfer as beneficial owner, is inevitably exercising the function of a trustee. He is exercising the function of trustee because it is as trustee that he is registered as one of the three joint proprietors. The trusts of course do not come on the title, but the very fact that there is more than one proprietor must ... mean that the proprietors (and each one of them) are trustees of the land. That they may also be beneficial owners appears to me to be neither here nor there. ... It should have been a power of attorney under section [25 of the 1925 Act] and not under section 10 [of the 1971 Act]."

2.15 The difficulty occasioned by the revocation of powers of attorney by reason of the onset of mental incapacity in the donor, was being addressed at the time Walia was reported. However, the Enduring Powers of Attorney Bill recommended by the Law Commission[27] expressly excluded powers granted pursuant to the 1925 Act.[28] There were two

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25. See para. 2.11 above.

26. [1985] 1 W.L.R. 1115, 1121.

27. The Incapacitated Principal (1983), Law Com. No. 122, para. 4.2.

28. Cl.2(8) of the draft Bill stated that: "A power of attorney under section 25 of the Trustee Act 1925 (power to delegate trusts by power of attorney) cannot be an enduring power."

reasons for this: first, because the 12 month limit on duration which the Act imposed would contradict the inherent long-term nature of an enduring power and, secondly, because the 1925 Act already made provision for replacement of unfit or incapable trustees.[29] Thus the original intention was that no power of delegation by trustees should be exercisable by means of an enduring power of attorney.

2.16 An amendment was added to the Bill, which became section 3(3) of the 1985 Act. This amendment was described by the then Lord Chancellor[30] as being:

> "necessitated by a decision of the High Court [Walia] ... The result of this decision, together with Clause 2(8) of the Bill, is that an attorney under an enduring power cannot dispose of any of the donor's property held on trust. Most married couples nowadays hold the matrimonial home upon a trust for sale, so that the inability of an attorney under an enduring power to dispose of trust property would have widespread effect and reduce the efficacy of the scheme contained in the Bill. This amendment seeks to remedy this defect."

2.17 Section 3(3) of the 1985 Act provides that:

> "Subject to any conditions or restrictions contained in the instrument,[31] an attorney under an enduring power, whether general or limited, may (without obtaining any

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29. Trustee Act 1925, s.36(1): "Where a trustee ... is unfit to act therein or is incapable of acting therein ... (a) the person or persons nominated for the purpose of appointing new trustees ... may appoint one or more other persons ... to be a trustee or trustees in [his] place." However, application to the Court of Protection for a replacement may be required under the Mental Health Act 1983, sections 148-149.

30. Lord Hailsham of St. Marylebone, Hansard (H.L.) vol. 465, 24 June 1985, cols. 548-9.

31. For consistency with the other provisions of the 1985 Act, it must be assumed that "instrument" here means the instrument creating the enduring power of attorney and does not mean the instrument creating the trust.

consent) execute or exercise all or any of the trusts, powers or discretions vested in the donor as trustee and may (without the concurrence of any other person) give a valid receipt for capital or other money paid."

The terms of section 25 of the 1925 Act, as they now apply, are reproduced in the Appendix.

2.18 It should be emphasised that an enduring power is effective from the moment of its execution, unless the contrary is expressed in the instrument creating it. It follows that, in general, an attorney appointed under such a power will have the powers provided by section 3(3) from the date of execution of the power of attorney and will have those powers notwithstanding the fact that the donor may remain mentally capable. It would need special added wording in the enduring power of attorney to provide for its effectiveness only on the donor becoming mentally incapable.[32]

2.19 The 1985 Act did not cancel the provisions for the grant of ordinary powers of attorney and a point of contrast between ordinary and enduring powers arises regarding the grant of the power concerned. An enduring power must be executed by the attorney; this ensures that the attorney accepts that he should be appointed. An ordinary power can be granted to an attorney who knows nothing of the appointment and is not prepared to accept it.

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32. Forms of words have been suggested, and there is evidence from the recent research (para. 1.7 above) that some enduring powers are granted in this form, although the examples found did not expressly relate to powers granted by trustees.

Registration on Incapacity

2.20 By executing an enduring power of attorney, the attorney must acknowledge the statutory duty that he may later have to register the power.[33] That duty arises when he has reason to believe that the donor is, or is becoming, mentally incapable.[34] Until the duty to register arises, the attorney has the full authority conferred by the power. When that time arrives, the attorney's powers are suspended, save for his duty to apply to the Court of Protection. This ensures that the notification procedure required by that Act has been followed and that the Court of Protection confirms the formal validity of the power.[35]

2.21 The Act requires the attorney to give notice to the donor and at least three specified relatives (if there are three who qualify) of his intention to register the power.[36] Once the attorney has made the application, certain limited authority is automatically restored. When the court registers the enduring power, the attorney can again exercise all his functions under it.

2.22 Registration also ensures that the attorney and third parties dealing with him can be assured that both the power

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33. 1985 Act, s.2(2)(b)(iii).

34. Ibid., s.4.

35. The Incapacitated Principal (1983), Law Com. No. 122, Para. 4.34.

36. 1985 Act, s.4(3), Sched. 1. The notice is to enable the persons notified to object to the registration on the grounds, among others, that the donor is not incapable or that the attorney is not a suitable person to be the donor's attorney: s.6(4). The list from which the persons to be notified are selected begins with the donor's husband or wife, and ends with remoter relations of the whole blood.

and the attorney's authority under it are valid and subsisting. This is because instruments will only be registered by the court if it is satisfied the formalities required of an enduring power are fulfilled and that the notification procedure is carried out.

Revocation

2.23 All powers of attorney are revocable unless coupled with an interest[37] or, under the 1971 Act, given as security and expressed to be irrevocable, although these can be revoked with the consent of the attorney.[38] The powers to which the statutory provision applies are those given to secure either a proprietary interest of the attorney, such as a mortgage, or the performance of an obligation owed to the attorney. In other cases[39] the donor's ability to revoke a power of attorney is unrestricted. Revocation can be express or implied if, for example, the donor acts in a manner incompatible with the continued operation of the power.

2.24 An ordinary power is automatically revoked on the donor's death or mental incapability. An enduring power under the 1985 Act, however, survives the donor's mental incapacity and is not thereafter subject to express or implied revocation by the donor while the power remains registered at the Court of Protection, unless the court confirms the revocation.[40]

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37. Walsh v. Whitcomb (1797) 2 Esp. 565; these powers are irrevocable while the interest subsists.

38. 1971 Act, s.4; they, too, are irrevocable only so long as the interest or obligation subsists.

39. Except as mentioned in para. 2.24 below.

40. 1985 Act, s.7(1)(a).

Protection of Attorney and Third Parties

2.25 The 1971 Act provides two types of statutory protection in the event of revocation of a power without the parties' knowledge. The first is for the attorney and the person with whom he deals. An attorney acting in pursuance of a power at a time when it has been revoked is not liable to the donor or a third party for breach of an implied warranty of authority if he did not know that the power had been revoked.[41] A third party dealing with the attorney is similarly protected, in that any transaction between him and the attorney is valid unless the third party knew of the revocation.[42]

2.26 The second type of protection is for a purchaser whose later transaction depends for its validity on the validity of the transaction between the attorney and the person who dealt with him. This covers the case of a purchaser who is buying something, which used to belong to the donor, from the person to whom the attorney sold it. It is "conclusively presumed" in favour of the purchaser that the third party who dealt with the attorney did not know of the revocation of the power, provided either that the transaction between the attorney and third party was completed within twelve months of the date on which the power came into operation, or that the third party makes a statutory declaration, before or within three months after completion of that transaction, to the effect that he did not know of the revocation of the power.[43]

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41. 1971 Act, s.5(1).

42. Ibid., s.5(2).

43. Ibid., s.5(4).

2.27 The 1985 Act adds to the second type of protection when the power in question is an enduring one. It provides that it shall be "conclusively presumed" in favour of the purchaser that the transaction was valid, provided either that the transaction between the attorney and third party was completed within twelve months of the date on which the instrument was registered, or that the third party makes a statutory declaration, before or within three months after that transaction, to the effect that he had no reason to doubt the authority of the attorney to dispose of the property which was the subject of the transaction.[44]

Statutory Provisions Contrasted

2.28 The effects of the two sets of statutory provisions authorising trustees to grant powers of attorney may be summarised as follows:

Scope	Section 25	Section 3(3)
Attorney	No delegation to sole co-trustee, unless trust corporation.	No restriction.
Notice	To be given to co-trustees and person with power to appoint.	No notice required.
Form	No prescribed form.	Prescribed form compulsory.
Mental incapacity	Grant of power does not survive.	Grant of power does survive.
Duration	Twelve month limit.	Indefinite.
Personal representatives	Can delegate powers.	Not expressly mentioned.

44. 1985 Act, s.9(4).

PART III

ISSUES FOR CONSIDERATION

Principal Issues

Safeguards for Beneficiaries

3.1 The first question which needs to be addressed in formulating policy in this field is whether a trustee's power to delegate his functions should be restricted in order to afford some protection to the beneficiaries of the trust. Any limit on delegation is likely to cause the trustee some difficulty or inconvenience, but one objective of the law of trusts is to provide appropriate protection for beneficiaries when the property from which they are intended to benefit is vested in, and managed by, others. The proper approach therefore appears to be to start by assessing what safeguards will offer useful benefits.

3.2 The need for safeguards for beneficiaries has become an issue now because those which statute imposed for many years were in effect swept aside by the 1985 Act, although, so far as we are aware, no views had been expressed that in the generality of cases they were harmful or inappropriate. In the particular case of co-owned property, the need for some change was demonstrated and where the co-owner trustees are themselves also the beneficiaries a relaxation of safeguards is clearly a possible option.

3.3 However, the fact that a particular regime of safeguards operated for a considerable period and that it was then supplemented by a radical alternative without general consultation, does not of itself mean that the former situation should be restored. The case for reducing or abandoning safeguards should be examined, particularly in

the light of such evidence as there may be of experience since the changes were enacted.

3.4 A single set of rules may not, however, be ideal to cover every situation. If it seems preferable to retain, or to reinstate, safeguards in relation to general trusts, it may nevertheless be appropriate to consider keeping a relaxation or abandonment of safeguards for some or all cases in which the trustees are also the only beneficiaries of the trust.

Effect of Mental Incapacity

3.5 Another major matter for consideration is whether delegation by a trustee should survive the trustee's mental incapacity. Until the 1985 Act came into force, the mental incapacity of the donor of any power of attorney automatically brought it to an end. The main purpose of the 1985 Act was to introduce a limited class of power (enduring powers of attorney) which could, and indeed was intended to, continue after the donor had become mentally incapable.

3.6 While this is clearly useful in dealing with a donor's own affairs, it may be questioned how far it is appropriate that all powers of attorney granted by trustees should be, or be capable of being, enduring powers. However, at least where the trustees are also the beneficiaries, one may say that the aim of allowing a person to arrange, before he loses mental capacity, for the management of affairs after that time is undermined if he cannot make effective arrangements to deal with his interest in a co-owned family house.

Safeguards

3.7 Section 25 of the 1925 Act allows a trustee to delegate all his powers and discretions to an attorney subject to

safeguards against abuse or overuse by the trustee to the detriment of the beneficiaries.[1] The safeguards are:-

(a) Duration - The power cannot subsist for longer than twelve months;[2]

(b) Identity of Attorney - The only other trustee cannot be the attorney, unless it is a trust corporation;[3]

(c) Notice - The donor must give notice of creation of the power to his fellow trustees and anyone else entitled to appoint new trustees;[4]

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1. In contrast to this unrestricted power to delegate (although subject to safeguards), in New South Wales and Western Australia, a trustee may only delegate with the consent of every co-trustee and anyone else entitled to appoint new trustees: Trustee Act 1925 (N.S.W.), s.64; Trustee Act 1962 (W.A.), s.54. Although the New South Wales Law Reform Commission described the delegation provisions applying in that State as "unsatisfactory and in need of reform", they were not included in its work on powers of attorney as being "too far removed from our present reference": Working Paper on Powers of Attorney (1973), para. 118; accordingly, the Commission made no recommendation for reform: Powers of Attorney (1975), para. 55.

2. 1925 Act, s.25(1).

3. Ibid., s.25(2). In Victoria, trustees have an unrestricted power to delegate, but only to a trustee company (the equivalent of our trust corporations) or to the Public Trustee: Instruments (Powers of Attorney) Acts 1958-1980 (Vic.); Public Trustee Act 1958 (Vic.), as amended. The Tasmania Law Reform Commission has recommended that similar arrangements should operate in that State: Report on Powers of Attorney (1984).

4. Ibid., s.25(4).

(d) Liability - The donor remains liable for the acts and omissions of the attorney.[5]

3.8 The 1985 Act allows a trustee to delegate his powers and discretions without any of the safeguards set out above, although its provisions are expressly "subject to any conditions or restrictions contained in the instrument". An attorney under an enduring power has authority which can last for more than one year,[6] he can be the sole co-trustee of the donor and no notice of creation of the power need be given to anyone. Furthermore, and contrary to normal principles of agency, he can do two things which the trustee donor cannot himself personally do: he can on his own give a valid receipt for capital money, without the concurrence of a second trustee,[7] and he apparently needs no consent to the exercise of trust powers, even if the trust instrument expressly requires the trustee not to act without the consent of one or more specified people.[8]

3.9 The 1985 Act[9] has other important repercussions in relation to powers granted by trustees:[10]

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5. Ibid., s.25(5).

6. An enduring power can be, and generally is, granted for an indefinite duration.

7. A trustee's power to give a valid receipt is only restricted in certain cases: para. 3.22 below.

8. To oblige the attorney to obtain the consents, the trustee would have to specify in the instrument creating the enduring power that the consents required by the trust deed or by statute were to be obtained.

9. 1985 Act, S.3(3).

10. R. T. Oerton, Trustees and the Enduring Powers of Attorney Act 1985: A Legislative Blunder (1986) 130 S.J. 23, examines the effect of s.3(3) and 2(8) of the 1985 Act in detail.

(a) The delegation takes place when the donor grants an enduring power in relation to his own property, unless the instrument creating the power states otherwise, whether or not the trustee intends it and without the trustee necessarily giving the matter thought;[11]

(b) Because the delegation of trust duties applies to powers "whether general or limited", it automatically confers power to "execute or exercise all ... of the trusts, powers or discretions [of the donor]" even on an attorney who is appointed to deal only with a single property or transaction;

(c) It makes no provision for the liability or otherwise of the trustee donor for the acts and omissions of his attorney. The question of liability was not, apparently, considered when the Enduring Powers of Attorney Bill was amended to apply to trustees.

3.10 Thus a trustee has a choice between two statutory modes of delegation of his powers and discretions. One involves safeguards limiting the powers of the donor and protecting beneficiaries, the other has none. The justification for these different approaches is seriously open to question.

3.11 In Part IV of this Paper we consider these safeguards in detail and in particular we ask whether they are needed at all and, if they are appropriate, whether they are satisfactory in their present form. In Part V we examine a

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11. One of the Explanatory Notes forming part of the latest revision of the prescribed form of enduring power of attorney draws the donor's attention, for the first time, to the fact that the grant of a power may have implications for trusteeship: Enduring Powers of Attorney (Prescribed Form) Regulations 1990, Schedule.

special scheme which could apply where the trustees are the beneficiaries, for which safeguards might be modified.

Enduring After Mental Incapacity

3.12 The 1985 Act states that "an attorney under an enduring power, whether general or limited, may (without obtaining any consent) execute or exercise all or any of the trusts, powers or discretions vested in the donor as trustee".[12] The first question this raises is whether it is appropriate that in general cases delegation by a trustee should last, and last indefinitely, after he loses mental capacity. Given that trustees are selected for their personal qualities, expertise and knowledge of the situation to which the trust relates, it is for consideration whether anything other than temporary and limited delegation can ever be justified. Unless a trustee happens to be the person nominated by the settlement to appoint new trustees or is the sole trustee, he will not alone be entitled on retirement to nominate his successor. Yet, in practice, to appoint an attorney by an indefinite enduring power has much the same effect.

3.13 The fact that the statutory delegation is automatic unless excluded is obviously a good way to make sure that trusteeships are not overlooked. But if no thought is given to them, it is less clear whether the effect which the 1985 Act has will generally be desirable. The attorney will be appointed to exercise all the donor's fiduciary powers. It is far from certain that one particular attorney will be the appropriate person to whom to delegate the donor's powers and duties under every trust of which he is trustee; and,

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12. 1985 Act, s.3(3). This authority is subject to any conditions or restrictions contained in the instrument creating the enduring power of attorney: see para. 2.17 above.

even if there is a single suitably qualified person, that may not be the attorney selected to deal with the donor's own affairs.[13] No notice has to be given to the other trustees; the result may be that they do not know whom they should be consulting. Other provisions of the 1985 Act are worded to apply generally, without excluding powers granted by trustees - e.g., giving the attorney power to make gifts[14] and requiring notice of an application to register with the Court of Protection to be given only to the donor and his relatives[15] - but incompatible provisions may well be held not to apply to such cases.

Beneficial Owners

3.14 Both in relation to safeguards and in relation to the enduring effect of powers of attorney, separate consideration needs to be given to the cases in which the trustees are the beneficiaries. At first sight, there seem to be good grounds for making them an exception in both respects, and we provisionally suggest that a special scheme should make separate provision for such cases. To the extent that safeguards are there to protect the beneficiaries from the misbehaviour of the trustees, the fact that the two groups of people are identical clearly reduces the risk against which beneficiaries need protection. Where someone settles his affairs by granting an enduring power of attorney, it is understandable that he should expect to be able to include the ability to deal with

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13. To take an example, a solicitor or accountant may be trustee of a number of trusts. A partner in the firm may be appropriate to take over that role, but an enduring power of attorney might understandably appoint the trustee's wife or husband as the right person to deal with his or her personal affairs.

14. 1985 Act, s.3(4), (5).

15. Ibid., s.4(3), Sched. 1, paras. 1-4.

assets in which he is beneficially interested but which he also holds as trustee.

3.15 However, some further consideration may be needed where both these factors apply together. Once a person has become mentally incapable, he certainly needs such protection as the law can afford, whether or not he is a trust beneficiary. A conclusion that no safeguards are needed for trustee/beneficiaries who are fully capable may require more thought when the rules are viewed in relation to the mentally incapable.

3.16 In Part V of this Paper we consider the possibility of a special scheme to cover delegation by trustees when they are the beneficiaries; the details are matters on which we shall welcome comment.

Other Matters

Trusts for Sale of Land

3.17 Section 22(2) of the Law of Property Act 1925 deals specifically with the situation where a trustee for sale of land becomes mentally incapable.[16] It reads:[17]

> "If land held on trust for sale is vested, either solely or jointly with any other person or persons, in a person who is incapable, by reason of mental disorder, of exercising his functions as trustee, a new trustee **shall** be appointed in the place of that person, or he **shall** be otherwise discharged from the trust, before the legal estate is dealt with under the trust for sale or under the powers vested in the trustees for sale."

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16. See para. 2.9 above.

17. As substituted by the Mental Health Act 1959; emphasis added.

3.18 Termination of the trusteeship would revoke any power of attorney granted by the trustee, because a principal can only delegate powers which he has. However, it is difficult now to be sure what is the position if nothing is done to remove a trustee for sale of land who becomes incapable if an attorney had been appointed under an enduring power. The main aim of the 1985 Act is, after all, to continue the operation of powers of attorney notwithstanding the incapacity of the donor.

3.19 It is arguable that section 22(2) is framed not as a power to remove an incapable trustee, but as a duty to do so. In the circumstances, the maxim of equity that "equity looks on that as done which ought to be done" might have the result that an incapable trustee thereby ceases to hold office. It can be argued that section 3(3) was meant to cover situations previously falling under section 22(2), and therefore to supersede it. However, the former was not expressed to repeal the latter and the wording of section 22(2) is quite clear. One commentator has argued: "It is submitted that this is a genuine case of inconsistency, because there is no way in which s. 22(2) and s. 3(3) can be reconciled as they stand".[18] On the other hand, as section 22(2) is confined to trusts for sale of land and section 3(3) applies generally, perhaps section 3(3) only covers cases outside the scope of section 22(2). The uncertainty of the application and interrelation of these two provisions is unsatisfactory.

3.20 But an alternative view is that in the context of section 22(2) the word "shall" is directory rather than mandatory[19] and that there is no scope for the application

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18. (1987) 131 S.J. 1509, where the interrelation of these two statutory provisions is analysed.

19. Cf. Doe d. Read v. Godwin (1822) 1 Dow & Ry K.B. 259.

of the equitable maxim. On this view, unless and until the mentally incapable trustee is actually replaced or removed he will remain a trustee and an attorney appointed by him prior to his incapacity under an enduring power can act until the trustee's replacement or removal. However, it must be accepted that on this view section 22(2) and section 3(3) still fit awkwardly together in that the trustee's mental incapacity, which an enduring power is intended to survive, triggers the requirement that the trustee be replaced or otherwise discharged.

3.21 The recent research into the use of enduring powers of attorney[20] suggests that they are regularly used to avoid the effects of the Law of Property Act 1925. However, the evidence is also that such use is confined to unregistered powers. As registration is required where the donor is, or is becoming, mentally incapable[21] the reported practice does not relate to the use of those powers after the trustee has become incapable.

Delegation to One Attorney

3.22 There are statutory requirements that there be not less than two trustees to give a valid receipt for proceeds of the sale of land and other capital money arising under a trust or settlement.[22] This provides a limited safeguard for the beneficiaries against mistake or fraud on the part

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20. Para. 1.7 above.

21. 1985 Act, s.4(1), (2).

22. Settled Land Act 1925, s. 94; Trustee Act 1925, s. 14; Law of Property Act 1925, s. 27. But note that the requirement for two trustees is only in connection with the giving of receipts for capital monies arising on the sale of land (but not other property) or under the Settled Land Act 1925.

of a trustee.[23] There is no mention of the impact on these provisions of the appointment of attorneys or of their power to give receipts. Section 25(2) of the 1925 Act forbids delegation to a sole cotrustee but does not mention the possibility of an individual acting as attorney of more than one trustee.[24]

3.23 In principle, if a trustee delegates all his powers, the attorney should be able to give a receipt on his behalf. But if two trustees, A and B, both appoint C as attorney, one may ask whether C can give a receipt on behalf of both A and B and satisfy the statutory provisions. If he can, the safeguard represented by money having to be received by two different people has disappeared. However, as we have pointed out,[25] the safeguard seems to have been jettisoned in respect of powers granted under the 1985 Act.

3.24 There are two points for consideration here. First, there is the uncertainty whether under the 1925 Act a single individual can be attorney of both or all trustees. Secondly, the approach adopted in 1925, when it was provided that two persons (not being a trust corporation) are needed to give a valid receipt for proceeds of sale of land and other capital money, contrasts with that adopted in 1985 when an attorney of a trustee was specifically empowered to give a receipt alone. These different provisions can apply

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23. "This restriction on a sole individual trustee being able to give valid receipts will be, I submit, of immense importance in practice, for it is easy, quite apart from fraud, for mistakes to be made by a sole trustee; for instance, allowing trust money to become intermingled with his own estate": The New Property Acts: Sir Benjamin Cherry's Lectures (1926), p.76.

24. See paras. 4.29-4.33 below.

25. Para. 3.2 above.

in identical circumstances; the differences do not appear to be based on any principle and are hard to justify.

PART IV

OPTIONS FOR REFORM: GENERAL CASES

4.1 We now turn to examine the reform options to tackle what has become a muddled and unsatisfactory situation. In large measure the present position results from the search for a single set of rules to cover very different situations: at one extreme, there is the traditional settlement with three or four independent trustees holding property for the benefit of various members of a family who enjoy different interests, either concurrently or sequentially; at the other extreme, a husband and wife jointly own their family home, and find themselves trustees by what amounts to a legal technicality.

4.2 There may be particular situations to which different rules should apply. We have ourselves identified as one such case some at least of the trusts where the trustees are themselves the beneficiaries. We have provisionally concluded that it should be dealt with separately.[1] Those responding to this Paper may differ from that view or may wish to suggest yet other circumstances to which separate regimes should apply; there would, however, be distinct disadvantages if this area of the law were to be made unduly complicated by a proliferation of special cases.

Safeguards

Overlapping Alternatives

4.3 We have previously pointed out that the 1925 Act and section 3(3) of the 1985 Act cover much the same ground, in

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1. Para. 3.14 above.

allowing trustees to delegate by power of attorney, but they are very different in the conditions which they impose.[2] We do not consider that the present position - where there are two powers allowing a trustee to delegate, one with safeguards and one without, which the trustee is free to choose between - is defensible. The safeguards are there to protect beneficiaries against imprudent delegation by a trustee. If safeguards may sometimes be needed to protect beneficiaries, it cannot be appropriate to allow the trustees, against whose abuse protection is provided, to opt out of them. There can be no guarantee that they will only opt out in cases where no safeguard is required. We do not wish to prejudge the question whether it is necessary to impose safeguards, but it is possible to take a view of the current situation. We have provisionally concluded that the present legislative scheme needs to be changed. There are two reasons for this. First, principle dictates that if safeguards for third parties are needed at all, rules of law should dictate the cases in which they may be omitted rather than the party delegating responsibility. Secondly, the law should be simplified by removing overlapping provisions.

Abolition of Safeguards

4.4 The first question for consideration is whether safeguards are needed at all, or possibly whether only in defined circumstances. The 1985 Act came into force on 10 March 1986.[3] We do not know how many enduring powers of attorney have since then been used by trustees to delegate their powers,[4] but during the period that the new procedure

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2. Para. 2.28 above.

3. Enduring Powers of Attorney Act 1985 (Commencement) Order 1986.

4. The recent research (para. 1.7 above) indicates that some enduring powers have been granted expressly for that purpose, but gives no guidance as to numbers.

has been available no complaint about the lack of safeguards for beneficiaries has come to our attention. It is therefore possible that, attractive though such safeguards look, they are not in practice needed. If they could safely be dispensed with, that would remove complications and restrictions from the law.

4.5 We should be interested to learn from those responding to this Paper:

(a) To what extent trustees have used enduring powers of attorney to delegate their powers, in cases where they are not, or not the only, beneficiaries?

(b) To what extent have they used enduring powers of attorney, where the same people were the trustees and the beneficiaries?

(c) What effects (if any) has the lack of safeguards for beneficiaries had?

4.6 If the evidence points to a reform recognising that the safeguards rarely have a significant influence on the practice of delegating trustees' powers, there are two possibilities on which we should welcome views.

4.7 Option A1: Abandon Safeguards. The first possible reform would be to abandon all the safeguards in all cases. If they are not needed, this would be an appropriate step. All trustees would then be given an unrestricted statutory power to delegate. The effect would be that of section 3(3) of the 1985 Act, before the donor becomes mentally incapable, and the 1925 Act provisions would be repealed. Whether the delegation should continue after the donor's

mental incapacity is a question which needs to be separately addressed.[5]

4.8 The effect of abandoning all safeguards on delegation goes beyond merely cancelling rules which some may see as affording protection which beneficiaries do not need. It also seriously undermines the established practice that a trustee is individually selected as suitable to carry out his duties. It would enable someone else, whose attributes may be completely unknown to the person responsible for appointing trustees, to be appointed to assume the trustee's role indefinitely.

4.9 Option A2: Retain Safeguards for Special Cases. The second possible reform would involve identifying cases in which safeguards are still needed, while freeing all other cases from restrictions. The safeguards would not have to be identical to those which apply at present - possible variations are discussed below[6] - but for the moment the details of the restrictions can be left on one side. The questions which need to be considered are: first, in which cases might safeguards usefully be retained; and secondly, how in practice could these cases be identified, to ensure that the safeguards are then provided.

4.10 If at least some safeguards are to be retained in general cases, different rules will probably be necessary for cases where the trustees are the beneficiaries. We consider these separately below;[7] these options should therefore be assessed in relation to the general position, leaving that particular case aside for the moment.

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5. Paras. 4.43-4.50 below.

6. Paras. 4.18 - 4.42 below.

7. Paras. 5.21-5.29 below.

4.11 If safeguards are only to apply to certain cases, it would need to be where the beneficiaries are most vulnerable, and particularly where they either lack legal capacity or their identity cannot be ascertained.[8] The following types of trust, or some of them, might therefore be affected:

(a) Trusts where at least one beneficiary is a minor;

(b) Trusts where at least one beneficiary is mentally incapable;

(c) Trusts where the identity of any beneficiary, or possible beneficiary, remains to be ascertained.

4.12 Safeguards in granting powers of attorney can only be fully effective if an attorney under a power granted in defiance of the restrictions is prevented from acting. This will involve the attorney, and particularly those dealing with the attorney, knowing whether it is a case to which the safeguards apply so that they can take steps to ensure compliance. However, it does not seem desirable to require third parties dealing with attorneys to investigate whether a trust falls into a particular category. Detailed inquiries about the beneficiaries could well be resented, and they could impose a heavy burden on the third party which he would probably be reluctant to undertake. It seems likely that the introduction of such an arrangement would lead many to consider that delegation by a power of attorney was impractical. The practice of delegation might be abandoned, which would mean the loss of a useful facility.

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8. Where the beneficiaries are all of full age and capacity they may authorise a trustee to appoint an attorney (see para. 2.7(b) above), but legislation goes further to give the convenience of authorisation without the need for express agreement.

4.13 A possible alternative approach is to require any trustee who purports to grant a power of attorney without safeguards to declare, on the face of the power, that it does not fall into one of the specified categories to which safeguards applied. A third party would be entitled to rely on the truth of the declaration. That would certainly be a simple formality, but clearly one open to abuse, and the worry would be that abuses would occur in just those cases where safeguards were most necessary. There must clearly be doubt whether this type of limit on safeguards is practical, because there is little chance of being sure that the benefits would indeed apply in the cases which they were intended to cover.

4.14 We would ask those who favour the partial abolition of safeguards to comment on:

(a) The categories of case in which some safeguards should be retained;

(b) How the powers of attorney requiring safeguards should be identified.

4.15 Option A3: Safeguards in all Cases. The third possible reform involves reverting to the position which applied before the 1985 Act was passed, under which safeguards applied whenever a trustee granted a power of attorney. This will be a familiar position to most readers of this Paper, but it involves justifying the need for safeguards.

4.16 Even though safeguards are retained in all cases, it is not essential that the same restrictions apply to every power which is granted. With that in mind, this is the option which we provisionally favour. A beneficiary under a trust who is not also a trustee is necessarily in a vulnerable position - he enjoys an interest in property

which is not under his control - and the law rightly takes the position that he should be offered all reasonable protection. These safeguards are designed to fall into that category. It is true that they can be inconvenient for the trustee who wishes to delegate and that they cannot stop all malpractice. We do not see the fact that the safeguards are not foolproof as an argument for dropping them altogether; that would necessarily leave beneficiaries in a worse position. Again, subject to what readers of this Paper may argue, we doubt whether the lack of reported difficulties encountered over the last five years, when trustees have been able to grant powers without safeguards, is a convincing reason for dropping them. It is a relatively short period, and improper conduct, which the lack of safeguards has allowed during that time, may yet come to light.

4.17 We have provisionally concluded that there should be restrictions on a trustee's power to delegate in all cases. This supports the general principle that a trustee should normally undertake personally the duties of the office which he has voluntarily accepted. It also affords a degree of protection to beneficiaries which is balanced against allowing trustees a reasonable flexibility in delegating.

Amending Safeguards

4.18 As we have already made clear, we do not wish to suggest that the form of the safeguards must necessarily remain as they are. It may be that those supporting their retention would nevertheless wish to see them varied. Accordingly, we now turn to a detailed consideration of each safeguard, in order to seek views on whether it should be retained and if so, in what form.

4.19 The duration of a power cannot sensibly be considered in isolation from the question whether it is to survive the

donor's mental incapacity, i.e. to be an enduring power. We discuss this issue later,[9] but, so that readers can fully consider the appropriate duration of these powers, we must anticipate that discussion. Our provisional conclusions are that, in general, powers granted by trustees should not endure beyond the donor's incapacity. But, in contrast, powers granted where the same people are the beneficiaries and the trustees should either be enduring or be capable of being granted in that way. For this reason, it seems appropriate only to consider an automatic limit on the duration of general trustee powers.

Duration of Delegation

4.20 Section 25(1) of the 1925 Act limits the duration of any power of attorney to twelve months. This follows the recommendation in our 1970 Report.[10] The period was chosen by analogy with other statutory provisions, particularly the rule that any trustee remaining out of the United Kingdom for more than twelve months may be replaced.[11] Although this provides some cohesion in the legislation, the twelve month maximum period is essentially an arbitrary one, chosen because it was thought to satisfy the needs of the situation. If it is now thought that the period is no longer appropriate, it can be changed without disturbing other relevant legislation.

4.21 Option B1: No Change. The first option is to leave matters as they are. In 1970 we recommended the twelve month maximum period as one which enabled a trustee to delegate his powers for moderate periods, and yet did not

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9. Paras. 4.43-4.50 below.

10. Powers of Attorney (1970), Law Com. No. 30, para. 22.

11. Trustee Act 1925, s.36(1).

encourage trustees to neglect their personal responsibilities without sufficient cause. At the same time, we recognised that it would be possible for a trustee to grant another power as soon as the first expired; but because it would again be necessary to give notice and to prepare a further power of attorney, we considered that there would be a deterrent against excessive use of the facility.

4.22 Option B2: Extend Period. Some may take the view that twelve months is an inconveniently short maximum duration for powers of attorney granted by trustees. They may consider that the time limit should be extended, while continuing to support the need to renew them, so that notice of any new power has to be given. The choice of an alternative maximum period must necessarily be as arbitrary as the present twelve months, based upon pragmatic considerations derived from practical experience. We invite those who favour a longer maximum period to suggest what period should be substituted, and to give the reasons which support their choice.

4.23 Option B3: Remove Time Limit. A time limit is not inherently necessary. A general power of attorney, relating to the donor's personal affairs and not to his responsibilities as trustee, can be granted without time limit.[12] He can revoke it at any time. The same rule could apply to trustee powers.

4.24 Although it seems undesirable that a trustee should be able, and some might feel be encouraged, indefinitely to delegate his authority, there are two grounds which may

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12. It will, of course, automatically be revoked on the death, bankruptcy or, unless an enduring power, mental incapacity of the donor.

favour dropping the time limit. First, any time limit must be capricious and will no doubt cause inconvenience in some cases; the only way to avoid such difficulty is not to have a limit at all. Secondly, it must be borne in mind that the creation of a power of attorney does not preclude the grantor from continuing to exercise the powers personally. That is to say, a trustee may act normally in the trust, but may grant a power of attorney as a standby facility to be used, perhaps, during occasional short absences from the country. The power can be held in abeyance - valid, but not used - while the trustee attends to his duties personally. So long as it is not formally revoked it is available to be used again whenever necessary. To apply a time limit to a power which it is intended to employ in this way considerably reduces its usefulness.

4.25 Option B4: Addition to Prevent or Deter Successive Powers. This is not an independent reform option, but one which can be adopted in conjunction with either Options B1 (no change) or B2 (extend period). As we mentioned above,[13] it was always recognised that a trustee would be able validly to grant a series of powers of attorney in succession, provided he complied with the formalities on the creation of each. That practice may be inappropriate if the maximum period for the grant of a power is extended, because the intention may then be that the new maximum period should be as long as any trustee should opt out of performing his duties personally. Accordingly, this option is to place some restraint on the repetitive granting of powers of attorney.

4.26 One way to address this point would be to introduce a new rule to the effect that a trustee had no power to grant a power of attorney within (say) two years after the end of

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13. Para. 4.21 above.

a previous period of delegation. Such a rule is simple to state, but problems of enforcement could be formidable. If the second power appointed a different attorney (who might not know of the earlier power), the only process of enforcement would be action by another trustee or a person entitled to appoint trustees, to whom notice was given. But, at least as matters now stand, failure to give such a notice does not, in favour of a person dealing with the attorney, invalidate anything which the attorney does.[14]

4.27 An alternative deterrent to overuse of the power to delegate was discussed in our 1970 Report.[15] This would extend the power to replace a trustee[16] to apply to the case of a trustee who acted by an attorney for more than twelve months. That period is not fundamental, and the rule could be applied with the substitution of a different period. We rejected this suggestion in our 1970 Report on the basis that if a trustee appointed an attorney merely to act if he happened to be away at the time when action was needed, it would not always be easy to decide whether he had indeed acted by an attorney for more than twelve months. If, to avoid that uncertainty, the rule permitted the replacement of a trustee simply if a power of attorney had remained in operation for more than twelve months, it could allow his replacement in circumstances which might be unjustified because there had been no personal neglect of his duties.

4.28 We have no evidence that the present one-year limit is unreasonably inconvenient for trustees. It does not seem to hamper trustees' legitimate aspirations to delegate, nor does the power seem to be abused by overuse. This indicates

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14. 1925 Act, s.25(4).

15. Powers of Attorney (1970), Law Com. No. 30, para. 23.

16. 1925 Act, s.36(1).

that for general cases the present arrangements are satisfactory, and accordingly we provisionally favour Option B1 (no change) without the addition of Option B4 (addition to prevent or deter successive powers).

Delegation to Sole Co-trustee

4.29 A trustee is not authorised to delegate his functions by power of attorney to his only other co-trustee, unless a trust corporation.[17] That statutory rule must be considered so far as it relates to general cases. We shall revert to it separately in relation to cases where the trustees are the beneficiaries.[18]

4.30 In general cases, this safeguard is consistent with other rules of trust law intended to protect beneficiaries: that trustees, other than charitable trustees, must take their decisions unanimously, and that there must be at least two trustees (except in the case of a trust corporation) to give any receipt for capital moneys arising from land.[19] The former ensures that when there are more than one trustee of a trust, no trustee can act on behalf of the trust without the knowledge and approval of every other trustee. The latter rule avoids the risk that a sole trustee might divert the capital money in breach of trust.

4.31 However, there are cases in which it is not clear how the present law applies:

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17. Ibid., s.25(2).

18. Para. 5.23 below.

19. Trustee Act 1925, s.14; Settled Land Act 1925, s.94; Law of Property Act 1925, s.27; para. 3.22 above.

(a) Say there are three trustees - A, B and C. If A grants a power of attorney to B, what is the position if C dies, leaving B as A's sole co-trustee? At the date A gave the power of attorney, everything was clearly in order, but was the power later invalidated? (The Act forbids a sole co-trustee being an attorney, not being appointed attorney.[20]) The suggestion that a later circumstance beyond the parties' control should change the position may seem capricious, but it is hardly less so than the established rule that the death of the donor of a power revokes the attorney's authority. The evil which the safeguard is intended to counter is just as dangerous if it arises after the date when the power is granted as if it existed at that date.

(b) May trustees each separately appoint the same attorney? Prima facie, the Act does not seem to rule this out: if trustees A, B and C each execute a separate power of attorney in favour of their solicitor, X, it would seem that X can act on behalf of all three trustees. None has appointed his sole co-trustee as his attorney; X is not a trustee at all. However, if the intention is that one person should not alone be able to exercise the discretion of the trustees or receive capital money arising from land, that aim would have been undermined.[21]

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20. By contrast, the Ontario Law Reform Commission recommended "that where there are only two trustees, one trustee should not be able to delegate to the other except where the latter is a trust company": Report on the Law of Trusts (1984), p.49.

21. "[I]t seems unlikely that two or more trustees may delegate their discretions to the same person, other than a trust corporation": Halsbury's Laws of England, 4th ed., vol. 48, (1984), para. 846, note 3.

4.32 There is no universal rule that trustees' powers should not fall into the hands of a single individual. In many cases, there is only a sole trustee and not only is he then entitled, and indeed under a duty, to exercise the trustees' discretionary powers, but he is expressly authorised to give receipts for money (other than capital money arising from land) and securities[22] which may be of greater value than the sums for which the receipt of two trustees is required. Also, a sole personal representative is entitled to act on his own.

4.33 Logic may dictate that there should be an overall rationalisation of the powers of sole trustees. However, such an exercise would range considerably more widely than the scope of the present study and has been reviewed relatively recently.[23]

4.34 Option C1: No Sole Co-trustee Attorneys. Those who consider that the present rules offer a valuable safeguard will wish them to continue, and the first option is therefore to make no fundamental change. However, some clarification in order to achieve consistency may be valuable. We would therefore ask those who support this option also to consider whether

(a) the provision should be clarified to ensure that a power of attorney in favour of a co-trustee (who is not a trust corporation) ceases to be valid if the co-trustee becomes the sole co-trustee, or possibly that it is not valid during any period when he is the sole

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22. Trustee Act 1925, s.14.

23. The Law Reform Committee considered limits on the number of trustees, but did not recommend increasing the minimum number of one: Twenty-third Report: The Powers and Duties of Trustees (1982), Cmnd. 8733, para. 2.2.

co-trustee (in which case the power would revive on the appointment of another trustee);

(b) it should be made impossible for one person (who is not a trust corporation) either to act as attorney for more than one trustee of the same trust, or (more narrowly) to act as attorney for all the trustees of the same trust.

4.35 Option C2: Freedom of Appointment. The alternative view would be that the restriction against the appointment of a sole co-trustee provides no worthwhile safeguard. After all, as we have already pointed out, many trustees' functions are at present discharged by sole trustees.[24] This reform option would therefore be to repeal the restriction. In support of this view, it should be borne in mind that a trustee remains liable for the acts and defaults of his attorney.[25]

4.36 Among the reasons for appointing more than one trustee are the advantage in having more than one view in managing the affairs of the trust and the reduction in the risk to the trust assets of one individual's dishonesty. These seem to us to be valuable advantages for beneficiaries, which should not be sacrificed simply because a trustee chooses to delegate his functions to an attorney. For this reason, we provisionally favour Option C1 (no sole co-trustee attorneys), and suggest that the legislation should make clear both that a power should be invalid if at any time it would result in one trustee being the only person to exercise the trustees' powers and that delegation by all the

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24. Para. 4.32 above.

25. 1925 Act, s.25(5); para. 4.42 below.

trustees individually should not be possible in favour of one outside person (unless a trust corporation).

Notice of Grant of Power

4.37 A trustee granting a power of attorney must give his co-trustees and anyone entitled to appoint trustees notice of the grant, with particulars and the reason for it.[26] This safeguard seems to have three purposes: first, it informs co-trustees in co-operation with whom they have to act; secondly, it alerts those who have the power to remove trustees to circumstances which may lead to the appointment of another trustee or other trustees in place of the trustee granting the power of attorney;[27] and thirdly, it acts as a deterrent to the over-frequent use of powers of attorney.[28]

4.38 The importance of this safeguard should not be exaggerated. In many settlements it is the trustees who are the people entitled to appoint and remove trustees, so that notification of those people adds nothing to notifying the trustees. Furthermore, it is scarcely conceivable that granting a power of attorney, or even several powers of attorney, would constitute grounds for the replacement of a trustee. Besides, the present legislation expressly declares that any omission to serve notice does not invalidate any of the attorney's acts, and it does not seem practicable to suggest putting third parties at risk by reversing that rule.

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26. 1925 Act, s.25(4).

27. Ibid., s.36(1); see Powers of Attorney (1970), Law Com. No. 30, paras. 19, 20.

28. Powers of Attorney (1970), Law Com. No. 30, para. 22.

4.39 Option D1: Keep Notice Provision. The present notice provisions seem technically satisfactory, so those who support the principle of keeping them will wish to opt to take no action. Our provisional view is that this safeguard, although of limited value, is appropriate and not unduly troublesome. We therefore suggest that it be retained.

4.40 Option D2: Abandon Requirement to Give Notice. The alternative is to repeal the requirement to give notice. This could be done independently of the other safeguards.

4.41 Option D3: Limit Notification to Co-trustees. The first purpose of this safeguard which we identified above,[29] informing co-trustees with whom they have to act in co-operation, is clearly of practical importance. The other benefits may well be of less value. That first purpose could be achieved by limiting the obligation to notifying co-trustees only, which in a small way would reduce the formalities required.

Trustee's Liability for Attorney's Acts

4.42 A trustee who appoints an attorney under the 1925 Act is liable for the acts or defaults of the attorney in the same way as if they were his own.[30] This is a strong safeguard for beneficiaries, because it considerably increases the risk of appointing an attorney, and provides a disincentive against repeated delegation, in lieu of retirement from the trust. As a safeguard it is also particularly appropriate, because the effect of it is to ensure that the delegation does not prejudice the

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29. Para. 4.37 above.

30. 1925 Act, s.25(5).

beneficiaries' position. As neither those responsible for appointing new trustees nor the beneficiary have any direct hand in selecting an attorney appointed by a trustee, there seems no justification for the trustee's responsibility to be lifted.[31] For general trustee cases, we know of no arguments which have been presented in this country in favour of amending this provision, and do not therefore suggest options for reform.[32] However, the point needs consideration in relation to the possibility of sub-delegation.[33]

Enduring Powers

4.43 Before the enactment of the 1985 Act, there was no question of a power of attorney granted by a trustee enduring after the donor became mentally incapable. Like any other power it automatically ceased to be effective upon the donor losing capacity.[34] This was still the position when the 1925 Act was passed and when it was amended by the

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31. In New Zealand and Western Australia a trustee who has granted a power of attorney has a defence against any action brought by a beneficiary in respect of an act or default of the attorney, if he proves that he appointed the attorney "in good faith and without negligence": Trustee Act 1956 (N.Z.), s.31(3); Trustee Act 1962 (W.A.), s.54(4). The Ontario Law Reform Commission considered whether to recommend the adoption of a similar rule in Ontario, but rejected the possibility, saying "we do not think that statute, as opposed to a trust instrument, should go this far": Report on the Law of Trusts (1984), p.56.

32. The Law Reform Committee concluded that trustees should remain liable for the acts or defaults of their attorney: Twenty-third Report: The Powers and Duties of Trustees, 1982 (Cmnd. 8733), para. 4.13.

33. Para. 4.54 below.

34. Drew v. Nunn (1878) 4 Q.B.D. 661.

1971 Act.[35] The radical change introduced by the 1985 Act was to allow a donor to create a power of attorney which remained valid even though he became mentally incapable.

4.44 When the new provision for delegation by trustees was made part of the enduring powers of attorney scheme,[36] not only did it remove the one-year limit on the duration of a power of attorney granted by a trustee,[37] but the power became one which could continue after the trustee had lost mental capacity. Whether this is appropriate for general trustee cases does not seem to have been discussed.

4.45 The concept of the enduring power of attorney - delegating powers indefinitely - is fundamentally incompatible with the idea that a trustee is expected personally to attend to the affairs of the trust. Once the trustee has become incapable of exercising the judgment and care which he was appointed to give, it is open to question whether his appointment should continue. Certainly, if he had granted an enduring power of attorney, he has ensured that there is still someone to exercise the trustee's functions. But the attorney acts without any supervision, control or intervention from the trustee, and, once the trustee is incapable, without there being the possibility of any. We have already provisionally concluded that there should be a time limit on delegation;[38] the use of an enduring power is not compatible with that conclusion, and

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35. There is, however, protection for an attorney who acts under a power which has been revoked without his knowledge and for a person who, also in ignorance of the revocation, deals with the attorney: 1971 Act, s.5(1), (2); para. 2.25 above.

36. 1985 Act, s.3(3).

37. 1925 Act, s.25(1).

38. Para. 4.28 above.

our current view is that enduring powers are not appropriate in general trustee cases. This accords with our original recommendation which led to the exclusion from the 1985 Act of powers granted under the 1925 Act. This recommendation was a practical one, not based on an issue of principle: a 1925 Act power could not last longer than twelve months.

4.46 As far as we are aware, no difficulties have so far been encountered as a result of the delegation of a trustee's discretionary powers lasting after he has become mentally incapable.[39] This clearly makes it appropriate to consider whether powers granted by trustees should remain capable of being enduring powers. However, we consider that it is possible that some of the difficulties we identify below may yet arise. We should be interested to learn of the practical experiences of those who respond to this Paper, as well as their views.

4.47 Even though an appointment by enduring power is indefinite, there is, of course, statutory power to remove an incapable trustee.[40] If the trustee were removed from office, his attorney would cease to have any role, because he could not exercise powers which his principal no longer had. However, a question could arise about the exercise of the power of removal. If indefinite delegation is provided for, it should presumably be considered an approved method of proceeding. One might then ask whether it should be possible to exercise the power of removal simply because of mental incapacity if, before incapacity, the trustee had

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39. Except the possible conflict with s.22(2) of the Law of Property Act 1925, relating to trusts for sale of land; paras. 3.17-3.20 above.

40. 1925 Act, s.36(1).

made suitable alternative arrangements which are still in operation.[41]

4.48 We have provisionally suggested that the 1925 Act provisions continuing the trustee's responsibility, even though he has granted a power of attorney, should continue.[42] The impact of this on the estate of a mentally incapable trustee must be considered. Being responsible for the acts of another necessarily entails risk, and by definition in this case the donor would not be in a position to monitor the attorney's performance or re-assess his own position. A trustee of full capacity is always able to revoke the power of attorney so as to end his exposure; that course would not be open to an incapable trustee.[43]

4.49 As things stand at present, there is also the evidence that the 1985 Act was not designed for trustee cases. An important part of the procedure which the Act lays down is the requirement for the attorney to give notices of his application to register the power with the Court of Protection when the donor is or is becoming mentally incapable. Those notices have to be given to certain relatives of the donor.[44] In the case of a power granted by a trustee, they may not reach anyone having any direct interest in the trust and they may be of no concern to the recipients specified by the Act.

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41. Clearly, if the attorney had himself become incapable, died, etc., the power of replacement would be needed.

42. Para. 4.42 above.

43. The Court of Protection could revoke the registration and the power of attorney on the ground that the attorney was unsuitable: 1985 Act, s.8(4)(g), (5); but there would not necessarily be anyone with an interest in bringing the matter before the Court.

44. 1985 Act, s.4(3), Sched. 1.

4.50 Although no practical difficulties arising from enduring powers granted by trustees have come to our notice, we are equally not aware of any calls for enduring powers to be available for trustees, except where the trustees are the beneficiaries. There seem to have been no calls for them when the topic was considered by the Law Commission in the study which led to its 1983 Report, nor when the 1985 Bill was considered. These considerations confirm our provisional view that general trustee powers should not be capable of surviving the mental incapacity of the donor.

Other Provisions

Sub-delegation

4.51 The traditional rule of law is that no attorney may himself further delegate the functions which he has been authorised to perform, unless the donor of the power expressly permits him to do so.[45] The trustee would only be entitled to authorise his attorney to delegate to a substitute if he was given power under the terms of the trust. The general rule is reinforced by the 1985 Act: a power which gives the attorney a right to appoint a substitute or successor is incapable of being an enduring power of attorney.[46]

4.52 The 1925 Act makes a very limited exception to the rule against sub-delegation, in relation to powers granted by trustees under that Act. An attorney may himself grant a power of attorney for the purpose of transferring any inscribed stock.[47] We do not know to what extent this power

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45. Halsbury's Laws of England, 4th ed., Vol. 1(2), (1990) para. 63.

46. 1985 Act, s.2(9).

47. 1925 Act, s.25(6).

is exercised, or how far it continues to be useful and necessary. We should welcome information about this.

4.53 As far as we are aware it is rare for trust instruments to authorise sub-delegation by a trustee's attorney and there is little or no sub-delegation in practice by attorneys appointed by trustees. But there is an argument that freedom to do so is an important, and indeed necessary, way to ensure that the purpose of allowing trustees to appoint attorneys is fully achieved. A trustee who foresees that he is not going to be able to attend personally to his duties can reasonably be expected to appoint an attorney. If during the trustee's period of absence or incapacity the attorney himself can no longer perform those duties, sub-delegation is the only alternative to replacing the trustee.

4.54 However, the freedom to sub-delegate raises the question of the trustee's continuing liability,[48] and whether it should extend to the acts of any substitute. Such an extension is a major addition to the trustee's risk: he would accept liability for the acts of someone whom he had not selected. Yet to release the trustee would seriously undermine the safeguard for beneficiaries.

4.55 The reason for not allowing the appointment of substitutes in the case of enduring powers, which we recommended,[49] had nothing to do with the delegation of trustees' powers; the provision that became section 3(3) of the 1985 Act was not then under consideration. We rejected the possibility of sub-delegation on the ground that "This would be contrary to the special relationship of trust

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48. Para. 4.42 above.

49. The Incapacitated Principal (1983), Law Com. No. 122, para. 4.22.

subsisting between the EPA donor and the attorney". An analogous argument could certainly apply to the relationship between a trustee on the one hand and, on the other hand, those who appointed him and the beneficiaries whose interests he is safeguarding.

4.56 Option E1: Ban all Sub-delegation. This would mean adopting the strict rule which at present applies to enduring powers of attorney. We provisionally favour this straightforward rule which would give consistency with enduring powers of attorney. It would change the law, but we think it would be in line with what happens in practice. We should welcome comment on whether the exception relating to inscribed stock[50] should remain.

4.57 Option E2: No Statutory Authority to Sub-delegate. This possibility would adopt the stance of the 1925 Act: although there is no statutory right to appoint a substitute,[51] the right may be conferred in the power of attorney by a trustee who is given the express power to do so by the trust instrument.

4.58 Option E3: Statutory Freedom of Sub-delegation. The third possibility is to authorise a trustee's attorney himself freely to grant a power of attorney to a substitute, to exercise the trustee's powers. Those who favour this reform are asked to consider whether the trustee should continue to be responsible for the acts both of the attorney and of his substitute.[52]

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50. 1925 Act, s.25(6); para. 4.52 above.

51. With the limited exception in section 25(6).

52. Para. 4.54 above.

Personal Representatives

4.59 There is one other way in which the parallel provisions of the 1925 and 1985 Acts differ. The 1925 Act applies to personal representatives,[53] but the 1985 Act probably does not. Section 3(3) of the 1985 Act expressly refers to the delegation of the donor's powers "as trustee". Certainly, a personal representative's position is a fiduciary one, but the duties of his office are normally distinguished from those of a trustee.[54] Only once the estate of the deceased has been fully administered does a personal representative, who continues to have responsibilities in relation to those assets, become a trustee.[55]

4.60 In certain circumstances, personal representatives can grant powers of attorney for the purpose of obtaining a grant of representation.[56] In this Paper, we are only concerned with the delegation of their powers after a grant of representation has been made in their favour. The application for a grant is properly regarded as an integral part of the administration of the probate system, rather than the exercise of discretionary fiduciary powers.

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53. 1925 Act, s.25(8).

54. See Ibid., s.68(17).

55. Powers of Attorney (1970), Law Com. No. 30, which led to the enactment of the Powers of Attorney Act 1971, referred in para. 11 n.11 and the Explanatory Notes to the appended draft Bill (pp.35, 37) to the doubts which had arisen about the application of the delegation provisions to personal representatives. The amendment to insert an express reference to personal representatives in the 1925 Act was proposed in order to resolve the doubts, and was duly enacted.

56. Non-contentious Probate Rules 1987, r.31.

4.61 We know of no difficulties which have arisen from the inclusion of personal representatives in the 1925 Act power to delegate, but their exclusion from the 1985 Act powers has drawn adverse comment.[57] We can see that a distinction might be drawn between executors, chosen by the testator, and administrators who are appointed by the court. However, the 1925 Act has applied to all personal representatives without distinction, and as far as we know without objection.

4.62 We provisionally conclude that whatever arrangements are to apply to trustees generally should be expressly extended to personal representatives, but we invite those responding to this Paper to comment.

Statutory Form

4.63 The succinct form of statutory general power of attorney, set out in Schedule 1 to the Powers of Attorney Act 1971, has certainly been, in the words of our predecessors who proposed it, "a worthwhile experiment".[58] It has been well received and is widely used. We think that this results from the fact that it embodies these virtues:

(a) It is a standard form which is used without amendment;

(b) It is short and easily understood;

(c) Its effect is certain;

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57. S. Cole, solicitor, letter, The Lawyer, Vol. 3, Issue 27, 4 July 1989.

58. Powers of Attorney (1970), Law Com. No. 30, para. 38.

(d) Its use is not compulsory.

4.64 We consider that it may now be possible to build on this experience and to promulgate a statutory form of power of attorney for use generally by trustees. In more detail, we envisage that a new statutory form might have these features:

(a) It would relate to the powers given under only one trust, which it would identify. The donor's co-trustees would be named, so that third parties would normally know from the joint ownership of an asset that it was subject to the trust in question.[59]

(b) It could be framed either to delegate all the trustee's powers under that trust, or so that it provided alternatives for the user to choose: (i) delegation of all powers or (ii) delegation of specified powers. The 1925 Act authorises the delegation of "all or any of the trusts, powers and discretions vested in him as trustee",[60] which presumably not only allows the trustee to delegate powers under one trust but not under another, but also to delegate some only of his powers under a particular trust. The 1971 Act standard form concentrates on the common case of complete delegation, and ignores cases where the attorney is appointed only for a limited purpose; this keeps the form simple. We invite the views of those who favour introducing a form for use by trustees on the question whether it should only cover delegation of all powers (so that other cases would, as now, need a specially drawn power of attorney) or whether both total and partial delegation should be possibilities, so that it would always be necessary to delete one alternative.

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59. There are, nevertheless, many cases where the same people are trustees of more than one trust.

60. 1925 Act, s.25(1); emphasis added.

(c) If a short maximum delegation period is retained,[61] it could be for that period. Otherwise, it could be without time limit, as is the case of the 1971 Act power.

4.65 The suggestion is that a statutory form would be prescribed as a facility available for the parties to use if they wished, without its use being compulsory. The objectives would be to prescribe a readily recognisable and understandable succinct form, which would save time and expense and achieve certainty. We should be interested to learn whether others believe this would be a useful provision.

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61. Para. 4.28 above.

PART V

SPECIAL SCHEME: TRUSTEES WHO ARE BENEFICIARIES

5.1 We now consider the circumstances where the trustees are also the beneficiaries, i.e. they hold the trust property in trust for themselves and for nobody else. We discuss whether in such cases there should be a special scheme for powers of attorney granted by trustees, regulating them but allowing greater freedom than in general cases. Any special scheme would, however, be voluntary: it would be available for use by those who qualified, but they could equally delegate by using a general trustee power of attorney if they chose.

5.2 The case where the trustees and the beneficiaries are the same is not a distinct legal category, but the fact that it has given rise to particular problems suggests that it may be appropriate to make special provision for it. The circumstances most commonly arise in the case of the family home owned by two co-owners. The trusteeship of the co-owners is imposed by statute[1] and can be seen as a legal technicality which should not be allowed to restrict unduly the arrangements which owners make for the management of their property. Our discussion of a possible special scheme will assume that it should be confined to co-owned land, as this seems to be where problems have arisen. If others have encountered similar difficulties in relation to other property, we should be glad to have details.

5.3 The special scheme discussed in this Part of the Paper is presented for comment both on the overall basis - whether there should be such a scheme at all - and on matters of detail. It is, of course, to be considered in the light of

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1. Law of Property Act 1925, s.34.

the present situation, in which section 3(3) of the 1985 Act has largely removed all safeguards and has made it possible for most powers of attorney granted by trustees to be enduring powers. The possible combination of non-enduring general trustee powers, to which some safeguards would apply, and a limited special scheme, would therefore be more restrictive than the present rules.

5.4 The first matter to be examined is the scope of the special scheme. Before turning to this, however, we shall outline its likely main provisions. These are discussed in detail below, but it will be helpful to bear them in mind when considering the limits to be placed on the extent of the scheme. The principal ways in which the special scheme's terms might vary from those relating to powers of attorney granted by trustees generally are:

(a) Safeguards. The safeguards for the protection of beneficiaries against the imprudence, or worse, of the trustees could be relaxed or dispensed with when the trustees and the beneficiaries were the same people;

(b) Enduring Power. If assets which are technically in trust are regarded simply as co-owned, they could reasonably be treated in the same way as other assets owned outright when someone is settling their affairs. So this type of power could survive the donor's mental incapacity.

Scope

5.5 While it is simple enough to define the scope of the special scheme by saying that it is to apply where land is held on trust by trustees for themselves as beneficiaries, it is less easy to be sure whether any particular case falls within that scope. There are three likely difficulties: first, trustees are not always aware of all the beneficial

interests which exist in the property they are holding; secondly, beneficial interests change hands; and thirdly, the position can only be ascertained, if at all, by an inappropriate investigation.

5.6 The courts have recognised that equitable interests in property may arise informally, e.g. by someone contributing to the purchase price of property so as to give rise to a resulting trust or by an occupier - after an agreement, arrangement or understanding reached between the parties sharing the house as their home that the property is to be shared beneficially - paying for improvements, without documentation. Those who own the legal estate may know the facts, but may not appreciate that the result is the creation of an interest in the property which effectively makes the owner of the interest a beneficiary. Co-owners may then be holding the property both for themselves and for the new beneficiary. This may mean that, in ignorance, the special scheme could be used where it was not intended to apply. There is no avoiding this, because in such a case the significance of the facts was not understood. But because there may also be cases in which the trustees have not yet learned the facts which changed the legal position, making inquiries of the trustees will not necessarily produce a conclusive answer.

5.7 The fact that a beneficiary's interest changes hands may mean that a case which came within the special scheme when the power of attorney was granted ceases to qualify because there is then a beneficiary who is not a trustee. A beneficiary's interest in a property can be disposed of inter vivos, e.g. by sale or gift, although this is not a common form of transaction. However, the death or bankruptcy of the beneficiary will also necessarily involve his interest changing hands. In this case, the effect will depend on the nature of the deceased's interest.

5.8 On the death of a joint tenant, his beneficial interest will automatically accrue to the other surviving joint tenant or tenants. But on the death of a tenant in common his interest will form part of his estate. In many cases, his personal representatives, and subsequently the beneficiaries under his estate, will not be the same people as his former co-trustees. Accordingly, the surviving trustees will then no longer be holding the property only for themselves.

5.9 If, in order to establish that the special scheme could be used, it was necessary to be sure that the case did indeed come within its scope, extensive inquiries would be needed and they might not be conclusive. This would be undesirable on two grounds. First, the facility which allows a trustee to delegate his powers should be as quick and as administratively convenient as possible; it should not make it significantly less easy to deal with the property. Secondly, in dealing with the legal estate - which is the interest to which the trust applies - it should not be necessary to go into the equitable title; the principle on which our property legislation is based is to put that "behind the curtain".

5.10 The different situations which might arise can be usefully illustrated by examples:

(a) A and B are the only trustees and beneficiaries. A grants a power of attorney to B. (This assumes that in such a case there would under the special scheme be no restriction on the appointment of a sole co-trustee.) If A or B dies the power comes to an end: on the one hand the donor has died which ends the attorney's authority, and on the other the attorney himself has died;

(b) In the same case, A (under a special scheme which permits it) grants a power of attorney to X, an outsider. If A dies, the power again necessarily comes to an end. But if B dies, and his beneficial share of the property goes to others, those beneficiaries do not have the benefit of any safeguards which a general trustee power would normally give;

(c) If there are three trustees who are also beneficiaries - C, D and E - the situation is similar to example (b). Whether C grants a power of attorney to D, his co-trustee, or to X, an outsider, the death of E will expose E's successors to such risks as the lack of safeguards may entail.

5.11 Bearing in mind that, within the special scheme, we are considering enduring powers of attorney, any disadvantages there may be in dispensing with safeguards could persist for a long time. However, much will depend upon the view taken of the need for safeguards to be retained at all.[2] If it seems appropriate to provide safeguards in general trustee cases, the scope of any special scheme should seek to ensure that inappropriate cases cannot come within it. However, it should be borne in mind that the appointment of an attorney does not necessarily change the situation fundamentally. If, in a case where no power of attorney has been granted, one of two tenants in common dies, the survivor will generally be entitled to appoint a new trustee and the deceased co-owner's successors might be prejudiced.

5.12 Option F1: Delegation only to Sole Co-trustee. This is the most restrictive option: it would involve limiting the special scheme to cases where there were only two trustees - which would not cover all trusts where the

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2. Paras. 4.4-4.17 above.

trustees and the beneficiaries were the same people, but would include most co-owned family homes - and would only allow a trustee to appoint his co-trustee as attorney. As illustrated by example (a) in para. 5.10, it would effectively ensure that anyone who acquired an interest in the property on the death of one of the trustees was not deprived of the benefit of any general scheme safeguards.

5.13 Option F2: Delegation to any Co-trustee. Although example (c) in paragraph 5.10 shows that delegation to a co-trustee, where there are more than two trustees, can deprive beneficiaries in the same way as delegation to an outsider, some may consider that this is an option which affords at least some protection. The choice of attorney is limited to a class which has been selected by whoever is responsible for appointing trustees; it therefore reduces the possibility of the selection of an inappropriate attorney.

5.14 Option F3: No Restriction on Choice of Attorney. This option does not afford any special protection to non-trustee beneficiaries who may later become interested in the trust. However, it is the most flexible and may be the most useful in practice to the trustees. If an elderly couple are co-owners of their home, and decide to make long-term arrangements for it at the same time as granting general enduring powers of attorney, the most practical and reassuring course for them to take may be for both of them to appoint one of their children or a professional adviser as attorney.

5.15 There are no doubt glosses which could be added to option F2 (delegation to any co-trustee) and option F3 (no restriction on choice of attorney) to seek to alleviate the possible dangers to outside beneficiaries. They might, e.g., include rules that the attorney's appointment would end if he had notice of the existence of outside

beneficiaries, or might provide that, once an enduring power had been registered, notice of the death of a trustee had to be given to the Court of Protection so that the position could be reconsidered. We doubt whether any such rule would, with any degree of certainty, improve the position materially and we fear that the purpose of a special scheme could be undermined if it was made too complicated. We therefore favour choosing one of the options, without additional provisions.

Non-trustee Beneficiaries

5.16 Whichever of the options F1-F3[3] is adopted, a power of attorney could be initially properly granted under a special scheme, because the trustees were then the beneficiaries, and yet later cease to be appropriate, because there were then non-trustee beneficiaries. Or, it might be that the existence of non-trustee beneficiaries when the power of attorney was granted would only later be discovered. In either case, the need to give the beneficiaries as much protection as possible would suggest that, as soon as circumstances changed and the conditions for the special scheme no longer applied (or were known never to have applied), any power of attorney granted under the scheme should cease to have effect. This nevertheless needs to be balanced against the need to protect innocent third parties dealing with the attorney.

5.17 We suggest that this be viewed in two ways: first, the validity of powers granted under the special scheme; and secondly, protection for third parties. In considering the impact of the interests of non-trustee beneficiaries it is necessary to bear in mind the varying levels of likelihood of their becoming interested, depending on the type of

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3. Paras. 5.12-5.14 above.

delegation permitted under the special scheme.[4] Possible ways to treat special scheme powers of attorney when it becomes known that there are non-trustee beneficiaries would be:

(a) Option G1: Revocation. It could be a rule of law that as soon as the conditions for the special scheme - the trustees being beneficiaries - ceased to apply, the power of attorney would automatically no longer have effect;

(b) Option G2: Suspension. If the effect of non-trustee beneficiaries were to suspend, rather than to revoke, the special scheme power of attorney it would be possible to revive it once the conditions for the special scheme had been re-established. This would have the advantage, when the donor had already become mentally incapable, that a change in beneficiaries might not render the power finally ineffective;

(c) Option G3: No Effect. The permanent settlement of the donor's affairs would be more satisfactorily achieved if the later introduction of non-trustee beneficiaries did not affect the validity of the power. In many cases, the interests of those non-trustee beneficiaries would not be in the donor's share of the property, but in some other beneficial share.[5]

Protecting Third Parties

5.18 To the extent that it is a matter of facilitating dispositions of the property and protecting third parties,

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4. See para. 5.10 above.

5. See para. 5.10(b), (c) above.

the difficulties could be simply dealt with. The form of power of attorney could contain a declaration by the donor that the case was one to which the special scheme applied. In favour of innocent third parties, that declaration could be conclusive. There are a number of precedents for this in conveyancing law.[6] However, it is important not to overlook the other real effect of that type of provision, which is to undermine the protection of the beneficiaries. The provision making the declaration unchallengeable will, in the final analysis, only be necessary in circumstances in which the declaration is incorrect. That is the case where there were non-trustee beneficiaries, and any requirement of safeguards for them may have been circumvented by the inappropriate use of the special scheme. Necessarily, a power will often be granted to facilitate disposals of property. There is a delicate balance to be struck between protecting those dealing with the attorney - who may not wish to enter into any transaction unless their position is guaranteed - and the safeguards which are appropriate for beneficiaries who may know nothing of what is being done with the property.

5.19 To give some protection against changes in circumstances, an additional procedural step could be required. In the case of a special scheme power of attorney granted more than twelve months before a disposition for which it was used,[7] the declaration might be conclusive only

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6. E.g., a receipt in a deed is evidence of payment of the money: Law of Property Act 1925, s.68; a personal representative's statement that he has not given or made any assent or conveyance of a legal estate is sufficient evidence that he has not: Administration of Estates Act 1925, s.36(6); a survivor of joint tenants who makes a statement that he is solely and beneficially interested in the property is deemed to be so: Law of Property (Joint Tenants) Act 1964, s.1(1).

7. Twelve months is an arbitrary period, but follows the precedent of the period after which a statutory

if reinforced by a statutory declaration by the attorney[8] that he knew of no beneficial interest under the trust which meant that the special scheme no longer applied. A rule requiring a declaration would only be needed if the effect of non-trustee beneficiaries was as envisaged in option G1 (revocation) or option G2 (suspension)[9] were adopted. However, we recognise that the protection afforded would necessarily be incomplete and that the procedure for using the power of attorney would be made more cumbersome.

5.20 We provisionally conclude that a conclusive declaration would be needed to make a special scheme useful in practice, but invite the views of others on the adoption of the suggestion for a supplementary statutory declaration.

Safeguards

5.21 Where trusteeship is in effect beneficial co-ownership, there seems no reason why the power of delegation to an attorney should not be exercised freely, as it can in relation to wholly owned property. Before dismissing the safeguards, however, it is necessary to consider each of them in the light of the possible form of the special scheme, particularly because there might be circumstances in which there are non-trustee beneficiaries. We shall consider separately the safeguards which we previously discussed.

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7. Continued
declaration is required of someone dealing with an attorney (not, in that case, a declaration by the attorney) that he did not know of the revocation of the power: 1971 Act, s.5(4); para. 2.26 above.

8. Made, say, within one month before the disposition.

9. Para. 5.17 above.

5.22 Duration of Delegation.[10] The suggestion is that powers granted under the special scheme should be, or at least be capable of being, enduring powers. Any short limit on duration would be incompatible with that aim. Even if it is decided that a special scheme power need not necessarily be enduring, there seems no reason to impose an artificial limit on those which are not. Any donor who wants to impose a limit could always do so when he granted the power.

5.23 Delegation to Sole Co-trustee.[11] One option is that the grantor of the special scheme power should only be able to appoint his sole co-trustee as his attorney.[12] Whether or not that limitation applies, in this context the sole co-trustee would always be the grantor's co-owner. If he chooses to appoint his co-owner as his attorney, no-one else is prejudiced, and it therefore seems wholly unobjectionable.

5.24 Notice of Grant of Power.[13] Were special scheme powers to be confined to grants to the grantor's sole co-trustee, there would clearly be no purpose in serving notice on him. With co-owned property it will be rare that the power to appoint new trustees will be in the hands of anyone other than the trustees. If it is, there could be some limited purpose in serving them. On the other hand, if there is freedom of choice of attorneys, giving notice would be useful because there might be no other way in which the co-owner would hear about the grant of the power. We therefore provisionally favour retaining this safeguard.

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10. Paras. 4.20-4.28 above.

11. Paras. 4.29-4.36 above.

12. Option F1; para. 5.12 above.

13. Paras. 4.37-4.41 above.

5.25 Trustee's Liability for Attorney's Acts.[14] Again, there needs to be a distinction here between a special scheme which is limited to delegation to a sole co-owner and wider schemes. In the former case, there is no need to insist that the trustee is liable to the beneficiaries for the attorney's acts. If A appoints B (his co-trustee) as his attorney and B, acting in that capacity, causes culpable loss, the only beneficiary to suffer, other than B himself, is A. No provision for a right of action against A, in his capacity as the trustee who appointed B, can be appropriate.

5.26 If the special scheme is wider, so that the possibility of non-trustee beneficiaries must be taken into account, it is not so obvious what rule is appropriate.

(a) Option H1: Appointor Remains Responsible. If it is accepted that any trustee appointing an attorney under the general scheme should, opposite the beneficiaries, remain responsible for the attorney's actions,[15] there seems no reason why beneficiaries whether co-trustees or non-trustees should not enjoy the same protection from a trustee who delegates under the special scheme;

(b) Option H2: Appointor not Responsible once Mentally Incapable. However, the fact that powers granted under the special scheme may be enduring powers does to an extent change the position. While a trustee who appoints an attorney retains his mental capacity he can revoke the power, but we have already drawn attention to the difficulties which arise when the trustee is

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14. Para. 4.42 above.

15. As we provisionally recommend: para. 4.42 above.

incapable.[16] There are competing priorities - protection of the beneficiaries and protection of the estate of someone mentally incapable - and this option would favour the latter.

5.27 Sub-delegation.[17] The considerations which apply to sub-delegation under the special scheme differ to some extent from those considered above in relation to general trustee cases.

5.28 Option J1: Ban Sub-delegation. An enduring power of attorney cannot authorise the attorney to sub-delegate.[18] As special scheme powers are to be, or to be capable of being, enduring powers, we provisionally favour this option which not only follows the rule which applies to other enduring powers but also our provisional recommendation for general trustee powers.[19] It would also be necessary if the terms of the special scheme limited delegation to the grantor's sole co-trustee, because there would be no other person qualified in that capacity. Finally, the continuing liability of the trustee after he becomes mentally incapable is a matter of concern[20] and a ban on sub-delegation would obviate any further difficulties in that connection.

5.29 Option J2: No Statutory Authority to Sub-delegate. The alternative is to allow the validity of a right to sub-delegate conferred by the power, without statute giving an overriding power to delegate. If the terms of the

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16. Para. 4.48 above.

17. Paras. 4.51-4.58 above.

18. 1985 Act, s.2(9).

19. Para. 4.56 above.

20. See para. 5.26(b) above.

special scheme limited appointments of attorneys to co-trustees, sub-delegation could be similarly restricted.

Enduring Powers

5.30 One of the objectives of a special scheme would be to give people the ability to make arrangements for the management and disposal of land of which they are co-owners on the same basis as they can, by granting an enduring power of attorney, deal with property of which they are absolute owners. Within the limits of a special scheme, there seems no objection to this.[21] There are two possible approaches:

(a) Option K1: Always Enduring. For simplicity, all powers granted under the special scheme could be enduring powers;

(b) Option K2: Capable of being Enduring. The first option seems unduly rigid; we provisionally favour giving the trustee the right to opt to make the power which he grants an enduring one if he decides to do so when granting it, and provided the document makes the position clear. There will be cases in which the special scheme is used for short-term delegation; the effect and formalities of an enduring power may then be inappropriate. We shall be interested to know whether anyone considers that having this choice would be unduly confusing, but subject to any such views it seems to us desirable that a trustee who does not want the power of attorney which he grants to survive his mental incapacity should not find that he is obliged to grant an enduring power.

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21. Subject to what is said about the possibility of non-trustee beneficiaries: paras. 5.5 et seq above.

Other Matters

Property

5.31 A power of attorney granted by a trustee strictly relates to the legal estate only. If he is also a beneficiary, he is fully entitled to grant an ordinary or an enduring power relating only to the equitable interest of which he is beneficial owner. A power which is confined to the legal estate will be useful in enabling the property to be sold, mortgaged or let. However, we see a number of reasons why, once the grantor has become mentally incapable, an enduring power granted under any special scheme should relate to all the trustee's interests in the property, rather than being confined to the legal estate. The disadvantages of powers which could only relate to the legal estate would include:

(a) Those contemplating granting a power of attorney might well not appreciate the subtleties of the legal position, and may understandably believe that by granting a power, which in law would be limited to the legal estate, they had made satisfactory provision not only for disposing of the property but also for dealing with their share of the proceeds;

(b) If it was necessary to grant two enduring powers, one to dispose of the legal estate and another to deal with the trustee's share of the resulting proceeds of sale, the procedure would be unnecessarily cumbersome;

(c) As we have already pointed out,[22] some of the provisions of the 1985 Act do not seem to be appropriate

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22. Para. 4.49 above.

to powers dealing with property held simply as trustee.[23]

5.32 These factors suggest that it would be useful not to limit a power of attorney to dealing only with the trustee's interest in that capacity. It is our provisional view that an enduring power of attorney granted under the special scheme should give the attorney power to deal both with the grantor's legal estate in the property as trustee and with his equitable interest as beneficiary.

Adaptations of the 1985 Act

5.33 Although for simplicity we are anxious that the existing provisions of the 1985 Act should apply to enduring powers of attorney granted under any special scheme, obviously the statute will have to be adapted where its existing provisions are not wholly appropriate. We set out below the points which we have identified as requiring attention, but we invite those responding to this Paper not only to comment on those points but to suggest any other matters they consider should be amended. We emphasize that these suggested amendments to the 1985 Act would apply only to trustee powers granted under the special scheme and that otherwise - apart from the repeal of section 3(3) - the Act would remain unaltered.

5.34 Attorney's Powers. If our provisional view is adopted, that a special scheme power should relate to both the legal and equitable estates,[24] there seems no reason why the full range of attorney's powers should not apply to the grantor's beneficial interest. Some limit may nevertheless be

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23. Although s.3(3) of the 1985 Act applies those provisions in such situations at the moment.

24. Para. 5.32 above.

required in relation to the legal estate, although on this point the Act has not yet been interpreted by the courts and it may be that the nature of the grantor's interest automatically limits the attorney's powers. To make the position clear, a provision could be added to the Act. This would be to the effect that where an enduring power relates to property, an interest in which the grantor holds in trust, the attorney's powers in relation to that interest would, notwithstanding anything in the Act, not go beyond the grantor's powers as trustee.

5.35 Notices. The notices to be given by an attorney before registering an enduring power with the Court of Protection are not directed in a way which is necessarily appropriate in the case of a trustee power. However, if a special scheme power deals with the beneficial interest as well, the existing provisions would properly be applicable, although they might need to be supplemented. We provisionally suggest that, in addition to the notices at present required, notice should also be served on the grantor's co-trustees and anyone else entitled to appoint new trustees. Obviously, if the present notice provisions happen to result in those people being notified, no additional notice would be needed.

Prescribed Form

5.36 An enduring power of attorney can only be granted in the form which has been prescribed.[25] We see no reason why this rule should not apply to an enduring power granted under the special scheme, although a different form would be appropriate and statutory power to enable the Lord

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25. 1985 Act, s.2(1)(a); Enduring Powers of Attorney (Prescribed Form) Regulations 1990.

Chancellor to prescribe different forms for different circumstances would be needed.

5.37 We provisionally suggest that any special scheme power, whether or not intended to be enduring, should be granted in a prescribed form. This would usefully identify the powers falling within the special scheme. It would probably be possible to employ a single form, with the provision that it was intended to survive the grantor's mental incapacity being deleted if not required. Our proposal here differs from our suggestion of a statutory form for general trustee powers.[26] That form was to be made available, but its use would be voluntary. Use of the form for special scheme powers would be mandatory.

5.38 The following points would be covered by the form:

(a) It would identify the property affected and the grantor's co-trustees. A separate power would be required for each trust;

(b) It would state that, between them, the trustees owned all the beneficial interests in the property;

(c) It would delegate all the trustee's powers, in that capacity, over the property and would give the attorney authority to do anything which the donor could lawfully do by an attorney, subject to any conditions or restrictions in the power,[27] in relation to his beneficial interest in the property;

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26. Paras. 4.63-4.65 above.

27. See 1985 Act, s.3(2).

(d) It would include a statement that the trustee had read, or had had read to him, the information explaining the effect of creating the power which would be part of the prescribed form;[28]

(e) It would include a statement that the trustee intended the power to continue in spite of his supervening mental incapacity,[29] but this statement could be omitted. The power would only endure if the statement were included;

(f) If the statement making the power enduring were included, the attorney would state that he had understood his statutory duty to register.[30]

Third Party Protection

5.39 Inevitably, there will be cases in which a special scheme power will be used, but where the scheme's requirements have not been satisfied. This may occur innocently, where the co-owners do not realise that a third party has acquired an equitable interest in the property, so that it is no longer true that the trustees between them own the entire beneficial interest. There could also be cases of fraud. It seems to us that some protection will be necessary for innocent third parties dealing with the attorney. For consideration, we suggest:

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28. See ibid., s.2(2)(b)(ii).

29. See ibid., s.2(2)(b)(i).

30. See ibid., s.2(2)(b)(iii).

(a) Where a power is used which appears to be valid on the face of it, a purchaser[31] should be able to assume that the conditions justifying the grant of a special scheme power existed;

(b) Any conveyance[32] of a legal estate in the property by the attorney if he was acting both on behalf of the grantor and as the sole co-trustee, should have the overreaching effect of a conveyance by two trustees where the capital money is paid to both of them.[33]

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31. In a wide sense: see Law of Property Act 1925, s.205(1)(xxi); 1971 Act, s.5(6); 1985 Act, s.9(7).

32. In a wide sense: see Law of Property Act 1925, s.205(1)(ii).

33. See Law of Property Act 1925, s.2. We have recommended reforms to this provision: see Overreaching: Beneficiaries in Occupation (1989), Law Com. No. 188.

PART VI

SUMMARY OF PROVISIONAL PROPOSALS

6.1 This Consultation Paper is published to solicit comments on the whole of the topic under discussion. We welcome responses dealing both with matters of broad principle and with detailed points; evidence of experience of the present provisions will be helpful, as well as views on whether and in what ways changes should be made.

6.2 Throughout Parts IV and V of this Paper we have identified options for reform. In some cases we have indicated our provisional views and on some points we have suggested that there should be no change. To give readers an overall picture of how the law might develop, we summarise below what the effect would be of adopting our provisional conclusions.

6.3 We suggest that the present overlapping provisions which allow trustees to delegate their powers[1] should be superseded by two provisions; but one important point for comment is whether two separate schemes, as we provisionally proposed, are necessary. Our provisional recommendations are: first, general rules applying to all trusts; and secondly, a special scheme would be available, in addition to the general provisions, for cases where the trustees held on trust for themselves alone.

General Scheme

6.4 In the case of all powers of attorney granted in general trustee cases, there would be safeguards for beneficiaries [para. 4.17]. These would be:

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1. 1925 Act, s.25; 1985 Act, s.3(3).

(a) No power should be effective for longer than one year, but there should be no additional provision to deter the grant of successive powers [para. 4.28];

(b) It would not be possible to delegate to a sole co-trustee, and a power would become invalid if it resulted in one person (other than a trust corporation) being able to exercise the power of all the trustees [para. 4.36];

(c) Notice of the grant of a power would be required to be given to co-trustees and those responsible for appointing new trustees [para. 4.39];

(d) The trustee would be responsible for the acts or defaults of his attorney [para. 4.42].

6.5 Other provisions would apply to a general trustee power of attorney:

(a) It would not be capable of surviving the mental incapacity of the trustee [para. 4.50];

(b) A trustee could validly give his attorney authority to sub-delegate, but there would be no automatic statutory authority to do so [para. 4.57];

(c) Personal representatives would have the same power to delegate as trustees [para. 4.62];

(d) There would be a succinct statutory form of power of attorney which could be used for this purpose, but its use would not be mandatory [paras. 4.63-4.65].

Special Scheme

6.6 The special scheme for delegation by trustees would apply to those cases where the trustees were also the beneficiaries [para. 5.1]. The power to delegate might be limited to a sole co-trustee, in which case the scheme could only apply where there were two trustees [para. 5.12], or to any other co-trustee [para. 5.13], or it might be unlimited [para. 5.14]. We have not expressed a provisional preference between these options, and we seek the views of others.

6.7 The impact on special scheme powers of attorney of non-trustees becoming beneficiaries, or it being discovered that there were already non-trustee beneficiaries, has to be considered. That could revoke or suspend the power, or alternatively have no effect [para. 5.17]. For the protection of third parties who take under dispositions made by an attorney, there would be a conclusive declaration that the special scheme applied, possibly supported in some cases by a statutory declaration by the attorney [paras. 5.18-5.20].

6.8 The period for which a special scheme power could be granted would not be limited [para. 5.22], but notice of the creation of the power would have to be given to any co-trustee (unless he was the attorney) and to those with the power to appoint new trustees [para. 5.24]. We have not reached a provisional conclusion about the extent of the grantor's responsibility for his attorney's acts and defaults. The rule could either be that he remains responsible for as long as the power subsists [para. 5.26(a)] or that his responsibility ceases on his becoming mentally incapable [para. 5.26(b)]. The attorney would not be empowered to sub-delegate [para. 5.28].

6.9 A special scheme power of attorney could be an enduring power, but it is for consideration whether it should automatically be enduring [para. 5.30(a)] or whether it should only be so if the trustee granting it so decided [para. 5.30(b)]. The following points would also apply:

(a) The authority granted by the power would extend both to the trustee's legal estate and to his beneficial interest in the property in question [para. 5.31];

(b) The 1985 Act would be amended to make it clear that, in relation to the legal estate, the attorney's authority extends only to doing what the trustee could have done [para. 5.34];

(c) Before registering a power with the Court of Protection, the attorney would have to give notice to any co-trustee of the grantor and anyone entitled to appoint new trustees [para. 5.35];

(d) A power would have to be granted in a prescribed form, whether or not it was to be an enduring power [para. 5.37];

(e) If a trustee purported to grant a power under the special scheme in circumstances where it did not apply, innocent third parties dealing with the attorney would be protected [para. 5.39].

APPENDIX

TRUSTEE ACT 1925, Section 25

Power to delegate trusts during absence abroad

25.- (1) Notwithstanding any rule of law or equity to the contrary, a trustee may, by power of attorney, delegate for a period not exceeding twelve months the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly with any other person or persons.

(2) The persons who may be donees of a power of attorney under this section include a trust corporation but not (unless a trust corporation) the only other co-trustee of the donor of the power.

(3) An instrument creating a power of attorney under this section shall be attested by at least one witness.

(4) Before or within seven days after giving a power of attorney under this section the donor shall give written notice thereof (specifying the date on which the power comes into operation and its duration, the donee of the power, the reason why the power is given and, where some only are delegated, the trusts, powers and discretions delegated) to-

(a) each person (other than himself), if any, who under any instrument creating the trust has power (whether alone or jointly) to appoint a new trustee; and

(b) each of the other trustees, if any;

but failure to comply with this subsection shall not, in favour of a person dealing with the donee of the powers, invalidate any act done or instrument executed by the donee.

(5) The donor of a power of attorney given under this section shall be liable for the acts or defaults of the donee in the same manner as if they were the acts or defaults of the donor.

(6) For the purpose of executing or exercising the trusts or powers delegated to him, the donee may exercise any of the powers conferred on the donor as trustee by statute or by the instrument creating the trust, including power, for the purpose of the transfer of any inscribed stock, himself to delegate to an attorney power to transfer but not including the power of delegation conferred by this section.

(7) The fact that it appears from any power of attorney given under this section, or from any evidence required for the purposes of any such power of attorney or otherwise, that in dealing with any stock the donee of the power is acting in the execution of a trust shall not be deemed for any purpose to affect any person in whose books the stock is inscribed or registered with any notice of the trust.

(8) This section applies to a personal representative, tenant for life and statutory owner as it applies to a trustee except that subsection (4) shall apply as if it required the notice there mentioned to be given-

(a) in the case of a personal representative, to each of the other personal representatives, if any, except any executor who has renounced probate;

(b) in the case of a tenant for life, to the trustees of the settlement and to each person, if any, who

together with the person giving the notice constitutes the tenant for life;

(c) in the case of a statutory owner, to each of the persons, if any, who together with the person giving the notice constitute the statutory owner and, in the case of a statutory owner by virtue of section 23(1)(a) of the Settled Land Act 1925, to the trustees of the settlement.

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