THE CHANCERY BAR ASSOCIATION

RESPONSE TO THE LAW COMMISSION'S CONSULTATION ON

THE TRUSTEE ACT 1925 SECTIONS 31 AND 32

Introduction

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

4. This response is the official response of the Association. It has been produced by Simon Taube and Gregory Hill and approved at the meeting of the Association's Committee on ??? 2011.

Summary of response: for the reasons developed below,

(a) we support the proposal in paragraph 3.26 of the consultation paper to amend section 32(1) proviso (a) so as to extend the statutory power of advancement to the whole of the beneficiary's share in all cases;

(b) we also support the proposal in paragraph 3.34 to remove, in all cases, the "proportionate part" restriction in the power of maintenance in section 31(1) proviso;

(c) we believe that -

(i) it would not be appropriate to delete, as suggested in paragraph 3.40(1), the references in the first part of the proviso to section 31(1) to the matters to which the trustees should have regard; but

(ii) as suggested in paragraph 3.40(2), section 31(1)(i) should be amended to make the power of maintenance exercisable *"in the Trustees' absolute discretion"*;

(d) we agree with the proposal in paragraph 3.68 that the amendments should apply to all interests under instruments taking effect after the amending legislation comes into force, including wills executed before commencement and exercises of general and special powers of appointment and powers of advancement conferred by instruments which took effect before commencement.

A. Extension of power of advancement to whole interest

A1. The proposal to extend the section 32 power to the beneficiary's entire interest in relation to the statutory trusts arising on intestacy would correspond with the express modification of that power which is routinely included in well-drafted wills and trust documents. If the amendment were made *only* for the purposes of intestacy, we think that in practice the restriction of the power to one-half of the beneficiary's entitlement would apply exclusively or almost exclusively to home-made wills, or those home-made wills which did not use commercial forms that included the usual extension of the power, and such a discrepancy between intestacies and home-made wills would be anomalous and undesirable. (In the worst possible case, a home-made will might create express trusts of part only of the estate and leave a partial intestacy as to the remainder, and if, for instance, minors were interested in both sections of the estate, it would be difficult to provide their respective parents with a convincing explanation of why it was desirable for section 32 to apply differently as between the express and intestacy trusts.)

A2. The risk of abuse of the section 32 power, mentioned in paragraphs 3.14-15 and 3.25 of the consultation paper, is we think much the same in relation to intestacies and home-made wills: in both cases the personal representatives are likely to be non-lawyers, and very often will include a parent of the minor beneficiary or beneficiaries in whose favour the power can be exercised. However, again in both cases, we think the personal representatives are likely only to know that the power is available to them because they have taken legal advice on how to administer the estate, and their legal adviser will tell them what their duties are.

A3. Where the power of advancement is exercised in relation to part only of the advanced beneficiary's interest, and a significant period elapses between the making of the advance and the distribution of the remainder of the fund, section 32(1) proviso (b) requires the advanced beneficiary to bring the advance into account as part of his or her entitlement. The advance is (normally) brought in at its cash value at the time the advance was made, and if before the date of distribution the rest of the fund appreciates significantly in value, the advanced beneficiary will participate in that appreciation to what some might think a disproportionate extent, as well as having had the

benefit of the advance (and of any appreciation in the advanced property if it has been retained rather than expended). This anomaly, if anomaly it be, will not be eliminated, but will at least occur less frequently, if the limitation of the power to one half of the beneficiary's interest is removed and the whole of his or her presumptive entitlement can be and is advanced.

A4. Proviso (b) in terms only applies where the advanced beneficiary becomes "absolutely and indefeasibly entitled", and if he or she dies before becoming so entitled, that proviso does not expressly require his or her issue to bring the advance into account if they are substituted as beneficiaries for their parent. So far as we are aware, this feature of section 32 does not cause difficulty in practice and has not been the subject of any reported judicial decision, probably, we think, because substitutional gifts normally refer to "the share which" the parent or other ancestor of the substituted beneficiary "would have taken if he or she had lived to attain a vested interest", which will be construed as incorporating as against the substituted beneficiary any accounting for advances which proviso (b) would have required as against the primary beneficiary. But if there is a possible difficulty here, the suggested amendment of proviso (a), permitting the beneficiary's entire entitlement to be advanced, will again tend to reduce the number of cases in which the point could arise.

A5. We consider that the balance of advantage is firmly in favour of the suggested amendment to proviso (a). We also agree that wider amendments of section 32, such as those mentioned in paragraphs 3.22-23 of the consultation paper, would not be generally appropriate, and should be left to be made by express provision in cases in which they are actually needed.

B. Removal of "proportionate part" restriction on power of maintenance

B1. We agree with the proposal to repeal the second part of the proviso to section 31(1): this will reflect what is now ordinary drafting practice. The statutory predecessor of section 31, Conveyancing Act 1881 section 43, had no provision equivalent to

either part of that proviso, and the learned editors of Wolstenholme and Cherry's Conveyancing Statutes, 12th edition (1932), said of it that "This paragraph is new and is designed to assist the trustees"; but we do not think it is possible now to draw any reliable inferences as to the considerations which may have led to that change being made. We believe that the situation in which the "proportionate part" restriction would operate, where there are two (or more) trusts for the same primary beneficiary, with fixed trusts for different classes of substitutional or reversionary beneficiaries capable of being prejudiced, by the accumulation provisions in section 31(2), if the income of one fund rather than the other is used for maintenance, is now very rare indeed;[1] and we consider that if such a situation does arise, it is appropriate to rely on the trustees of each fund taking that circumstance into account when exercising their respective discretions.

C. Other possible amendments of section 31(1)

C1. We consider that it would not be appropriate to delete the first part of the proviso to section 31(1), suggested as a possibility in paragraph 3.40(1) of the consultation paper. That part of the proviso is sometimes expressly disapplied, but we do not think there is any uniform drafting practice to that effect. We think that, as mentioned in paragraph 3.35, it is likely to be helpful for the statute to mention the most important considerations for the trustees to have in mind when considering the exercise of their discretion. In particular, where the section is applicable to small estates (either testate or intestate) with non-lawyer trustees, (and especially if section 31(1)(i) is amended to give them, in terms, an "absolute" or "unfettered" discretion, C2 below,) we think such a provision will facilitate the giving of advice to such trustees as to the nature of the power of maintenance and the basis on which it can appropriately be exercised: for example, the considerations specifically mentioned make it clear that although the

[1] That situation could have arisen under a traditional marriage settlement with a "husband's fund" and a "wife's fund", if both spouses died leaving an infant child or children who also died without becoming absolutely entitled to capital, in which event the two funds would go in different directions, to the spouses' respective siblings or other relatives.

matters in section 31(1)(i)(a) and (b), the availability of other income and the existence of someone bound to maintain the beneficiary, are not outright bars to the exercise of the power, they remain relevant to the exercise of the trustees' discretion.

C2. We do support the proposed amendment suggested in paragraph 3.40(2) of the consultation paper, to give the trustees an absolute discretion as to the amount of income applied for maintenance, and remove any argument that they are always bound to justify their decision by reference to an objective criterion of "reasonableness". We believe that in practice an express modification of section 31 to this effect is usual (though, as paragraph 3.38 points out, not invariable). We consider, however, that because any general amendment will extend to small estates and non-lawyer trustees, it is appropriate (for the reasons in C1 above) to retain an express indication of the considerations to which the trustees must have regard, as a counterbalance to any such widening of the trustees' discretion.

C3. We agree that the statutory provisions (and related case-law) as to the destination of accumulations under section 31 are complicated and counter-intuitive, but in modern conditions, with infectious disease a less severe hazard than, say, 150 years ago, it is comparatively unusual for a beneficiary not eventually to attain a vested interest, and the possible anomalous results of subsection (2) do not often arise. For that reason, and because any change would necessitate complex transitional provisions, we do not think it is appropriate to amend this aspect of section 31.

D. Transitional issues

D1. We recognise that technical issues can be raised in relation to wills executed before the commencement of amending legislation, and in relation to interests created after commencement by exercising powers of appointment or of advancement under wills or trusts which took effect before commencement. However we consider that simplicity and uniformity are desirable if attainable, and that although it would not be appropriate to apply the proposed reforms to interests under instruments

which have already taken effect, there are no technical considerations of sufficient weight to justify a departure from the straightforward transitional provision proposed in paragraph 3.68 of the consultation paper, that the reforms should apply to all interests arising under instruments taking effect after commencement, including wills executed before commencement and exercises of powers of appointment and advancement conferred before commencement.

D2. We agree (i) that since the reforms will not directly affect substantive interests, but will only modify discretionary powers conferred on the trustees, it is appropriate - in the interest, as we have said, of simplicity and uniformity - to apply those reforms to interests under wills executed pre-commencement which do not expressly modify sections 31 and 32 (consultation paper paragraph 3.50), and (ii) that it is right for express modifications of those sections made in wills executed pre-commencement to take priority over the statutory amendments (paragraph 3.53).

D3. As to existing powers of appointment and advancement, the simple transitional rule proposed in paragraph 3.68(2) will be clearly appropriate in cases (which we think will be the large majority) in which the will or settlement creating the power in question itself also modifies sections 31 and 32 in accordance with modern drafting practice: in that situation, the proposed rule will in effect be a "word-saving" provision, enabling the appointment or advance to confer powers equivalent to those in the original instrument without having to spell out the modifications again. In cases in which sections 31 and 32 are not modified in the original instrument, we think that it is nevertheless justifiable to allow an appointment or a settled advance, the purpose of which is to create trusts for the benefit of the beneficiary or beneficiaries in whose favour it is made, to incorporate powers of maintenance and advancement framed in accordance with current drafting practice.

[date, etc]