DRAFTING WILLS AND SETTLEMENTS IN 1963.*

On 6th December 1962 the Law Reform (Property, Perpetuities and Succession) Act 1962 and the Trustees Act 1962 received the royal assent. The Trustees Act provided that it should come into force on 1st January 1963. The other Act, which for the sake of shortness I shall refer to as the Perpetuities Act, came into force on the date of assent.

The purpose of this paper is to examine briefly what considerations the draftsman should have in mind when preparing wills and settlements in the light of the provisions of these new Acts. These can be conveniently considered under the following main heads:

Firstly: Wills in contemplation of marriage,

Secondly: The dispositive parts of wills and settlements,

Thirdly: The duties, powers, and discretions of trustees, and

Fourthly: Miscellaneous provisions of importance to the draftsman.

Wills in contemplation of marriage.

Section 20 of the Perpetuities Act provides as follows:

20. (1) Notwithstanding anything in section eighteen of the Wills Act, 1837 (adopted in the State by 2 Vict. No. 1) or any other statutory provision or rule of law to the contrary, a will expressed to be made in contemplation of a marriage is not revoked by the solemnisation of the marriage contemplated.

(2) Without limiting the provisions of subsection (1) of this section a will expressed to be made in contemplation of marriage is, unless the testator expressly provides to the contrary, not valid in the event of the contemplated marriage not being solemnised.

(3) This section applies only to wills made after the commencement of this Act.

The points to be noted are:—(a) The section applies only to wills made after the commencement of the Act—6th December 1962. (b) In order for the section to apply, the will must contain an express reference to the particular marriage contemplated, and must not be simply expressed to be made in contemplation of marriage generally.[1]

* *A paper read at the 1963 Law Summer School of the University of Western Australia.*

1 Sallis v. Jones, [1936] P. 43.

(c) If the testator intends the will to be valid notwithstanding that the intended marriage is not solemnised, he must so provide in the will. Hence to avoid possible trouble and misunderstanding, it would be desirable for the will to state expressly that it is not to be valid unless the contemplated marriage is solemnised, if the testator desires this to be the case, rather than rely on the provisions implied by the subsection. (d) As the validity of a will of immovables is determined by the *lex loci rei sitae,* and that of movables by the law of the deceased's domicile at the date of his death, sufficient enquiry should be made of the testator for the draftsman to be satisfied it is safe in the particular circumstances to use this form of will.

The dispositive parts of wills and settlements.

As the Perpetuities Act is being dealt with in another paper, it is sufficient to draw attention here to the following matters:

(a) The draftsman has now no need to resort to the royal lives clause to ensure that the limitations of his document are valid for a sufficiently lengthy period, because section 5 of the Perpetuities Act enables him to make the limitation for any period of years not exceeding eighty as is specified in the instrument. If no period of years is specified in the instrument, either expressly or by implication, then the other provisions of law relating to perpetuities are applicable to determine the validity of the limitations contained in the instrument.[2]

(b) The Accumulations Act 1800 no longer applies in the State, and instead it is provided that the power or direction to accumulate income is valid if the disposition of the accumulated income is valid, and not otherwise.[3]

(c) Another important change made by the Perpetuities Act under this heading is that, in general terms and subject to the exceptions stated in section 21, where a devise or bequest is made to a child or other issue of the testator who dies in the lifetime of the testator, then (unless a contrary intention appears in the will) instead of the gift taking effect as if the devisee or legatee had died immediately after the testator, it goes over to the children of the devisee or legatee who are living at the time of the testator's death.

It has, of course, long been usual to include in wills a provision along these lines, with the important difference that the draftsman's usual provision has been in such terms as to vest the substituted gift

2 See sec. 5 of the Act.
3 See sec. 17 of the Act.

only in such of the children of the deceased devisee or legatee as survive the parent and attain the age of 21 years. The principal inconvenience which will be caused by relying on the provisions of the Act is that if any child who benefits under the substituted gift dies under 21 then, as he has a vested interest, it will be necessary for letters of administration of his estate to be obtained and an administration bond, with sureties, given in most cases. Moreover, if the deceased infant child is not survived by a wife or any children of his own, then we would get the result that his mother, if she survived the infant, would take a substantial part of his estate by virtue of the Administration Act. As the usual idea of these substituted gifts is to confine the benefits to the lineal descendants of the testator, it would appear desirable to make sure that the testator understands the possibilities of the situation before relying on this statutory provision in preference to the common form provision previously used.

(d) An important provision relating to the dispositive part of wills and settlements is the provision of section 61 of the Trustees Act relating to protective trusts. Under that section, when the instrument directs that any income, including an annuity or other periodic income payment, is to be held on protective trusts for the benefit of any person for life or for any less period, then during that period the income is to be held on the trusts provided by the section. These provide in general terms that the income is payable to the beneficiary named until something occurs (by his own act or otherwise) which would deprive him of the right to receive the income, or any part of it, if it were payable to him absolutely. In that case the income is to be held on trust to be applied at the discretion of the trustee for the maintenance, education, advancement or benefit of the principal beneficiary and his wife or her husband and his or her children or more remote issue, or failing any such then the objects of the discretionary trust are the principal beneficiary and the persons who would be entitled to the trust property or the income thereof if he were dead.

Note particularly that by subsection (4) of section 61 it is provided that the section has effect subject to any variation contained in the trust instrument, so that the benefit of the use of a short form of words, combined with a variation in any respects desired for the individual case, can be obtained by using this section.

In using this section, consideration should be given to permitting the trustee to accumulate the income in any year and to use the accumulations in any subsequent year. The section appears to con-

template the income being wholly applied in each year and does not provide for accumulations. Obviously when the trustee may have to deal with an infant beneficiary, this power would be desirable.

(e) Section 25 of the Perpetuities Act abolishes restraint on anticipation imposed on the enjoyment of property by a woman except in the case of restraints in force prior to the commencement of the Act. In England it has been pointed out that the result in practice has been to impose a greater restriction because the restraint had no operation while a woman was discovert, and a widow could accordingly during her widowhood by deed destroy the possibility of the restraint re-arising on her remarriage. Now wherever the testator wishes a restraint to be imposed, the draftsman will create a protective trust for the woman, which almost invariably is drawn to endure for the whole of her life.

The duties, powers, and discretions of trustees.

The first general consideration to bear in mind is that the powers given by the Trustees Act are in addition to the powers given by any other Act and by the instrument (if any) creating the trust; but the powers conferred on the trustee by the Act, unless otherwise stated, apply if and so far only as the contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.[4]

For the draftsman's consideration, the powers, duties, and discretions of trustees may be divided into two categories:—

Firstly. There are what we may call ancillary powers conferred on trustees by the Trustees Act 1962. These are enabling powers which are of an uncontroversial nature, and which the draftsman will usually be glad to have apply to the trust instrument. It will not normally be necessary to negative or modify these powers. In the past considerable inconvenience was caused through the trustees lacking powers of a machinery nature because of the need for them not having been in contemplation when the instrument was drawn. Section 30 of the Act contains a lot of these provisions which are mostly of a facilitating and machinery nature.

A very useful adjunct to the trustee's power of sale is contained in section 34 enabling a trustee to sell on terms of deferred payment so that the purchase money is payable over a period of up to ten years, provided that the clauses set out in the section are included in

[4] See sec. 5 (2) of the Act.

the agreement. Section 43 also contains most useful powers, which apply notwithstanding anything to the contrary in the trust instrument. This section provides that a trustee who has authority to pay or apply capital money for any purpose or in any manner, may raise the money required by sale or mortgage of any of the trust property for the time being in possession, and also that where a trustee in exercise of his powers purchases any property for the trust, he may make the purchase on terms of deferred payment or on mortgage of that property.

Draftsmen should notice particularly the comprehensive powers in connection with company securities contained in section 25 (3) and (4). These will undoubtedly save much drafting verbiage.

Section 44 contains a facilitating clause which has long been in other legislation, and the lack of which has been a nuisance in this State, necessitating the draftsman's including some such provision in the trust instrument. It provides that a purchaser or mortgagee paying or advancing money on a sale or mortgage purporting to be made under a trust or power vested in the trustee shall not be concerned to see that the money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

Comprehensive powers of insurance, including power to insure property up to its replacement value, are given by section 46. The application of insurance moneys received by a trustee is governed by section 47. Powers for a trustee to employ and pay agents of any kind to transact any business, or do any act, in the administration of the trust are contained in section 53.

Secondly: In considering the trustee's powers, duties, and discretions, the draftsman should carefully examine those of major importance to see whether any of them require to be negatived or modified in the particular case. Of these the power of sale is the most important power to consider.

Section 27 (1) (a) and (b) gives the trustee power to sell or exchange any of the trust property with power to postpone the sale to the extent provided by subsections (1) (c) and (5) of the section. Subsection (4) provides that where the trust property includes land, the trustee shall sell the land if so required in writing by the person or all the persons at that time beneficially entitled to an interest in possession under the trust of the land. The latter provision preserves for the tenant for life the power which he had to sell the settled land under the Settled Land Act (which has now been repealed by the Trustees Act). If these powers are to be limited or varied in any way, then the trust instrument must so provide.

Under the Settled Land Act the tenant for life had power to lease the settled land, and the definition of tenant for life in that Act included a very wide range of beneficiaries. Therefore, if you wish the tenant for life, or persons having any other type of limited interest in the property, to be able to lease it, or to have the trustee lease it, at their discretion, you should incorporate the necessary powers and directions in the trust instrument. It is true that the trustee has a power to lease for up to ten years, and in the case of a building lease up to thirty years, under section 27 (e), and section 94 of the Act empowers the Court, on the application of any party interested in the trust property, to review the acts and decisions of the trustee. It is reasonable to suppose, however, that the Court will be reluctant to interfere with a *bona fide* exercise of discretion by a trustee. It is suggested, therefore, that if you want a tenant for life or other beneficiary with a limited interest in the property to have definite rights to let it, you should not only so provide in the instrument, but you should take care to ensure that the letting authorized will bind the reversion so that anybody taking the property under such a lease will get an effective term which will not be ended by the termination of the limited interest of the beneficiary.

The second of the statutory powers to be considered for modification is the power relating to investments. These powers are contained in sections 16 to 26 of the Trustees Act. Power is here given to invest in certain unit trust schemes, and also in a limited class of company shares, debentures, and deposits. A very useful power to purchase a dwelling house for the use of any beneficiary is given by section 17; previously, in the absence of power in the trust instrument, this could only be done with the approval of the Court under section 5 (j) of the old Trustees Act as amended in 1955.

It will be appropriate in many cases for the range of authorized investments to be made much wider by the trust instrument than those permitted by the statute. Further, if the trustee is to have power to retain indefinitely property of a wasting or speculative nature, it will still be necessary for the instrument to contain express authority for this.[5] It should also be noted that there is only a limited power for the trustee to expend trust moneys in improving or developing the trust property in section 30 (c). It will often be appropriate to give the trustee much wider and more general powers to expend trust moneys in improving or developing trust property.

[5] See secs. 27 (1) (c) and 27 (5).

The next power in order of importance which the draftsman should consider to see whether variation is warranted in the particular case is the power of maintenance and advancement of infants contained in section 58 of the Act. In considering whether this section is wholly applicable to your case you should pay particular attention to subclause 1 (b) which provides that if a person on attaining the age of twenty-one years has not a vested interest in the income, the trustee *shall* thenceforth pay the income to him until he attains a vested interest or dies. In many cases where the vesting of capital is postponed beyond 21 years of age, it is desired that the income shall be applied at the discretion of the trustees until the capital vests. It will be necessary, therefore, for the trust instrument to vary the statutory power to that extent if it is desired to postpone the absolute entitlement of income to beyond the age of 21.[6]

It should also be particularly noted that the power to apply capital for the maintenance, education or benefit of the person contingently entitled is limited by section 59 (a) to £1,000, or half of the presumptive or vested share or interest, whichever is the greater. Also, under section 59 (c) the consent of any person entitled to any prior interest in the property who may be prejudiced by the application of the capital must first be obtained. The draftsman should consider whether this provision should be enlarged to permit any fraction greater than one-half, or even the whole, of the capital to be used for maintenance, education, etc., and to what extent the consent of the prior interested persons should be necessary in the particular case. Here also may be noted the useful power for the trustee to hand over chattels to an infant or his guardian under section 73 without the value of these having to be taken into account under section 59 (a).

A comprehensive power for the trustee to impose conditions when exercising a power of payment or advancement for maintenance, etc., is contained in section 60. This could be very useful to enable a trustee, when parting with substantial capital for the advancement of a beneficiary, to help to protect the beneficiary's interests in it by taking security over it for repayment, which the trustee could waive if everything went satisfactorily.

The power to carry on a business should also be examined. Section 55 of the Act limits the "carrying on period" to one of the following:—

[6] See *Re* Turner's Will Trusts, [1937] Ch. 15, for authority that such a variation is permissible notwithstanding the mandatory wording of the subsection.

(a) Two years from death,

(b) The period necessary or desirable for winding it up, or

(c) Such further period or periods as the Court may approve.

In many cases the testator will want his trustees to have unrestricted powers to carry on a business in which he is interested, and in such cases it will still be necessary so to provide in the will.

Note that under section 56 the trustee may convert the business into a company and retain the shares or debentures received by him on such conversion as an authorized investment. Therefore, if the trustee has only the limited powers of section 55, he can continue the business indefinitely by converting it into a company, provided he is prepared to run the gamut of section 94.

Turning lastly to the miscellaneous provisions of importance to the draftsman, we should first note that it will no longer be necessary to provide for a trustee engaged in any profession or business to be able to charge his usual fees, because section 98 (5) provides that in the absence of a direction to the contrary in the trust instrument, a trustee engaged in any profession or business for whom no benefit or remuneration is provided in the trust instrument is entitled to be paid his usual professional or business charges for business transacted, time expended, and acts done by him or his firm in connection with the trust.

There are cases in which it may be also desired to provide for a trustee, who is a director of a company in which shares are held by the trust, to retain director's fees for his services in the company. In such a case, the instrument must contain express provision that the director is not accountable to the estate for his director's fees if the case is one where it might be contended that his voting power as a trustee obtained his appointment.

Two rules of law which have been a nuisance in the administration of estates are negatived by sections 104 and 105 of the Trustees Act unless there is provision to the contrary in the trust instrument. Section 104 abolishes the rule in *Allhusen v. Whittell*[7] which requires that debts and legacies are to be treated as paid, not out of capital only, but out of capital together with a proportionate part of the income for one year. This section is limited to apply only to the wills of testators dying after the commencement of the Act, and will not affect the legality or validity of anything done before the commencement of the Act.[8]

7 (1867) L.R. 4 Eq. 295.

8 See sec. 5 (4) of the Act.

Section 105, which abolishes the rule in *Howe v. Dartmouth,*[9] is limited in its operation to the wills of persons who die after the commencement of the Act. The rule in *Howe v. Dartmouth* provided that, where an unauthorized investment forms part of a testator's residuary personalty which is held on trust for persons in succession, the property is to be valued at the expiration of one year from the testator's death, and the tenant for life is only entitled to interest at 4% on that value.

Because of the comprehensive provisions of section 105, it will no longer be necessary for the draftsman to use wording directing that the income from property yielding income shall be applied as income from the date of the testator's death.

To ensure that the provisions of this fresh legislation do apply to the particular will or trust instrument it will be desirable to include in it a provision that it is to be construed in accordance with the laws of this State, and that the trustees shall have the powers, authorities, and discretions conferred on them by such law except to the extent to which they are negatived or modified by the instrument.

If the settlor or testator intends that any act, omission or decision of a trustee in the exercise of a power shall not be capable of being reviewed by the Court at the instance of an aggrieved party under section 94 of the Trustees Act, then it would appear to be necessary for the power to be expressly conferred by the trust instrument. Section 94 only empowers the Court to review

> "any act omission or decision of a trustee in the exercise of any power *conferred by this Act,*"

or to intervene at the instance of a person who has reasonable grounds to apprehend any such act, omission or decision of a trustee by which he will be aggrieved.

If the power is conferred by the trust instrument, then any party aggrieved in relation to its exercise or non-exercise would appear to be limited to the narrow range of instances which the decided cases have established as being those in which the Court will interfere with the exercise of a trustee's power or discretion.

As a final general suggestion to the draftsman, it is submitted that the correct approach to the new statutory provisions is to regard them as being of great value in the wide range of ancillary powers which they confer on trustees, and which will enable a lot of trivial and often seemingly unnecessary powers and discretions to be omitted

[9] (1802) 7 Ves. 137, 32 E.R. 56.

from trust instruments, but at the same time to continue to use in your drafting of wills and trust instruments the wide general powers and discretions which, in appropriate cases, you have been in the habit of conferring on trustees in regard to sale and conversion and postponement thereof, for the improvement and development of property and the carrying on of businesses, the maintenance and advancement in life of minors and those contingently entitled, and also in regard to the range of permitted investments.

The legislation has naturally had to be on the conservative side on these matters, applying as it does to home-made wills, and also in many respects to trusts created before the coming into force of the legislation.

Do not, therefore, be tempted by the comprehensive and greatly enlarged provisions of the Trustees Act to approach the situation in 1963 as being one in which the draftsman merely has to name a trustee, describe the trust property, delineate the beneficial interests, and leave the rest to be implied to produce a satisfactory and workable trust. The draftsman will still have to give much thought to providing for the requirements of the individual situation, but at least he can do so with the knowledge that he can now concentrate on the main objectives without being worried too much about possible sins of omission concerning the many enabling and corrective provisions now embodied in the new legislation.

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