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7.1.2 Powers of trustees

(A) Power of sale

Trustees do not have a general power to sell the trust property and convert the proceeds unless such a power is expressly or impliedly granted in the trust deed.

(B) Power of management

Legislation has been introduced to grant trustees wide powers of management. For example, most jurisdictions grant trustees the following powers:

- (1) powers to effect repairs and improvement of property ([Trustee Act 1925 \(NSW\) ss 82, 82A](#))
- (2) powers to insure the property ([Trustee Act 1925 \(NSW\) s 41](#))
- (3) powers to settle claims made against the trust ([Trustee Act 1925 \(NSW\) s 49](#))

(C) Power of maintenance

43 Maintenance and accumulation—instruments that came into operation on or after 1 March 1926

(1) Where any property is held in trust for a person who is for the time being an **infant** for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested, the trustee may at the trustee's sole discretion pay to the parent or guardian, if any, of the infant, or to the person with whom the infant is for the time being residing, or otherwise apply to the whole or any part of the **income** of the property, for or towards the maintenance education or benefit of the infant.

- (1) "Maintenance" refers to periodic payments for such goods and services as food, clothes, and medical treatment.
- (2) Section 43 applies only to infant beneficiaries.

(D) Power of advancement

The trustee can advance up to a half of the beneficiary's presumed share for the advancement or benefit of the beneficiary.

44 Advancement

(1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee may from time to time pay or apply any capital money subject to the trust, not exceeding altogether in amount one-half of the value of the property or share, for the advancement or benefit of such person or where such person is an infant, for the maintenance, education, advancement or benefit of such person in such manner as the trustee shall in the trustee's absolute discretion think fit.

- (1) "Advancement" refers to lump sum payments for goods and services that establish the beneficiary in life, such as payments towards establishing a beneficiary in a trade or profession
- (2) Trustee's power of advancement is for any beneficiary, infants and adults. This is the power to advance the capital, not the income, of the trust.

Pilkington v IRC [1964] AC 612

Facts: Pilkington was entitled to a life interest in the income of trust property. On his death, the capital was to go to his children or remoter issue as he appointed. In default of appointment, capital was to go to his children when they reach 21 or married.

The trustees proposed to advance a sum of money, to be settled on trust, to one of the daughters, who was then aged 5. The terms of the trust would involve income from the trust property being applied for her maintenance and benefit until she turned 30, at which time she would become absolutely entitled to both the capital and income.

This course of action would result in the daughter's contingent defeasible interest in the original trust being converted into a vested interest. However, considering the tax implications that would result from leaving the trust in its present state, the trustees argued the change should be made.

Issue: whether it was within the scope of power of advancement to pay into new trust

Held: Power of advancement was not just for the advancement of the young person, but also otherwise for his benefit. That enlarged the power considerably, nearly everything that will improve the material situation of the beneficiary

(Viscount Radcliffe) the 'advancement' itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment.

So much for "advancement," which I now use for brevity to cover the combined phrase "advancement or benefit." It means any use of the money which will improve the material situation of the beneficiary.

It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation. The power to carry out the operation of anticipating an interest is not conferred by the word "advancement" but by those other words of the section which expressly authorise the payment or application of capital money for the benefit of a person entitled "whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion," etc.

In this case, the element of anticipation consists in the raising of money for her now before she has any right to receive anything under the existing trusts: the advancement consists in the application of that money to form a trust fund, the provisions of which are thought to be for her benefit.

I have not been able to find in the words of the section, anything which in terms or by implication restricts the width of the manner or purpose of advancement.

7.1.3 Duties of trustees

(A) Duty to obey the terms of the trust

The most important duty.

- (1) If all beneficiaries are sui juris and absolutely entitled and unanimous, then they can direct trustee to depart from the trust, or even to put an end to the trust. Trustee will have no liability if it follows the instructions
- (2) Courts have inherent power to authorise departure from the trust (*Chapman v Chapman*)

Emergencies:

- (a) Changes in the nature of investments for infants from personalty to realty
- (b) Investments in business transactions not authorised by a trust of settled land for the sake of salvage of the trust property
- (c) Payment of maintenance out of income, even where there is a direction to accumulate income
- (d) Compromises of disputed rights in favour of unborn children

***Chapman v Chapman* [1954] AC 429**

Facts: Trustees sought to rearrange trusts to avoid some estate duty.

Held: the House of Lords did not authorise the scheme.

(Viscount Simonds LC) four categories:

- There is no doubt that the Chancellor (whether by virtue of the paternal power or in the execution of a trust, it matters not) had and exercised the jurisdiction to change the nature of an infant's property from real to personal estate and vice versa, though this jurisdiction was generally so exercised as to preserve the rights of testamentary disposition and of succession.
- Equally, there is no doubt that from an early date the court assumed the power, sometimes for that purpose ignoring the direction of a settlor, to provide maintenance for an infant, and, rarely, for an adult, beneficiary.
- So, too, the court had power in the administration of trust property to direct that by way of salvage some transaction unauthorized by the trust instrument should be carried out. Nothing is more significant than the repeated assertions by the court that mere expediency was not enough to found the jurisdiction.
- The court had power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian ad litem².

² A "guardian ad litem" is a person the court appoints to investigate what solutions would be in the "best interests of a child."