

1. Is the statutory maintenance scheme in s. 31 easy to operate and understand?

Suggested Answer:

It looks remarkably complicated and involves some tricky concepts. E.g.

11.1.4 The duty to maintain an adult beneficiary. While the beneficiary is a child, the trustees have discretion upon how to maintain them, but once the beneficiary reaches 18, the trustees must pay them maintenance, even if they are not yet fully entitled to the income.

11.1.5 Accumulations. The trustees may not use up all the income of the trust and must invest the surplus, known as accumulations. If the beneficiary has only to reach the age of majority to become entitled to their income, then they receive these accumulations when they reach 18, or marry below that age. If the beneficiary's interest is contingent and the condition that they have to meet is not reaching the age of 18 or marrying, they do not receive the accumulations until they meet that condition.

11.1.6 Gifts carrying intermediate income. To understand this, imagine that each beneficiary under the trust has a little piece of trust property generating income, which can be used to maintain the beneficiary. Most kinds of property generate this income, except for contingent pecuniary legacies.

11.1.7 The contingent pecuniary legacy. This is a sum of money that the beneficiary only receives if they meet a contingency or condition. It would usually be reaching a particular age, e.g. 18 or 30. These legacies are not regarded as carrying the intermediate income, making maintenance possible, unless the contingent pecuniary legacy is left, by a parent for the child to inherit at 18. (See *Re Abrahams* [1911] 1 Ch 108.

On the other hand, the basic power to maintain a child beneficiary, in other words to pay for their upkeep and education is easy to understand. Section 31(1) was amended in 2014 to give the trustees an open-ended discretion. They should focus on the needs of the child beneficiary, rather than whether a parent can or should pay for what the child needs: *Fuller v Evans* [2000] 1 All ER 636.

See FURTHER READING B.S. Ker "Trustees' Powers of Maintenance" [1953] 17 Conv. 273.

2. Do the trustees' powers to maintain excuse the parents from their duties?

Suggested Answer:

See 11.1.3 and study the wording of section 31 (1). Then look at *Fuller v Evans* [2000] 1 All ER 636. The short answer is No. The parent or parents should maintain the child, but the trustees should look at the situation of the child and consider, in their discretion, whether it was appropriate to help. The trustees' obligation is to do what is in the best interests of the beneficiaries, who are children. The old wording of section 31 used to have a sub-section (a) and (b) which required the trustees to have regard to "any other fund applicable to the same purpose" and, in particular, whether there was "any person bound by law to provide for his maintenance or education". This would usually mean the parents. This part of the section has been repealed, by the Inheritance and

Trustees Powers Act 2014 and now, the maintenance may be paid “as the trustees see fit.” *Fuller* is an accurate statement of the modern law. Upon his divorce, Fuller agreed to pay his children’s school fees and maintenance, but this did not prevent his trustees helping pay these financial obligations. The trustees’ job was to provide for the children.

3. Do advancement and benefit have too wide a meaning?

Suggested Answer:

See 11.2 The cases give an idea of the many different purposes for which an advance can be made. *Pilkington v IRC* [1964] AC 612 is a particularly good source of information and defines advancement as “the establishment in life of the beneficiary” and benefit as “large words”. An advance could be to set the beneficiary up in their career or profession, to give them somewhere to live, help them marry, enable them to donate to charity or help them pay less tax. The main abuse is where parents pocket the advances intended for the benefit of their children. The idea is that the trustees should have a wide discretion. The courts may step in if the trustees are abusing their power, but it does require a beneficiary to bring a case. For that the beneficiaries, often children, must realise what is happening and be willing to sue. *In Re Pauling’s Settlement Trusts* [1964] Ch. 303 is a good example of the beneficiaries realising that their father had taken their money, some years after the event and being able to recover some of it.

4. Is a protective trust fair to the creditors of the principal beneficiary?

Suggested Answer:

See 11.4

Under a protective trust, the principal beneficiary or life tenant, enjoys the income of the property, until they become bankrupt or get themselves in debt. At that event their life interest determines (ends) and the property is held on a discretionary trust for the principal beneficiary and their family. That means that the creditors of the principal beneficiary are left with nothing. The principal beneficiary no longer has any income against which they can claim: *Re Coleman* [1888] 39 ChD 443.

That may seem unfair to the creditors, but the protective trust is quite an old creation of equity and has statutory form in section 33 Trustee Act 1925. There are certain restrictions. A person cannot create their own protective trust to preserve their property from their own impending bankruptcy: *Re Burroughs-Fowler* [1916] 2 Ch 251. The principal beneficiary loses control of their property to the trustees, which they may not like.

The whole point of a discretionary trust is “as a protection to spendthrift or improvident or weak life tenants” as explained in *General Accident v IRC* [1963] 1 WLR 1207 (see 11.4.3). It means that even if the principal beneficiary is foolish, their family is protected as the property is held on a discretionary trust and the trustees can decide how best to look after them. Protecting the family is more important than paying the creditors.