The Law of Trusts
DELEGATION BY INDIVIDUAL TRUSTEES

LAW COMMISSION

LAW COMMISSION
LAW COM No 220

The Law Commission

(LAW COM. No. 220)

THE LAW OF TRUSTS
DELEGATION BY INDIVIDUAL TRUSTEES

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed 11 January 1994*

LONDON: HMSO
£8.25 net

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are:

The Honourable Mr Justice Brooke, *Chairman*

Professor Jack Beatson

Mr Charles Harpum

The Commissioners who signed the report on 15 November 1993 were:

The Honourable Mr Justice Brooke, *Chairman*

Mr Trevor M. Aldridge, Q.C.

Professor Jack Beatson

Mr Richard Buxton, Q.C.

Professor Brenda Hoggett, Q.C.

The Secretary of the Law Commission is Mr Michael Collon and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London WC1N 2BQ.

THE LAW COMMISSION

DELEGATION BY INDIVIDUAL TRUSTEES

CONTENTS

THE LAW COMMISSION

Item 8 of the Fourth Programme: The Law of Trusts

DELEGATION BY INDIVIDUAL TRUSTEES

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I
INTRODUCTION

Scope of this Report

1.1 Traditionally, the primary responsibility of most trustees is to hold property on behalf of other people, safeguarding and dealing with it at the trustees' discretion in the best interests of the beneficiaries. The competence, integrity and judgment of an individual who is appointed a trustee is therefore of particular importance, and for this reason the law has always intervened to limit the ability of trustees to delegate their functions to others. In this Report we examine the circumstances and manner in which an individual trustee should be authorised to delegate, and we make recommendations for change.

1.2 We also recognise the fact that the rules governing the way in which land can be jointly owned create trusteeships as a technical formality, in cases where the trustees also have beneficial interests in the property, and that in those circumstances the rules governing trustees may not be wholly appropriate. Our proposals take account of the need to treat such cases differently.

Background

1.3 Notwithstanding the general prohibition on a trustee delegating his functions to someone else, it is allowed in three cases. First, the instrument establishing a trust can confer the necessary authority, either generally or in specified cases. Secondly, if all the beneficiaries under a particular trust are ascertained and of full age and capacity, they can authorise delegation. Thirdly, and this is the case with which we are concerned, there are circumstances when it is permitted by statute.

1.4 General statutory authority to delegate was first given to trustees by the Trustee Act 1925.[1] The rules were amended in 1971,[2] following recommendations by the Law Commission.[3] The approach of these provisions is to allow a trustee to delegate, but to limit the way in which he may do so. They impose restrictions which constitute safeguards for the beneficiaries, intended to discourage excessive delegation and to protect the trust funds against misuse.

1.5 New legislation concerning powers of attorney was introduced in 1985. The Enduring Powers of Attorney Act 1985 created a new form of power of attorney ("an enduring power of attorney") which can continue in force even though the donor subsequently loses mental capacity.[4] This new provision, which allows people to make advance provision for the management of their property and affairs, followed a recommendation of the Law Commission.[5] The Act contains a number of safeguards to prevent abuse, including the use of a prescribed form of power of attorney and a registration procedure.

1.6 The Law Commission's recommendations for enduring powers of attorney envisaged that they would not be used by trustees. However, difficulties in dealing with land held by

[1] Section 25.

[2] Powers of Attorney Act 1971, s.9. The amended section 25 is set out in Appendix B.

[3] Powers of Attorney (1970), Law Com. No. 30.

[4] Enduring Powers of Attorney Act 1985, s.1(1)(a).

[5] The Incapacitated Principal (1983), Law Com. No. 122.

joint owners, which became apparent during the course of the passage of the Bill,[6] led to the late introduction of what became section 3(3) of the Enduring Powers of Attorney Act 1985.[7] That subsection allows a trustee to choose to delegate his functions by using an enduring power of attorney, which does not involve any safeguards for beneficiaries, rather than granting a power of attorney under section 25 of the Trustee Act 1925. The latter provision nevertheless remains in force.

1.7 Section 3(3) of the Enduring Powers of Attorney Act 1985 has attracted criticism on a number of grounds: the effect of an enduring power of attorney in delegating trustee powers is automatic, unless expressly excluded, and may as a result be inadvertent; to continue delegation after the trustee becomes mentally incapable will often be inappropriate, at least where the trustee has no beneficial ownership in the property; the safeguards for beneficiaries incorporated in earlier legislation have been abandoned; having two overlapping provisions on the statute book, each permitting trustees to delegate but subject to different conditions, is unsatisfactory. As a result, we decided to examine this topic.

1.8 We published a Consultation Paper in April 1991, analysing the present law and proposing options for reform.[8] The provisional conclusion which we then reached was that there should be new legislation to remove the untidy and confusing overlap. In general trustee cases, i.e. where trustees hold the trust property only for third parties, we suggested that the safeguards for beneficiaries should be largely reinstated. They should, however, be relaxed for co-owners of land, where trustees hold it on their own behalf. A well informed response to the Consultation Paper overwhelmingly supported our provisional recommendations, although detailed criticisms of the special scheme, which we suggested for cases where trustees were also beneficiaries, persuaded us to attain our objectives in a different and simpler way. We are very grateful to all those who expressed their views to us in the course of the consultation.

Collective delegation

1.9 Some of those who responded to the Consultation Paper urged the need to reconsider the powers of trustees to delegate as a body,[9] rather than individually, particularly in relation to the investment of trust funds. This was beyond the scope of the Consultation Paper,[10] and therefore we did not take that opportunity to discuss the issues involved or to issue a general invitation to comment. Different considerations of principle may apply to the delegation by one trustee, which will often leave other trustees still directly concerned with the management of the trust, from a case of delegation by all trustees. Trustees can, and no doubt should, employ professional advisers where appropriate; views may differ, however, on whether those advisers should have the power of decision, as distinct from the duty to tender advice. The powers of trustees were reviewed by the Law Reform Committee,[11] whose recommendations have yet to be implemented. Since then, there have been considerable changes in the financial markets and any changes which are relevant should be taken into account. This important topic needs to be considered, and although outside the scope of this project, it could be a candidate for the Commission's attention when we undertake further work on the law of trusts.[12]

Structure of the Report

1.10 Part II of this Report sets out the present law. This statement is reproduced from the Consultation Paper, as there have been no developments since it was published. In Part III we analyse the need for reform of the law in this area. Our recommendations for reform are set out in Part IV. In Part V we summarise our recommendations.

---

[6] Para. 2.12 below.

[7] The subsection is reproduced in para. 2.17 below.

[8] The Law of Trusts: Delegation by Individual Trustees (C.P. No. 118), to which we shall refer as "the Consultation Paper".

[9] See Trustee Act 1925, s.23(1).

[10] Consultation Paper, para. 1.12.

[11] *Twenty-third Report: the Powers and Duties of Trustees* (1982, Cmnd.8733). This included consideration of aspects of the powers which trustees enjoy to delegate as a body: paras. 4.16-4.28.

[12] Fourth Programme of Law Reform, item 8.

1.11 A draft Bill to implement our recommendations is set out, with Explanatory Notes, in Appendix A. For ease of reference, section 25 of the Trustee Act 1925 (as amended by section 9 of the Powers of Attorney Act 1971) is set out in Appendix B. Appendix C lists those who responded to the Consultation Paper.

Abbreviations

1.12 We use the following abbreviations in this Report:

"the 1925 Act": Trustee Act 1925 as amended;

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

"the 1985 Act": Enduring Powers of Attorney Act 1985;

"section 25": section 25 of the 1925 Act, as amended by section 9 of the 1971 Act;

"section 3(3)": section 3(3) of the 1985 Act.

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, 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.

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

---

[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, 517.

[2] See *A.G.* v. *Scott* (1749) 1 Ves. Sen. 413; *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 the Consultation Paper [was] 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. *Whitely* (1887) 12 App. Cas. 727.

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

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

[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.

co-trustees.[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 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 attorney 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;

(b) Where all the 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.

Trustees 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 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 will not avoid the inconvenience caused by the trustee's subsequent mental 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

[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: 1971 Act, s.5.

[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).

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

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

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.[20] It was argued that the limitation did not apply because, in those circumstances, the function which was performed by an attorney of a joint owner was not a trustee function, but a function performed as a beneficial owner.[21]

2.12 The position was clarified by the case of *Walia* v. *Michael Naughton Ltd.*[22] 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[23] to the defendant was executed by P and M personally and by M as attorney for 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 beneficial owners and, accordingly, a power of attorney under section 10 was an appropriate power.[24] It was argued that the provision of section 10(2) that the section does not apply to the functions which the trustee 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:[25]

> 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 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[26] expressly excluded powers granted pursuant to the 1925 Act.[27] There were two 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

---

[20] 1971 Act, s.10(2).

[21] *Emmet on Title*, (18th edition) (1983), p.280: "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 41 *The Conveyancer* (1977), 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 can be cured on registration of the conveyance at the Land Registry.

[22] [1985] 1 W.L.R. 1115, for brevity, we refer to this case as "*Walia*".

[23] Expressed to be made by P, M and A "as beneficial owners".

[24] See para. 2.11 above.

[25] [1985] 1 W.L.R. 1115, 1121.

[26] The Incapacitated Principal (1983), Law Com. No. 122, para. 4.2.

[27] Clause 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".

already made provision for replacement of unfit or incapable trustees.[28] 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[29] 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,[30] 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 and may (without the concurrence of any other person) give a valid receipt for capital or other money paid.

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.[31]

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.

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.[32] That duty arises when he has reason to believe that the donor is, or is becoming, mentally incapable.[33] 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.[34]

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.[35] Once the

---

[28] 1925 Act, 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, ss.148, 149.

[29] Lord Hailsham of St. Marylebone, Hansard (H.L.) vol. 465, 24 June 1985, cols. 548–9.

[30] 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.

[31] Forms of words have been suggested, and there is evidence from the recent research that some powers are granted in this form, although the examples found did not expressly relate to powers granted by trustees.

[32] 1985 Act, s.2(2)(b)(iii).

[33] *Ibid.*, s.4.

[34] The Incapacitated Principal (1983), Law Com. No. 122, para. 4.34.

[35] 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.

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 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 that 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[36] or, under the 1971 Act, given as security and expressed to be irrevocable, although these can be revoked with the consent of the attorney.[37] 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[38] 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 incapacity. 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.[39]

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 with 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.[40] 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.[41]

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.[42]

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.[43]

---

[36] *Walsh* v. *Whitcomb* (1797) 2 Esp. 565; these powers are irrevocable while the interest subsists.

[37] 1971 Act, s.4; they, too, are irrevocable only so long as the interest or obligation subsists.

[38] Except as mentioned in para. 2.24 below.

[39] 1985 Act, s.7(1) (a).

[40] 1971 Act, s.5(1).

[41] *Ibid.*, s.5(2).

[42] *Ibid.*, s.5(4).

[43] 1985 Act, s.9(4).

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.

PART III

NEED FOR REFORM

General Trustee Cases

Present Legislation

3.1 The original rule that a trustee could not delegate his discretionary powers, unless authorised to do so by the trust instrument[1] or by all the beneficiaries if they are all identified and of full capacity, has now been modified by statute for over 65 years. Nobody has suggested to us that this modification should be reversed, and we accept that, although it is reasonable to expect that a trustee should normally perform his functions personally, a limited power of delegation is useful and appropriate to give flexibility and continuity in the management of a trust. There will inevitably be times when the trustee cannot personally attend to the affairs of the trust, perhaps because of illness or absence, and it is useful to be able to ensure that the trust is not neglected. If it were not possible to appoint a temporary substitute, the only course might be for the trustee to resign and be replaced. This could be contrary to the wishes of all concerned and not necessarily in the beneficiaries' best interests. Accordingly, we accept that the principle of delegation is firmly established. The question is not whether trustees should be allowed to delegate, but in what circumstances.

3.2 Section 25 of the 1925 Act, as it now applies, limits the trustee's ability to delegate in a number of ways which are aimed at affording protection to the beneficiaries. A trustee has statutory authority to delegate by power of attorney if:

(a) The delegation does not last for more than twelve months;[2]

(b) The attorney is not the trustee's sole co-trustee, unless a trust corporation;[3]

(c) The trustee gives notice both to any person entitled to appoint new trustees and also to any co-trustee;[4]

(d) The trustee remains liable for the attorney's acts and defaults.[5]

3.3 By contrast, section 3(3) provides:

> Subject to any conditions or restrictions contained in the instrument,[6] 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 and may (without the concurrence of any other person) give a valid receipt for capital or other money paid.

3.4 It is apparent that none of the four safeguards for beneficiaries which section 25 contains applies in the case of delegation under an enduring power of attorney. There is a further important distinction. A power of attorney which has effect under section 25 is subject to the rule that it is automatically revoked by the mental incapacity of the donor.[7] However, the fundamental purpose of an enduring power is that although it can take effect immediately on execution, when the donor is still fully capable, it is not revoked on his losing capacity.[8]

---

[1] Para. 2.1 above.

[2] Section 25(1).

[3] Section 25(2).

[4] Section 25(4).

[5] Section 25(5).

[6] 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.

[7] *Yonge* v. *Toynbee* [1910] 1 K.B. 215.

[8] 1985 Act, s.1(1)(a).

Criticisms of Section 3(3)

3.5 Section 3(3), and its existence in parallel with section 25, has been criticised on a number of grounds:

(a) Lack of safeguards for beneficiaries;

(b) Delegation extending beyond mental incapacity;

(c) Automatic delegation;

(d) Statutory duplication.

3.6 It is clear from the views expressed to us on consultation that the safeguards which section 25 currently affords to beneficiaries are considered to be of value. Thus, the requirement to give notice of the grant of a power of attorney[9] ensures that those who have the power to replace trustees[10] know of any repeated delegation.[11] Further, the rule against delegation by a sole co-trustee reinforces a number of statutory provisions which require capital to be paid to at least two trustees (or to a trust corporation),[12] and, although these provisions provide only a limited guarantee of financial probity,[13] we know of no suggestion that they should be repealed. The majority of those who responded to the Consultation Paper did not consider the position under section 3(3), which provides no safeguards, at all satisfactory. Rather, they favoured retaining the section 25 safeguards, while acknowledging that some of them could usefully be improved. We accept this view.

3.7 We shall first consider what reforms can usefully be made to the safeguards at present provided by section 25, bearing in mind that if they are to avoid stultifying the conduct of trust business, they cannot be watertight. No practical difficulties were identified in relation to two of the safeguards: first, that the trustee remains responsible for the attorney's acts and defaults[14] and that he must give notice of the grant of a power of attorney.[15] The 12-month time limit on the period of delegation received support on consultation, but there are some points of clarification which we need to address.[16] Weaknesses in the ban on delegation to a sole co-trustee were acknowledged, and we shall consider how the purpose of this safeguard can more effectively be achieved.[17]

3.8 When someone is mentally incapable of exercising the functions of a trustee,[18] those who have the power of appointing new trustees are entitled to remove and replace the incapable trustee.[19] A trustee who, before losing capacity, appoints an attorney under an enduring power permits the continued exercise of the trustee functions, in his name, after he becomes incapable. In general trustee cases, this seems anomalous, and indeed it is also undesirable because the incapable trustee is not in a position to exercise any supervision over the attorney whom he appointed.

3.9 The way in which section 3(3) is worded makes it apply automatically when an enduring power of attorney is created, unless the power excludes its effect.[20] That is to say,

[9] Section 25(4).

[10] 1925 Act, s.36(l).

[11] Which is possible, even though no power of attorney can be granted under this provision for more than twelve months: s.25(1).

[12] Paras. 3.15 *et seq* below.

[13] The view of the draftsman of the 1925 legislation was over-optimistic. "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.

[14] Section 25(5).

[15] Section 25(4).

[16] Paras. 4.6–4.10 below.

[17] Paras. 4.11–4.15 below.

[18] See 1925 Act, s.36(9); Law of Property Act 1925, s.22(2).

[19] 1925 Act, s.36(1).

[20] Not all commentators accept this literal interpretation of section 3(3). However, there is evidence both from our consultation and in research carried out for your Department (by Professor Stephen Cretney Q.C. and Messrs. Gwynn Davis, Andrew Barkowski and Roger Kerridge, Faculty of Laws, Bristol University) that enduring powers of attorney have in fact been created in reliance upon it.

a donor of an enduring power of attorney delegates all the powers that he has under any trust, except where he makes an express restriction.

3.10 Clearly, there is the strong possibility that those who are not well versed in this area of the law will inadvertently delegate trustee powers when executing an enduring power of attorney. It is not satisfactory that any powers of a trustee should be exercised without due deliberation, nor is it satisfactory to have a statutory provision which makes that likely. In this case, the result may be that the person appointed as attorney under an enduring power, who has been selected to manage the donor's personal and family affairs, is unsuited to exercise the responsibilities of the donor's trusteeships.

3.11 Statute law, as it stands at present, offers a trustee who chooses to delegate two possible routes to follow: under section 25 or section 3(3), both of which are of general application. The conditions for each and the results of each are different, but their fundamental purpose is the same. Provided he selects a particular form of document the trustee can avoid certain restrictions on his freedom of action and can also indefinitely extend the period for which delegation is effective. This duplication is untidy and it serves to complicate the law. As we said in the Consultation Paper, "These different provisions can apply in identical circumstances; the differences do not appear to be based on any principle and are hard to justify".[21]

3.12 Finally, section 3(3) appears to modify general trust law in two ways which are difficult to justify. First, the words "without obtaining any consent" may enable the attorney to exercise the donor trustee's powers without obtaining the consents which the trustee would require if he were exercising the power himself.[22] Secondly, the words "may (without the concurrence of any other person) give a valid receipt for capital" appear to override the requirement that, notwithstanding anything to the contrary in a trust instrument, a valid receipt for the proceeds of sale of trust land can only be given by two trustees (unless there is a trust corporation as trustee).[23] In both cases, the words of section 3(3) would seem to conflict with the provisions of the 1925 Act. Since those long established rules have not been called into question, it is inappropriate that they should be undermined in this indirect manner. It is also contrary to general principle that an attorney should be able to act subject to fewer constraints than his principal.

3.13 We know of no decided case in which the terms of section 3(3) have been considered, and it may therefore be that the meaning of these phrases would be construed in a different way, so as not to conflict with the earlier legislation. However, we find it difficult to see what they usefully add, and it seems unhelpful to retain on the statute book a provision which gives rise to legitimate doubts about its meaning.

Section 3(3): Conclusion

3.14 In the light of the support expressed by those who responded to our consultation for the existing safeguards for beneficiaries,[24] and their acceptance of the inappropriateness of section 3(3) in relation to general trustee cases, we do not consider that section 3(3) can be allowed to stand. For the law to revert to the previous position governing general trustee cases,[25] would be consistent with the principle that the fundamental purpose of trust law is to protect the position of beneficiaries, without imposing restrictions on settled property which undermine its value.[26]

Two-trustee Rules

3.15 Subsection (2) of section 25 provides that the donee of a power of attorney created by a trustee may "not (unless a trust corporation) [be] the only co-trustee of the donor of the power". The precise purpose of this provision is unclear. Presumably it is to ensure that if a trust has two trustees, that number should not, in effect, be reduced to one as a result of one

[21] Consultation Paper, para. 3.24.

[22] The sale of property subject to a trust for sale may require the consent of specified persons: see Law of Property Act 1925, s.26.

[23] *Ibid.*, s.14(2), (3).

[24] Subject to some amendments: paras. 4.6 *et seq* below.

[25] Albeit subject to relaxation in certain cases: paras. 4.21 *et seq* below.

[26] Unreasonably restrictive conditions on managing and disposing of trust property, imposed to safeguard beneficiaries, could well depress the market value of the property, contrary to the beneficiaries' interests.

trustee granting a power of attorney to the other. However, it can hardly be intended simply to maintain the number of trustees administering a particular trust, because it takes no account of the effect of delegation where there are more than two trustees. It must therefore be aimed solely at preventing one person alone from conducting the affairs of a trust. But there is no rule against a trust having only one trustee, so that legislation to prevent that state of affairs arising only in this particular case seems unnecessary, particularly when the donor retains responsibility for what is done in his name.[27] Nevertheless, on consultation we found that there was considerable support for the belief that "two minds are better than one" and that this was some safeguard against dishonesty.

3.16 As we pointed out in the Consultation Paper, however, even assuming that we have correctly identified the purpose of the present provision, there are two cases with which it does not seem to deal satisfactorily:[28]

(a) Assume that there are three trustees: A, B and C. A appoints B as his attorney. Later, C dies. That leaves A and B as the only trustees, and A has already delegated his functions to B. The 1925 Act provides that the donor's only co-trustee may not *be* the donee. It is not clear whether all that is prohibited is delegation to the only other person who is a trustee at the date when the power of attorney is granted, or whether the prohibition extends to the state of affairs in this illustration, i.e. where at some later date the attorney becomes the donor's sole co-trustee;

(b) In a case where there are two trustees, each of them separately appoints one particular third party as his attorney. This does not appear to be prohibited by section 25,[29] but it is contrary to the policy of the section.

3.17 Although there is no general rule which requires at least two trustees to act, there are a number of separate statutory provisions which lay down this requirement in particular circumstances.[30] The policy underlying these sections – the need to safeguard capital monies due to a trust – is clear and is not questioned. To the extent that the present terms of section 25 do not operate as intended, it is the policy of these other statutory provisions which is being undermined. Any reform should therefore be targeted to ensure that these two-trustee rules, which Parliament has already enacted, are made as effective as possible. Section 25 appears to support the proposition that there should always be two trustees acting personally in any trust, but it only has this effect where there are two trustees and one has delegated his powers to the other;[31] the present legislation is therefore anomalous and should be reconsidered.

Simple Form of Power of Attorney

3.18 A successful innovation introduced by the 1971 Act was a succinct form of general power of attorney,[32] to enable users to dispense with the lengthy documents which until then had listed in detail the various powers which were delegated. Although the use of the statutory form is voluntary, it is now commonly adopted. However, it is not available for trustees who wish to delegate their powers.[33] In the Consultation Paper we suggested that another succinct form should be provided, to be available for use by a trustee who wished to delegate all his functions under a particular trust, although the use of that form instead of a traditional form of power of attorney would not be mandatory.[34] This suggestion received a lot of support from those who responded.

---

[27] Section 25(5).

[28] Consultation Paper, para. 4.31.

[29] 48 *Halsbury's Laws of England* (4th edition), (1984), para. 846, note 3, states that "it seems unlikely that two or more persons may delegate their discretions to the same person, other than a trust corporation", but cites no authority. Likewise, Underhill and Hayton, *Law of Trusts and Trustees* (14th edition), p.555, note 10, states: "it seems several trustees cannot delegate (simultaneously or successively) to an individual of their number"; again, no authority is cited.

[30] Para. 4.12 below.

[31] The section allows the sole trustee of a trust to delegate to a third party, even though the result is that one person alone will still be exercising the trustee's powers.

[32] 1971 Act, s.10(1), Sched. 1.

[33] *Ibid.*, s.10(2); *Walia* v. *Michael Naughton Ltd.* [1985] 1 W.L.R. 1115.

[34] Consultation Paper, paras. 4.63–4.65.

Co-ownership of Land

3.19 The scheme adopted in the 1925 property legislation to govern the way in which land can be owned by more than one person, has an impact on delegation by power of attorney which needs to be taken into account. Whenever the legal estate is held by more than one person they are joint tenants and trustees for the person or persons beneficially entitled.[35]

3.20 This well established law nevertheless comes as a surprise to many. When two people buy a house to live in, they rarely think that they are taking on a trusteeship, yet they necessarily and inevitably become trustees, albeit holding for themselves as beneficiaries. This means that as things stand, and unless special provision is made when they acquire the land, the powers of each owner in relation to the legal estate are limited in the same way as the powers of any other trustee. When a co-owner delegates the ability to dispose of or manage the legal estate in that land, the powers he delegates are necessarily confined by any restrictions applying to trustees generally.[36] The provision which became section 3(3) was introduced at a late stage, to counter resulting inconveniences which came to public attention while the Bill was passing through Parliament. In view of our conclusion that that subsection should be repealed,[37] it is necessary to reconsider what special arrangements may be necessary for trustees in this situation.

Section 25 and Beneficial Owners

3.21 The section 25 regime has a number of drawbacks when applied to beneficial co-owners of land:

(a) The power of attorney can only last for a year and cannot survive the donor's incapacity;

(b) The donor cannot delegate to his sole co-trustee, if that co-trustee is not a trust corporation;

(c) The trust must exist when the power is created.

3.22 What underlies the general rule which restricts delegation by trustees and the limited modification of that rule by section 25 is the principle that particular care is needed when one person is entrusted with the legal ownership and management of what is in essence someone else's property. We would not dissent from the view that such caution is thoroughly justified. However, the picture changes radically as soon as someone whom the law categorises as a trustee is dealing with what is in reality his own property. Then one can legitimately ask why an owner's powers should be circumscribed in relation to land and buildings, merely because a trust is imposed as a matter of convenient legal mechanics.

3.23 The period for which delegation is permitted demonstrates clearly the inconvenient impact of the rules affecting trustees in general on beneficial co-owners. There is no time limit on any power of attorney which someone grants in relation to land of which he is sole owner or in relation to other property.[38] Simple convenience in managing a property owner's affairs may dictate that a power of attorney should last longer than one year. Repeated powers can be granted by a trustee under section 25, but that may not be convenient; and it is to be questioned whether a beneficial owner should be required to go to the inconvenience and expense involved in granting a new power of attorney every year.

3.24 Even more seriously, a power of attorney granted under section 25 cannot be an enduring power,[39] so that it is automatically revoked if the donor becomes mentally incapable. The 1985 Act was intended to create a new, convenient and inexpensive way for an individual to settle the permanent management of his affairs in advance of losing mental capacity, whether through accident, illness or advancing age. To exclude co-owned real

[35] Law of Property Act 1925, ss.34(2), 36(1). On the abolition of legal tenancy in common (*ibid.*, s.1(6)), the beneficial interests of co-owners – whether as joint tenants or tenants in common – became equitable interests (*ibid.*, s.1(3)) and the legal estate had to be held by one or more trustees on their behalf.

[36] *Walia* v. *Michael Naughton Ltd.* [1985] 1 W.L.R. 1115.

[37] Para. 3.14 above.

[38] If the donee enters into a transaction more than twelve months after the date of the power of attorney, the person with whom he deals may need to make a statutory declaration that he did not know of the revocation of the power: 1971 Act, s.5(4).

[39] 1985 Act, s.2(8).

property from the scheme, when a share in the family home is many people's most valuable asset, seriously undermines the scheme's utility and effectiveness. As the then Lord Chancellor said in Parliament when he introduced the amendment to the Bill which became section 3(3),[40] "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".

3.25 Similarly, a trustee's inability to appoint a sole co-trustee as attorney can be seen as an unwarranted restriction in a family context. There will be many couples who would want to appoint each other as attorney under enduring powers, so that if one loses capacity the other will have complete control of their joint affairs. If their home was vested in them jointly, without anyone else being named as co-owner, section 25 would not permit one partner to delegate to the other. Accordingly, in relation to the family home they would be frustrated in achieving their objective.

3.26 Finally, it appears that section 25 can only apply to trusts which exist when the power of attorney is created.[41] This is inconvenient because it means that an attorney's authority does not extend to a share in a property which the donor acquires after the power of attorney is granted, even if at that time the parties were already planning the acquisition. This presents problems in relation to the common case of the sale of one house and the purchase and mortgage of another if both properties are to be in the names of both parties.

3.27 The majority of those who responded to the Consultation Paper favoured some exemption from section 25 for beneficial co-owners of land, although the details of the "special scheme" which we put forward[42] did not find favour. A minority considered it a logical and principled approach that all trustees should be subject to the same rules. However, it seems to us that this approach does not address the justifiable expectations of this large class of property owners who own land jointly. They have not freely opted to become trustees, they may not realise that the law so classifies them and in any event they are given no choice. We consider that special rules, designed to address the needs of beneficial co-owners, are justified.

---

[40] Lord Hailsham of St. Marylebone, Hansard (H.L.) Vol. 465, 24 June 1985, cols. 548–9.

[41] Because within seven days the donor must give notice to the other trustees: s.25(4). There are devices which can probably be employed to avoid the effect of this provision, but they are not particularly convenient and, being untested, their effect must be uncertain.

[42] Consultation Paper, Part V.

PART IV

OUR RECOMMENDATIONS FOR REFORM

A. GENERAL TRUSTEE CASES

Safeguards for Beneficiaries

Repeal of Section 3(3)

4.1 We have already accepted the view widely expressed to us in response to the Consultation Paper that in general trustee cases[1] we should revert to the position that individual trustees who wish to delegate their functions should be governed by section 25, which offers greater safeguards for the trust beneficiaries.[2] Accordingly, *we recommend* that section 3(3) be repealed.[3]

4.2 It would not, however, be satisfactory to repeal section 3(3) without making provision for transitional cases. Enduring powers of attorney must have been granted since 1985 in circumstances where section 3(3) has had the effect of delegating the trustee powers of the donor, and in some of those cases the donor will have lost mental capacity since granting the power. In such circumstances, the enactment of an alternative to section 3(3) will be of no value, because the donor is no longer able to grant a new power of attorney.

4.3 When an attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable, he has a duty to apply to the Court of Protection for the registration of the power.[4] It will therefore be possible, by identifying powers of attorney in respect of which an application to register is made and which are then registered, to separate the cases where the donor is still capable, and has the capacity to adjust any power of attorney which he has executed to meet a change in the law, from those where he is no longer capable. It will take some time for the effect of the change in the law to become widely known, and for trustees to take the appropriate action of granting a new power of attorney. It therefore seems reasonable to allow a transitional year to go by before cancelling[5] the delegation of trustee powers by enduring powers of attorney granted before the new measure takes effect.

4.4 For these reasons *we recommend* that if an enduring power of attorney has been registered before the commencement date of the new Act, or is registered as a result of an application made at any time before the end of the first year after the new Act comes into force, section 3(3) should continue to apply to that power of attorney indefinitely until the registration is cancelled. It should also apply while the application to register is pending. In any other case section 3(3) should apply until the first anniversary of the day when the Act came into force.[6] This would allow a year in which alternative arrangements could be made.

Section 25 Reconsidered

4.5 Nevertheless, even though we are suggesting that in most cases the terms of section 25 should apply without any alternative, we need to make recommendations to address the concerns which originally led to the enactment of section 3(3).[7] The consultation also demonstrated that there may be ways in which the detailed provisions of section 25 can be improved, and we have therefore examined each of the safeguards which that section imposes. We should emphasize that what we are considering here is the nature of the statutory framework which will apply in those cases where the trust instrument itself makes no provision. When a trust is established, the trustees may be authorised to delegate their powers with greater freedom than section 25 allows, or conversely, delegation may be

[1] I.e., where trustees hold the trust property only for third parties.

[2] Para. 3.14 above.

[3] Draft Bill, clause 4(1).

[4] 1985 Act, s.4(1), (2).

[5] As a result of repealing section 3(3).

[6] Draft Bill, clause 4(2) – (5).

[7] Paras. 4.21 *et seq* below.

further restricted or prohibited, in which case section 25 will be overridden.[8] In addition, it is always possible for the beneficiaries under a trust, if all are of full age and capacity, to authorise a trustee to delegate his powers in circumstances in which he would otherwise be unable to do so.

Period of Delegation

4.6 In the Consultation Paper we sought views on the question whether the maximum period of delegation, twelve months,[9] should be changed.[10] This time limit is arbitrary,[11] but we found no great pressure to change it. The assessment of the appropriate length of delegation is essentially a matter of balancing the practical convenience of those who use these powers of attorney against the possibilities of abuse.[12] The evidence we received suggested that the present balance was satisfactory. *We recommend* no change.

4.7 There is, however, a further minor matter. Section 25 at present provides that ". . . a trustee may . . . delegate for a period not exceeding twelve months . . .". This leaves open a number of questions: when, if nothing is said, does the period start? can a trustee specify a twelve-month period starting some time in the future? what is the effect of a delegation without an express time limit? if it purports to last for longer than a year, is it valid for the first twelve months, or wholly void ab initio?

4.8 We consider that it would be convenient, in the course of the present reform, to make amendments designed to tie up these loose ends. In doing so we suggest that the donor's intentions should be followed as closely as possible, subject only to observing the twelve-month maximum. This policy should help trustees to plan the smooth running of the trust's affairs, which must be in the interest of the beneficiaries. There can be, for example, no objection to a donor specifying a future date for the delegation to start[13] and if he fails to impose a time limit on the period of delegation, or one within twelve months after the period starts, full effect can reasonably be given to the power of attorney until the permitted period ends.

4.9 Accordingly, *we recommend* that the period of delegation should be governed by these rules:[14]

(a) The period should begin on the date specified by the power of attorney, or, if nothing is said, upon its execution by the donor;

(b) The period should end twelve months after it begins, or earlier if the power of attorney so provides.

4.10 Once it is provided that a power of attorney granted for a period longer than 12 months can validly delegate trustee powers during its first year,[15] it will be possible to allow an enduring power of attorney to be used to delegate those powers, something which is not at present permitted.[16] This is not likely to be of great practical value, because a delegation limited to one year is incompatible with the fundamental purpose of an enduring power, the effect of which is indefinite; nevertheless it will prevent a power of attorney granted by a trustee being completely invalid simply because the wrong form is used. Accordingly, *we recommend* that it should be possible to use an enduring power to delegate a trustee's functions under section 25.[17]

---

[8] 1925 Act, s.69(2).

[9] Section 25(1).

[10] Consultation Paper, paras. 4.20–4.28.

[11] The twelve-month time limit was fixed by analogy with section 36(1) of the 1925 Act (replacement of a trustee who remains out of the United Kingdom for twelve months): Powers of Attorney (1970), Law Com. No. 30, para. 22.

[12] The need for repeated powers of attorney, every year, was seen as a small but useful means of discouraging permanent delegation: *ibid.*

[13] Obviously, if he had by then ceased to be a trustee, the power of attorney would be of no effect.

[14] Draft Bill, clause 5(2), (3).

[15] But no longer.

[16] 1985 Act, s.2(8).

[17] Draft Bill, clause 6.

Delegation to Sole Co-trustee

4.11 We have already pointed out[18] that the prohibition against delegation to a sole co-trustee, other than a trust corporation, is unsatisfactory and is not supported by principle, but that many of those who responded to our consultation favoured the affairs of a trust being in the hands of more than one person. We consider that the proper approach would be for the rules governing delegation to apply restrictively in those cases in which statutory provisions already require a minimum of two trustees. If other situations are identified in due course in which this minimum should also be made mandatory, specific legislation can and should be introduced to cover those cases too. The rules which govern delegation by trustees could then follow suit.

4.12 The present "two-trustee rules" are:[19]

(a) The proceeds of the sale of land held on trust for sale must be paid to, or at the direction of, at least two trustees;[20]

(b) Capital money arising under the Settled Land Act 1925 must be paid to, or at the direction of, at least two trustees;[21]

(c) A receipt for such payments must be given by at least two trustees;[22]

(d) Equitable interests and powers in land subject to a trust for sale are overreached when the land is sold, provided the proceeds are paid to at least two trustees.[23]

4.13 These provisions can at present[24] be undermined in two situations. These will arise if events occurring after the power of attorney is created result in the donor and the donee being the only trustees, or if all the trustees independently delegate their powers to the same third party. We consider that these problems should be avoided by introducing a general provision which will in effect mean that one person cannot, in however many capacities he may be acting, satisfy a statutory requirement that two trustees must act.

4.14 There would be another advantage in creating a general provision to that effect, not exclusively linked to section 25; it could cover delegation authorised in different ways. The provision would apply even if, for example, the trust instrument authorised trustees to delegate without impediment. This overriding of specific authority is appropriate because under the present law the two-trustee rules relating to the payment of capital money apply notwithstanding anything to the contrary in the relevant trust instruments.[25] This reinforcement of the two-trustee rules would also apply in cases to which we later recommend that section 25 safeguards should not apply.[26] Although this requirement could cause some inconvenience on a sale of land, it seems appropriate to maintain the rule because, as we explain below,[27] there may be cases where there are beneficiaries other than the trustees whose interests should be protected. We shall be making a recommendation in due course to eliminate the only likely cause of serious difficulty,[28] and by concentrating exclusively on reinforcing the two-trustee rules, nothing in the delegation safeguards would prevent a single attorney conducting the general management of the property.

4.15 *We accordingly recommend* that a new provision should make it clear that the statutory rules which require two trustees to receive trust money, and related provisions, should not be satisfied by one person alone (other than a trust corporation).[29] We should add in the interests of clarity that, so long as there are at least two trustees, the requirement

[18] Paras. 3.15–3.17 above.

[19] In each case, there is an exception permitting a trust corporation to act on its own.

[20] Law of Property Act 1925, s.27(2).

[21] Settled Land Act 1925, ss.18(1) (c), 94(1).

[22] 1925 Act, s.14(2).

[23] Law of Property Act 1925, s.2(1)(ii).

[24] Disregarding section 3(3): see para. 3.12 above.

[25] Settled Land Act 1925, s.18(1)(c); Law of Property Act 1925, s.27(2).

[26] Para. 4.31 below.

[27] Para. 4.22 below.

[28] Para. 4.41 below.

[29] Draft Bill, clause 7; for the consequential repeal of section 25(2), see clause 5(4).

that there must be at least two people could be satisfied either by two people acting in different capacities, or by two people acting jointly in the same capacity. To take an example where A and B are the only trustees: if A and B each appoint X as attorney, X (acting alone) would not satisfy the two-trustee rules. However, if A appointed X as his attorney and B appointed Y, X and Y could act together and would satisfy the rules. In the same way, if A appoints X and Y as his joint attorneys and B makes a similar appointment, X and Y can still meet the requirement for two trustees.

Other Safeguards

4.16 There are three other safeguards for beneficiaries which section 25 provides: the need to give notice that a power of attorney has been created,[30] the imposition of liability on the trustee for the acts and omissions of the attorney whom he appoints[31] and the prohibition of sub-delegation.[32] Those who responded to the Consultation Paper were unanimously in favour of keeping the notice requirement even though we suggested possible alternatives.[33] As far as the trustee's liability is concerned, one respondent suggested that it could properly be limited in all cases provided he had exercised due diligence in the selection and appointment of an attorney. However, the other respondents who addressed the point favoured the retention of the present rule. We understand that further delegation by attorneys, and indeed provisions authorising sub-delegation, are very rare. Although opinions were divided on whether change was desirable, we do not favour it because it seems to offer little practical advantage.

4.17 Since there appear to be no objections in principle to, or difficulties in practice with, these safeguards, *we recommend* no change to them.

Form of Power

4.18 Our suggestion that statute should authorise the use of a succinct form of general power of attorney for use by trustees[34] received considerable support on consultation. It is not our intention to prescribe a form whose use should be mandatory. Rather, the form would be an optional facility available to those who find it convenient. It should also be emphasized that it would not create a new legal category of power of attorney – such as a power of attorney given as security[35] or an enduring power of attorney[36] – but would merely make available a form of words which would give effect to the intention of a trustee who wished to delegate his powers under section 25.

4.19 Section 25 authorises a trustee to delegate "all or any" of his functions as trustee. There will therefore be a demand from time to time for many different forms of power of attorney, limiting the delegation to a particular property, to specified transactions, or in some other way. We consider that, as in the case of the 1971 Act form, the most useful, and indeed the only practical, way to proceed is to provide a document which is likely to cover the situation which is most commonly encountered. If the form achieves this, while requiring a minimum of completion and amendment by the user, it is most likely to be widely used and the chance of error will be minimised. We also consider that, following the precedent of the 1971 Act, it will be desirable to promulgate the new form in primary, rather than secondary, legislation. This would achieve maximum publicity for the form, and this will be particularly important given that its use will not be mandatory. A further consideration to be taken into account is that powers of attorney are frequently used in international transactions, and it will generally be easier to establish the authenticity of a new form of instrument abroad if it appears on the face of an Act of Parliament.

4.20 Accordingly, *we recommend* that statute should provide a form of power of attorney which a trustee may use in the following circumstances:[37]

---

[30] Section 25(4).

[31] Section 25(5).

[32] Section 25(6).

[33] Consultation Paper, paras. 4.37–4.41.

[34] Consultation Paper, paras. 4.63–4.65.

[35] 1971 Act, s.4.

[36] 1985 Act, s.1.

[37] Draft Bill, clause 5(6).

(a) *It is granted by one trustee.* It is technically possible for two trustees each to delegate his powers by the same document. However, if one of them later becomes incapable, or ceases to be a trustee, difficult questions may arise as to the continuing effect of the document in relation to the delegation by the other trustee. We doubt whether delegation by more than one individual in the same document is satisfactory, and to permit it in this statutory form would not achieve our objective of making the form simple to use;

(b) *It authorises the attorney to exercise all the trustees' powers.* We believe that this is the most common case, and therefore the one for which the statutory form should cater. As in the case of the 1971 Act form, it would not be necessary to specify the extent of the delegation on the face of the form, but statute should expressly declare that it has that effect;

(c) *It relates to a single trust.*[38] Again, this is probably the most common form of delegation. Many professional people are trustees of a number of trusts and for them delegation of their functions under all those trusts may sometimes be appropriate. However, as a matter of principle, the law should encourage trustees to give deliberate thought before exercising any of their powers, and this includes the power to delegate. Even in the case of a professional trustee, a single attorney may not be the best person to act as a substitute for the trustee in every trust, and at least where the new form is used there should be encouragement to give the matter due consideration;

(d) *It appoints one attorney.* Although other statutory forms of power of attorney offer the opportunity to appoint joint or joint and several trustees,[39] one important consideration suggests that a statutory form for the use of trustees should not be drafted on that basis. The number of trustees of land who can act in any particular trust[40] is limited to four.[41] There are two good reasons for this: it stops the management of the trust from becoming unwieldy, because too many people have to be consulted, and it facilitates the examination of the title to unregistered land. If one trustee appoints more than one attorney to act in his place, this limit may in practical terms be exceeded.

B. CO-OWNERSHIP OF LAND

Beneficial Owners

4.21 We have pointed out[42] that there are certain circumstances in which delegation by a trustee under section 25 is not satisfactory, and where safeguards for beneficiaries are less necessary. These circumstances arise where the trustees of land are also the beneficial owners, and the trust is merely a technical device imposed by the 1925 property legislation. The archetypal case is that of a couple who are joint owners of their family home. Although there are very many cases of this type, the same situation also arises in connection with other forms of real property[43] and other types of co-owner.

4.22 There are cases in which the trustees and the beneficiaries are the same people; in such cases it is easy to see that they might appropriately be treated differently from cases where the trustees and beneficiaries are quite separate. The matter is more difficult where some, but not all, the beneficial interests are owned by beneficiaries who are not also trustees. Further, the owners of the legal estate do not always know the identity of the

[38] We have not pursued our suggestion (Consultation Paper, para. 4.64(a)) that the donor's co-trustees should be named. This would not necessarily identify the trust under which the powers had been delegated, and in practice might mean that a new power of attorney would be needed if there were a change in the identity of any other trustee (because a third party dealing with the attorney might not otherwise be convinced that the power of attorney related to the right trust).

[39] 1971 Act, s.10(1) (b); 1985 Act, s.11(1).

[40] Other than a charitable trust.

[41] 1925 Act, s.34(1); Law of Property Act 1925, s.34(2).

[42] Paras. 3. 21 *et seq* above.

[43] The case of *Walia* v. *Michael Naughton Ltd.* [1985] 1 W.L.R. 1115, which triggered the enactment of section 3(3), concerned a jointly owned hotel.

beneficiaries, and the beneficial interests may from time to time change hands.[44] We have concluded that it is not possible to define with precision a class which would include every case in which it would be desirable to relax the rules safeguarding beneficiaries, excluding only those cases where there should be no relaxation.

4.23 Nevertheless, because the section 25 rules are inappropriate in a substantial number of cases, the need for some relaxation cannot be ignored, and we consider that it is important that the matter should be addressed in a more focused way than was done by section 3(3). In our view a practical distinction can be drawn between the cases in which the donor trustee has no beneficial interest at all, to which section 25[45] should apply, and cases in which that trustee has some beneficial interest.

4.24 A proposal along these lines would mean that safeguards on the grant of a power of attorney would be dispensed with, even where there was a beneficiary of the trust who was not a trustee. However, we consider that a fair balance will be maintained if the two-trustee rules are reinforced in such cases. The effect of this can be illustrated by considering a case where A and B hold land as trustees on behalf of A, B and C. A, a trustee with a beneficial interest, grants a power of attorney to B. If the land is sold, the two-trustee rule would prevent B alone from receiving the purchase price, and C will continue to have as much protection as he would have had before A granted the power of attorney.

4.25 We should add that, in order to achieve the maximum flexibility, we propose that the question whether the donor trustee has a beneficial interest in the land should be judged at the date the attorney exercises the power delegated to him. Accordingly, if a trustee/beneficiary grants a power of attorney, but later disposes of his beneficial interest, the new provisions would no longer apply. This flexibility will overcome a difficulty which is caused by the fact that section 25 only applies to existing trusts,[46] because there need be no special formalities when the power of attorney is granted and, assuming that it is sufficiently widely drawn, it can also embrace after-acquired land.

Form of Power of Attorney

4.26 In the Consultation Paper, we suggested that powers of attorney granted by trustee/beneficiaries might be governed by a special scheme. We are now persuaded that such a reform would have two major disadvantages. If a special scheme were to involve a new type of power of attorney, it would add to the complexity of the law. A further proliferation of types of power of attorney would make the authentication of powers by those who receive them regularly, for example the Land Registry and company registrars, a more burdensome responsibility. In addition, if the status of a power of attorney within the special scheme had to be determined at the outset, it would not be possible to introduce the flexibility which we consider desirable. We have therefore concluded that there should be no separate category of powers of attorney for use in these cases.

4.27 The question should be whether a power of attorney not granted under section 25 extends to a particular act in relation to the land in question. It would apply to land held by the donor as trustee if, but only if, the answer to two questions was Yes. First, is the power sufficiently widely drawn to give the necessary authority? Secondly, when the attorney wants to exercise the authority does the donor have a beneficial interest in the land?

4.28 The fact that the power of attorney must demonstrate on its face[47] that the authority delegated is sufficiently wide, emphasizes that this delegation is completely voluntary. The grantor of a power of attorney can avoid extending its effect to all or any particular trust property simply by ensuring that that property does not fall within the terms of the document. Furthermore, when a trust is established, it will be open to the settlor to provide in the trust instrument that there should be no such delegation, or to restrict the circumstances in which it could apply.

---

[44] Consultation Paper, paras. 5.6–5.8.

[45] As amended in accordance with the recommendations of this Report.

[46] Para. 3.26 above.

[47] Or by the operation of section 10 of the 1971 Act, in relation to a general power of attorney in the form prescribed by that Act.

Beneficial Interest

4.29 The beneficial interest which a trustee possesses in the trust property may be very substantial or very small. It is in the nature of interests in property that they can vary infinitely in size, and there are many different types of interest. We do not consider that it would be possible to define satisfactorily the type or extent of beneficial interests which would be required to bring a trustee within the proposed new provisions. Accordingly, we propose that a trustee with any beneficial interest should be able to delegate his trust powers with reduced safeguards whatever the nature and extent of that interest.

4.30 Although this proposal is made to tackle a problem which is caused by the provisions of legislation relating to land, appropriate new legislation will need to go somewhat further. The attorney who sells, or who joins in selling, land on behalf of a trustee with a beneficial interest will clearly need to have authority to dispose of the proceeds of sale on behalf of the donor. In some circumstances, the proper interpretation of the authority granted by a power of attorney would permit the attorney to deal with the proceeds. However, it would be better if all doubt were removed by making express statutory provision.[48] Similarly, an attorney might receive income from the land;[49] and we suggest that his statutory authority should extend to receiving the income from land and dealing with it.

Recommendations

4.31 *We accordingly recommend* that the authority granted by a power of attorney,[50] whether or not an enduring power or one granted under section 25, should extend to empowering the attorney to deal with land, the proceeds of land and the income from land, which the donor holds as trustee, during such time as the trustee is also entitled to any beneficial interest in that property. However, this rule should not apply if the trust instrument precludes the trustee from delegating his powers in this way. In addition, no power of attorney would have this effect if or to the extent that the power itself expressed a contrary intention.[51]

4.32 This recommendation will give ordinary powers of attorney not granted under section 25 a greater effect than they currently possess,[52] but it will be an effect which the donor will be able to exclude or limit by including an appropriate provision in the power of attorney. In the case of a power of attorney which was granted before the new provision takes effect, however, the grantor will not have had this opportunity to exclude or limit it even though he may not want his grant to have this effect. In addition, if the existing delegation has been made by an enduring power of attorney which has already been registered, because of the donor's incapacity, there would be a duplication with section 3(3) which will continue to apply in relation to that power of attorney.[53] For these reasons, *we recommend* that the extended effect of a power of attorney granted by a trustee with a beneficial interest in land should apply only to a power of attorney created after the new legislation takes effect.[54]

Evidence of Beneficial Interest

4.33 If, as we propose, an attorney for a trustee with a beneficial interest is to be able to act on behalf of the trustee on the authority of a power of attorney which makes no specific reference to trust property he must be able to demonstrate that he is indeed so authorised. We do not propose, however, that he should have to prove the trustee's ownership of that beneficial interest. One of the principles underlying the 1925 property legislation was to permit dealings with a legal estate in land without purchasers being concerned with any equitable interests which might exist. Those equitable interests are kept "behind the curtain". It would be an unacceptable retrograde step to introduce a procedure under which

[48] Expressly authorising the attorney to deal with the proceeds of sale would also avoid any question whether a beneficial interest is properly to be regarded as an interest in the land or, because of the doctrine of conversion, an interest in the proceeds of sale of it.

[49] Even if only apportioned rent, collected when the property was sold.

[50] Including a power of attorney in the statutory form introduced by the 1971 Act: draft Bill, clause 3.

[51] Draft Bill, clause 1(1)–(7).

[52] Section 3(3) currently extends the effect of enduring powers of attorney, but we have already concluded that this should cease: para. 3.14 above.

[53] Para. 4.4 above.

[54] Draft Bill, clause 1(8).

the equitable title to land had to be investigated before it was possible to dispose of the legal estate in it.

4.34 We consider that this difficulty can be overcome by a device which has already been used to facilitate conveyancing in a number of other circumstances:[55] by requiring the attorney to state the facts formally and allowing this statement to be relied upon in the absence of fraud. The statement could, but need not be, in a separate document; it could conveniently be included in the transfer of land sold. If it were in a separate document, we consider that there should be a limited period during which the statement could be made; the likelihood that the passage of time would impair its accuracy would then be minimised. In a case where, through inadvertence or for any other reason, no statement relying on the proposed statutory provision was made, it would still be open to the parties to establish the facts by direct evidence.

4.35 We have given careful consideration to the weight of the evidential value of such a statement. Clearly, unless it can normally be relied upon, the statement will not fulfil its intended purpose of facilitating conveyancing, by removing the need to investigate whether the trustee does indeed own a beneficial interest. On the other hand, beneficiaries must, so far as is practicable, be protected against loss resulting from fraud. The danger of fraud could arise in two ways: it could be perpetrated by the attorney selling the land or by the purchaser buying it. Taking the case of the purchaser first, we suggest that he should never be allowed to rely on a statement unless he himself is in good faith. This can be achieved in the legislation by adopting a definition[56] which applies only to a purchaser in good faith.[57]

4.36 However, if the attorney is fraudulent, stating that the grantor has a beneficial interest when he knows it is not the case, both the beneficiaries and the purchaser are likely to be innocent parties. The attorney might possibly make a false statement for convenience, merely as a means of making use of a power of attorney which would otherwise be invalid, and might faithfully account for the proceeds of sale. In such a case, his misconduct would not have caused anyone to lose money. But if he defalcates, the question is whether the loss should fall upon the innocent beneficiaries or the innocent purchaser.

4.37 In our view, the loss must fall on the beneficiaries. The suggested statutory provision is there to ensure that no unreasonable difficulty is caused in the conveyancing procedure; if a well-advised purchaser always had to make inquiries to ensure that the facts supported a statement made by an attorney, the new provision would lose all value as a simplification procedure. This support for efficient conveyancing follows statutory precedent.[58] However, a beneficiary suffering loss would not be without redress. Even assuming that any action against the attorney would be worthless, the beneficiary could also have recourse to the trustee who had selected and appointed the attorney and who would, under our proposals, remain liable for the result of the attorney's actions.[59]

4.38 *We recommend* that, in favour of a purchaser[60] in good faith, a written and signed statement of an attorney that the donor, although a trustee, also possesses a beneficial interest in the specified land (and/or, as the case may be, the proceeds of the land or the income from it) should be conclusive evidence[61] of that fact.[62] The statement should be made

[55] 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, 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).

[56] From the Law of Property Act 1925, s.205(1) (xxi).

[57] Draft Bill, clause 2(1).

[58] Section 1 of the Law of Property (Joint Tenants) Act 1964 "deems" a survivor of joint tenants to be solely and beneficially entitled if he states that he is so interested in the land, or conveys as beneficial owner. If such a statement is made fraudulently, the purchaser (in good faith) may still rely upon it, and any beneficiary whose equitable interest has been ignored will suffer loss.

[59] Draft Bill, clause 1(4).

[60] Or a lessee, mortgagee or any other party dealing with the attorney who acquires an interest in or charge on property for money or money's worth: Law of Property Act 1925, s.205(1) (xxi).

[61] Even though statute were to make a statement conclusive evidence, one which is inaccurate on its face could nevertheless be challenged: *Re Caratal (New) Mines Ltd.* [1902] 2 Ch. 498.

[62] Draft Bill, clause 2.

at the time when the attorney performs an act authorised by the power of attorney, or within the following three months.[63] Since this statement will have serious consequences, *we recommend* that any inaccuracy should be punishable to the same extent as an inaccuracy in a statutory declaration.[64]

Appointing New Trustees

4.39 One potential problem is created by the interaction of our recommendation that an enduring power of attorney granted by a trustee may be used to authorise dealings with trust property if the trustee also has a beneficial interest in it,[65] with our recommendation that the two-trustee rules should continue to apply to such cases.[66] This difficulty can be illustrated by considering the case of a sole trustee, who holds land on behalf of himself and another beneficiary. He appoints one attorney by an enduring power of attorney, giving his attorney full powers to deal with the land. He then loses mental capacity. If the attorney wishes to sell the land, he will not be able by himself to satisfy the newly-clarified rule[67] which will require the purchase money to be paid to two trustees. However, unless the trust instrument names someone else as having power to appoint new trustees – which is not very common – the only person able to do this is the donor of the power of attorney, who has already lost capacity.

4.40 There is, of course, already a procedure which can be followed in such cases, but it would normally require an application to be made to the Court of Protection.[68] One of the objectives of the 1985 Act was to provide people with a means of having their affairs managed once they had become incapable, without the necessity of involving the court. Leaving matters as they stand would therefore undermine the policy of the 1985 Act.

4.41 In our opinion, an appropriate solution to this difficulty would be to give the power of appointment of new trustees, in this limited case, to the attorney. This would allow him to appoint a second trustee, and so carry out the transaction which had been authorised, while at the same time it would provide the appropriate safeguard for any other beneficiaries. *We therefore recommend* that where an attorney is to exercise his authority to act on behalf of a sole trustee/beneficiary who has lost mental capacity, he should have the power to appoint an additional trustee.[69] The same problem could arise where there were two or three trustees of a trust, each or all of whom had delegated authority to the same attorney and each or all of whom had lost mental capacity. *We recommend* that the power to appoint an additional trustee should apply in these cases as well. The appointment would not be temporary or limited to carrying out the transaction in question; the additional trustee would be a full trustee of the trust.

Incapable Trustees for Sale

4.42 In the Consultation Paper[70] we raised the question of the possible confusion which is being caused by the existence of a statutory provision that a trustee for sale of land who is incapable, by reason of mental disorder, of exercising his functions of trustee, *shall* be replaced or discharged.[71] Clearly, there may be circumstances in which an attorney who is appointed before the onset of a trustee's disability can properly continue to act. *We recommend* that amending legislation should make this clear.[72]

---

[63] This is the time limit for a statement by the person dealing with an attorney that he does not know of the revocation of the power of attorney: 1971 Act, s.5(4)(b).

[64] Perjury Act 1911, s.5. A similar provision applies to a false declaration about previous dealings by a personal representative: Administration of Estates Act 1925, s.36(6).

[65] Para. 4.31 above.

[66] Para. 4.15 above.

[67] Taking into account our recommendation: para. 4.15 above.

[68] 1925 Act, s.36(9).

[69] Draft Bill, clause 8.

[70] Consultation Paper, paras. 3.17–3. 21.

[71] Law of Property Act 1925, s.22(2).

[72] Draft Bill, clause 9.

C. OTHER MATTERS

Interpretation of References to Land

4.43 One of the difficulties which is created by the widespread lack of understanding of the distinction between legal estates and equitable interests in land, how they may exist in parallel in the same land and how the same person can simultaneously own both types of interest, is that powers of attorney will often fail to distinguish clearly between them. A landowner may speak of "my house" even if it is jointly owned, but even if he says "our house" he is unlikely to make it clear whether he is referring to his legal, fiduciary interest in it, or to his equitable, beneficial interest.

4.44 This lack of legal precision could undermine the usefulness of our recommendation extending the effect of a power of attorney to land of which the donor is both trustee and beneficiary,[73] because the proposal would only apply where the authority granted by the power of attorney was wide enough. If, for example, the power of attorney was properly construed to be confined to the donor's beneficial interest, the statutory provision which allowed the power to extend to his fiduciary interest would have no effect. It must of course be possible for a donor who wants to impose such a restriction to do so, but it would be unfortunate if he created such a limitation unwittingly. What is needed, therefore, is a fallback provision, which will be applied in the absence of evidence of a contrary intention, to give effect to what the donor is most likely to have intended. The normal meaning of a reference to land, for someone not versed in the system of divided legal estates and equitable interests, will include all that person's interests in the land. Accordingly, *we recommend* that, in the absence of any contrary intention, a reference in a power of attorney to land belonging to the donor should be construed as a reference to every interest which he owns in that land at the date when he acts under the power.[74]

4.45 It would not be appropriate to impose a new rule of construction on existing powers of attorney which until now could have been interpreted differently. This is particularly important in the case of a rule which it is intended that a grantor should be able to exclude, because the opportunity to exclude it would not have been available to the grantor of a power of attorney created before any reforming measure comes into effect. *We therefore recommend* that this rule of construction should only be applied to powers of attorney granted after the new provision takes effect.[75]

Obsolete Provision

4.46 Subsection (3) of section 25 requires that a power of attorney be attested by at least one witness. This provision was superseded by the general provision relating to all deeds in the Law of Property (Miscellaneous Provisions) Act 1989, section 1(3).[76] As section 25(3) is now obsolete, *we recommend* that it be repealed.[77]

D. THE SCHEME ILLUSTRATED

4.47 We can now summarise our recommendations for delegation by trustees and give illustrations of how they would operate in practice.

4.48 Once our recommendations are implemented, there will be three relevant types of power of attorney, all of which already exist.

(a) *Trustee powers.* These must conform to section 25, and may, but need not, be in the statutory form introduced by the new provisions. This form of power of attorney may be used whether or not the trustee has a beneficial interest in the property; if he does, a trustee power can be used in relation to that beneficial interest, unless the contrary is stated. Trustee powers last for a maximum of one year.

(b) *Enduring powers.* These will operate under the 1985 Act (but without section 3(3)). An enduring power will extend to the donor's fiduciary interests to the same extent either as a trustee power (if it complies with the terms of section 25) or as an

[73] Para. 4.31 above.

[74] Draft Bill, clause 10(1), (2).

[75] Draft Bill, clause 10(3).

[76] A similar specific provision in the 1971 Act, s.1(2), was repealed by the 1989 Act.

[77] Draft Bill, clause 5(5).

ordinary power, but it will continue to be effective after the donor's mental incapacity. (The current requirement for registration will continue to apply).

(c) *Ordinary powers.* These may be general (whether or not in the form introduced by the 1971 Act) or more limited (for example, relating to a particular property or even to a particular transaction). They will, unless the contrary is stated, extend to the donor's fiduciary interests in any property in which he has (at the date when the power is used) a beneficial interest. This type of power will be revoked automatically when the donor ceases to have capacity.

4.49 Cases in which these powers of attorney could be used may be illustrated as follows:

(a) A and B jointly own a house, i.e. they are trustees for themselves.[78] A wishes to appoint an attorney with authority to deal with his legal, fiduciary interest. If he uses an ordinary power, his attorney may (so long as A owns a beneficial interest) act at any time until A becomes incapable. If he uses an enduring power of attorney, the authority granted can last until either A or the attorney dies. If he grants a trustee power, the authority lasts for the maximum of one year. A is entitled to appoint B, his co-trustee and the co-owner, as attorney. But in that case if B decides to sell the house, it will be necessary for someone else to join in the sale on behalf of the sellers. If A has by that time lost mental capacity, B will be able to appoint a third trustee.

(b) A and B are joint owners of a house, in which A, B and C all have beneficial interests. The position is the same as in (a).

(c) A and B jointly own a house (as in (a)) and A grants a power of attorney. Later, A disposes of his equitable interest or, because it was originally only granted for a limited period, it expires. He then no longer has a beneficial interest in the land. The only type of power of attorney which can then validly grant authority to deal with A's fiduciary interest is a section 25 power. When more than a year has passed since the power came into force, it will no longer be valid.

(d) A and B jointly own a house on behalf of C and D. A grants a power of attorney. If it is a section 25 power it can immediately be effective. Neither of the other types of power[79] can have effect in relation to A's interest in the house (which is exclusively fiduciary). Later, however, A inherits C's beneficial interest in the house. A's attorney can then deal both with A's beneficial interest and with his fiduciary interest, even though the power was granted before A became entitled to C's interest.

[78] Whether as joint tenants or as tenants in common in equity.

[79] Except an enduring power complying with the section 25 formalities.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 In this Part of the Report we summarise our recommendations. In doing so, we refer back to the paragraph in which the recommendation was made and, where appropriate, we note the provision in the draft Bill in Appendix A which would implement the recommendation.

5.2 (1) Section 3(3) should be repealed, subject to Recommendation (2).

[Paragraph 4.1; clause 4(1)]

(2) As a transitional measure, the effect of the repeal should be delayed in the case of enduring powers of attorney created before the Act came into force. If the power was registered, or an application to register it was made before the end of the first year after the Act came into force, the repeal should not apply until the registration was cancelled or while the application was pending. In other cases, the repeal should take effect one year after the Act came into force.

[Paragraph 4.4; clause 4(2)–(5)]

(3) The maximum period for which a power of attorney under section 25 may be granted should remain twelve months.

[Paragraph 4.6]

(4) The period of delegation should begin when the power of attorney specifies, or, if it is silent, when it is executed. It should end twelve months later, or earlier if the power of attorney so provides.

[Paragraph 4.9; clause 5(2), (3)]

(5) It should be possible to use an enduring power to delegate trustee functions, so long as the formalities of section 25 are complied with.

[Paragraph 4.10; clause 6]

(6) The statutory rules which require a minimum of two trustees to act[1] should not be satisfied by a single person (other than a trust corporation) acting, although a trustee and an attorney for another trustee, or joint attorneys for more than one trustee, should suffice.

[Paragraph 4.15; clause 7]

(7) The provisions in section 25 requiring notice of the grant of a power of attorney to be given, imposing liability on the donor for an attorney's acts, and prohibiting sub-delegation, should remain unchanged.

[Paragraph 4.17]

(8) A form of power of attorney for use by trustees should be introduced by statute, for use by one trustee wishing to delegate all his powers under a single trust to one attorney.

[Paragraph 4.20; clause 5(6)]

(9) While a trustee holds land and also has a beneficial interest in it, an ordinary or enduring power of attorney may authorise the attorney to act in relation to that land, the proceeds of it and the income from it. This should apply unless a contrary intention is expressed in the trust instrument or in a power of attorney.

[Paragraph 4.31; clauses 1(1)–(7), 3]

(10) Recommendation (9) should only apply to a power of attorney granted after the new Act comes into force.

[Paragraph 4.32; clause 1(8)]

[1] Para. 4.12 above.

(11) To establish that Recommendation (9) applies, a purchaser should be entitled to rely on an appropriate written statement by an attorney, made at the time when, or within three months after, he acts under a power of attorney. This statement would say that at the relevant time the donor, although a trustee, possessed a beneficial interest in specified land, the proceeds of it or the income from it. A person making an inaccurate statement should be punishable as if the statement were a statutory declaration.

[Paragraph 4.38; clause 2]

(12) An attorney for a sole trustee who has lost mental capacity, or an attorney for two or three incapable trustees, who wishes to exercise authority pursuant to Recommendation (9) should have power to appoint an additional trustee.

[Paragraph 4.41; clause 8]

(13) The present statutory provision which requires the replacement or discharge of a trustee for sale of land who, by reason of mental disorder, becomes incapable of exercising his powers as trustee, should be clarified to ensure that a duly authorised attorney may still exercise the trustee's powers.

[Paragraph 4.42; clause 9]

(14) A reference in a power of attorney to land belonging to the donor should, in the absence of contrary intention, be construed as referring to every interest which the donor owns in that land.

[Paragraph 4.44; clause 10(1), (2)]

(15) Recommendation (14) should only apply to powers of attorney granted after the new Act comes into force.

[Paragraph 4.45; clause 10(3)]

(16) The obsolete provision in section 25 which requires a power of attorney to be attested should be repealed.

[Paragraph 4.46; clause 5(5)]

(Signed) HENRY BROOKE, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
15 November 1993

APPENDIX A

Draft

Trustee Delegation Bill

ARRANGEMENT OF CLAUSES

Attorney of trustee with beneficial interest in land

DRAFT

OF A

B I L L

INTITULED

An Act to amend the law relating to the delegation of trustee functions by power of attorney and the exercise of such functions by the donee of a power of attorney; and to make provision about the authority of the donee of a power of attorney to act in relation to land. A.D. 1993.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Attorney of trustee with beneficial interest in land

Exercise of trustee functions by attorney.

1.—(1) The donee of a power of attorney is not prevented from doing an act in relation to—

(a) land,

(b) capital proceeds of a conveyance of land, or

(c) income from land,

by reason only that the act involves the exercise of a trustee function of the donor if, at the time when the act is done, the donor has a beneficial interest in the land, proceeds or income.

(2) In subsection (1) above—

(a) "conveyance" has the same meaning as in the Law of Property Act 1925, and 1925 c. 20.

(b) the reference to a trustee function of the donor is to a function which the donor has as trustee (either alone or jointly with any other person or persons).

(3) Subsection (1) above—

(a) applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney, and

(b) has effect subject to the terms of that instrument.

(4) The donor of the power of attorney—

(a) is liable for the acts or defaults of the donee in exercising any function by virtue of subsection (1) above in the same manner as if they were acts or defaults of the donor, but

EXPLANATORY NOTES

Clause 1

1. This clause implements the recommendations in paragraphs 4.31 and 4.32 of the Report by creating a further statutory exception to the common law rule that a trustee must exercise in person the functions vested in him as a trustee.

Subsection (1)

2. This subsection gives effect to the recommendation in paragraph 4.31 of the Report. It provides that, where the donee of a power of attorney would only be prevented from doing an act because doing it would involve the exercise of a function of the donor as a trustee, the donee may nevertheless do that act if:

(a) the act relates to land (as defined in clause 11(1)), the capital proceeds of a conveyance (as defined in subsection (2)) of land or the income from land; and

(b) at the time the act is done, the donor has a beneficial interest of any size or nature in the land, proceeds or income to which the act relates.

Subsection (2)

3. This subsection defines terms used in subsection (1). "Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or an interest therein by any instrument, except a will (Law of Property Act 1925, section 205(1)(ii)). A "trustee function of the donor" is one the donor has as a sole trustee or one he exercises jointly with fellow trustees.

Subsection (3)

4. This subsection implements a recommendation in paragraph 4.31 of the Report. A trustee may limit or exclude delegation under this section by making express provision in the power of attorney.

Subsection (4)

5. Paragraph (a) of this subsection makes the donor liable for what the donee does, or omits to do, as attorney. It replicates the effect of section 25(5) of the Trustee Act 1925 (see Appendix B). Paragraph (b) exonerates the donor from liability for delegating a trustee function he would otherwise have been obliged to perform personally.

(b) is not liable by reason only that a function is exercised by the donee by virtue of that subsection.

(5) Subsections (1) and (4) above—

(a) apply only if and so far as a contrary intention is not expressed in the instrument (if any) creating the trust, and

(b) have effect subject to the terms of such an instrument.

(6) The fact that it appears that in dealing with any shares or stock the donee of the power of attorney is exercising a function by virtue of subsection (1) above does not affect with any notice of any trust a person in whose books the stock is, or shares are, registered or inscribed.

(7) For the purposes of this section and section 2 below a person who, by reason of the operation of the doctrine of conversion, has a beneficial interest in the proceeds of sale of land shall be treated as having a beneficial interest in the land.

(8) This section applies only to powers of attorney created after the commencement of this Act.

Evidence of beneficial interest.

2.—(1) This section applies where the interest of a purchaser depends on the donee of a power of attorney having power to do an act in relation to any property by virtue of section 1(1) above.

1925 c. 20.

In this subsection "purchaser" has the same meaning as in Part I of the Law of Property Act 1925.

(2) Where this section applies an appropriate statement is, in favour of the purchaser, conclusive evidence of the donor of the power having a beneficial interest in the property at the time of the doing of the act.

(3) In this section "an appropriate statement" means a signed statement made by the donee—

(a) when doing the act in question, or

(b) at any other time within the period of three months beginning with the day on which the act is done,

that the donor has a beneficial interest in the property at the time of the donee doing the act.

(4) If an appropriate statement is false, the donee is liable in the same way as he would be if the statement were contained in a statutory declaration.

General powers in specified form.

1971 c. 27.

3. In section 10(2) of the Powers of Attorney Act 1971 (which provides that a general power of attorney in the form set out in Schedule 1 to that Act, or a similar form, does not confer on the donee of the power any authority to exercise functions of the donor as trustee etc.), for the words "This section" substitute "Subject to section 1 of the Trustee Delegation Act 1993, this section".

Enduring powers.

1985 c. 29.

4.—(1) Section 3(3) of the Enduring Powers of Attorney Act 1985 (which entitles the donee of an enduring power to exercise any of the donor's functions as trustee and to give receipt for capital money etc.) does not apply to enduring powers created after the commencement of this Act.

Subsection (5)

6. This subsection implements a recommendation in paragraph 4.31 of the Report. A settlor may limit or exclude delegation under this section by making express provision in the trust instrument.

Subsection (6)

7. This subsection replicates in relation to the exercise of trustee functions under subsection (1) the general effect of section 25(7) of the Trustee Act 1925 (see Appendix B) in relation to delegation under that section. It enables the bank or company in whose books shares and stocks are registered to ignore the notice of the trust which it would otherwise receive when dealing with a donee acting under subsection (1); as for example where the donee uses the proceeds of sale of land to acquire stock from a company.

Subsection (7)

8. The doctrine of conversion treats the interests of the beneficiaries under a trust for sale of land as interests in the proceeds of sale of that land rather than in the land itself (see n. 38 to para. 3.30 of the Report). This subsection ensures that, notwithstanding that doctrine, a donor who is a trustee for sale holding land for beneficiaries including himself, has a beneficial interest in the land, so that subsection (1) can apply.

Subsection (8)

9. This subsection, which prevents the section applying to powers of attorney granted before the Bill comes into force, implements the recommendation in paragraph 4.32 of the Report.

Clause 2

1. This clause implements the recommendations in paragraph 4.38 of the Report. It provides evidence to satisfy a purchaser that the donor has the necessary beneficial interest to enable subsection (1) to apply, without having to investigate the donor's equitable title.

Subsection (1)

2. This section applies to a purchaser whose interest depends on section 1 applying to a particular power of attorney. A "purchaser" is a person who, acting in good faith, acquires an interest in, or charge on, property for money or money's worth (Law of Property Act 1925, section 205(1)(xxi), as it applies to Part I of that Act).

Subsection (2)

3. This subsection provides that in favour of such a purchaser an "appropriate statement" (as defined in subsection (3)) is conclusive evidence that the donor has the necessary beneficial interest at the time the donee exercises the trustee function under clause 1. Such evidence may be displaced by fraud or inaccuracy on the face of the statement.

Subsection (3)

4. For the purpose of this section "an appropriate statement" is a signed statement made by the donee that the donor has a beneficial interest in the property at the time that the donee exercises the trustee function under clause 1. The statement must be made by the donee during the period of three months that begins with the day that the trustee function is exercised under clause 1. It could be included, for example, in a transfer of a property.

Subsection (4)

5. A donee making a false statement is liable to the penalties which apply on making a false statutory declaration under section 5 of the Perjury Act 1911: a penalty on summary conviction of imprisonment for up to six months and/or a fine not exceeding £5,000; on indictment, the penalty would be imprisonment for up to two years and/or a fine.

Clause 3

This clause amends section 10(2) of the Powers of Attorney Act 1971. The amendment is a consequence of the recommendation in paragraph 4.31 of the Report that clause 1 should apply to all powers of attorney. It allows a general power of attorney in the statutory form promulgated by the 1971 Act to delegate trustee functions in the circumstances in which section 1 applies. To this extent, it reverses the effect of *Walia* v. *Michael Naughton Ltd* [1985] W.L.R. 1115.

Clause 4

1. This clause implements the recommendations in paragraphs 4.1 and 4.4 of the Report by repealing section 3(3) of the Enduring Powers of Attorney Act 1985 subject to various transitional provisions.

Subsection (1)

2. The repeal of section 3(3) applies, without transitional provisions, to all enduring powers of attorney granted after the Bill comes into force.

(2) Section 3(3) of the Enduring Powers of Attorney Act 1985 ceases to apply to enduring powers created before the commencement of this Act— 1985 c. 29.

(a) where subsection (3) below applies, in accordance with that subsection, and

(b) otherwise, at the end of the period of one year from that commencement.

(3) Where an application for the registration of the instrument creating such an enduring power is made before the commencement of this Act, or during the period of one year from that commencement, section 3(3) of the Enduring Powers of Attorney Act 1985 ceases to apply to the power—

(a) if the instrument is registered pursuant to the application (whether before commencement or during or after that period), when the registration of the instrument is cancelled, and

(b) if the application is finally refused during or after that period, when the application is finally refused.

(4) In subsection (3) above—

(a) "registration" and "registered" mean registration and registered under section 6 of the Enduring Powers of Attorney Act 1985, and

(b) "cancelled" means cancelled under section 8(4) of that Act.

(5) For the purposes of subsection (3)(b) above an application is finally refused—

(a) if the application is withdrawn or any appeal is abandoned, when the application is withdrawn or the appeal is abandoned, and

(b) otherwise, when proceedings on the application (including any proceedings on, or in consequence of, an appeal) have been determined and any time for appealing or further appealing has expired.

Trustee delegation under section 25 of the Trustee Act 1925

5.—(1) Section 25 of the Trustee Act 1925 (delegation by power of attorney of any or all of a trustee's functions) has effect subject to the following amendments in relation to powers of attorney created after the commencement of this Act. Amendments of section 25 of the Trustee Act 1925. 1925 c. 19.

(2) In subsection (1), omit the words "for a period not exceeding twelve months".

(3) After that subsection insert—

"(1A) A delegation under this section—

(a) commences as provided by the instrument creating the power or, if the instrument makes no provision as to the commencement of the delegation, with the date of the execution of the instrument by the donor, and

(b) continues for a period of twelve months or any shorter period provided by the instrument creating the power."

Subsection (2)

3. For earlier enduring powers, this repeal takes effect one year after the Bill comes into force unless subsection (3) applies.

Subsections (3) and (4)

4. The attorney under an enduring power must apply to the Court of Protection for registration of the instrument creating the power if he has reason to believe that the donor is, or is becoming, mentally incapable (Enduring Powers of Attorney Act 1985, s.4). If an enduring power created before the Bill comes into force is registered pursuant to an application for registration made before or within a year after commencement, section 3(3) continues to apply to it while it is registered. In cases where such applications are "finally refused" (as defined in subsection (5)) section 3(3) continues to apply until final refusal.

5. The expressions used are defined in the same way as in the 1985 Act.

Subsection (5)

6. An application is deemed to be "finally refused" when the applicant has withdrawn or abandoned the application or the right to appeal has been exhausted.

Clause 5

1. This clause amends section 25 of the Trustee Act 1925 (see Appendix B) in accordance with the recommendations in paragraphs 4.5 - 4.11 and 4.16 - 4.20 of the Report.

Subsection (1)

2. This subsection provides that the amended section 25 does not apply to powers of attorney granted before the Bill comes into force.

Subsections (2) and (3)

3. These subsections implement the recommendations in paragraphs 4.6 and 4.9 of the Report by preserving the twelve month time limit on delegation. Although, subject to that maximum, a power of attorney can define the period for which it has effect, if nothing is said, it is to apply for twelve months from the date of its execution by the donor.

(4) In subsection (2), omit the words "but not" onwards (which prevent a sole co-trustee from being the donee of a power of attorney under section 25).

(5) Omit subsection (3) (which requires that an instrument creating a power of attorney under section 25 be attested by at least one witness and was superseded by the Law of Property (Miscellaneous Provisions) Act 1989).

1989 c. 34.

(6) After subsection (4) insert—

"(4A) A power of attorney given under this section by a single donor—

(a) in the form set out in subsection (4B) of this section, or

(b) in a form to the like effect but expressed to be made under this subsection,

shall operate to delegate to the person identified in the form as the single donee of the power the execution and exercise of all the trusts, powers and discretions vested in the donor as trustee (either alone or jointly with any other person or persons) under the single trust so identified.

(4B) The form referred to in subsection (4A) of this section is as follows—

"THIS GENERAL TRUSTEE POWER OF ATTORNEY is made on [*date*] by [*name of one donor*] of [*address of donor*] as trustee of [*name or details of one trust*].

I appoint [*name of one donee*] of [*address of donee*] to be my attorney [*if desired, the date on which the delegation commences or the period for which it continues (or both)*] in accordance with section 25(4A) of the Trustee Act 1925.

[*To be executed as a deed*]".

Section 25 powers as enduring powers.

6. Section 2(8) of the Enduring Powers of Attorney Act 1985 (which prevents a power of attorney under section 25 of the Trustee Act 1925 from being an enduring power) does not apply to powers of attorney created after the commencement of this Act.

1985 c. 29.

Miscellaneous provisions about attorney acting for trustee

Two-trustee rules.

7.—(1) A requirement imposed by an enactment—

(a) that capital money be paid to, or dealt with as directed by, at least two trustees or that a valid receipt for capital money be given otherwise than by a sole trustee, or

(b) that, in order for an interest or power to be overreached, a conveyance or deed be executed by at least two trustees,

is not satisfied by money being paid to or dealt with as directed by, or a receipt for money being given by, a relevant attorney or by a conveyance or deed being executed by such an attorney.

(2) In this section "relevant attorney" means a person (other than a trust corporation within the meaning of the Trustee Act 1925) who is acting either—

1925 c. 19.

(a) both as a trustee and as attorney for one or more other trustees, or

Subsection (4)

4. This subsection removes the prohibition on a sole co-trustee being the donee of a power of attorney granted under section 25.

Subsection (5)

5. This subsection implements paragraph 4.46 of the Report. Section 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 applies to any deed and requires that it be signed by the individual making it in the presence of a witness who attests the signature (or that it be signed at his direction in his presence and the presence of two witnesses who each attest the signature). No special provision for executing powers of attorney is therefore required.

Subsection (6)

6. This subsection implements the recommendation in paragraph 4.20 of the Report.

7. The new subsection (4B) sets out a prescribed form which may be used by a trustee wishing to delegate. A power of attorney differing in immaterial respects only will have the same effect as a power in the prescribed form. Such a power delegates all one trustee's functions under a specified trust to a single donee.

Clause 6

1. This clause implements the recommendation in paragraph 4.10 of the Report. The repeal of section 2(8) of the Enduring Powers of Attorney Act 1985 allows an enduring power to be used to delegate trustee functions.

Clause 7

1. This clause implements the recommendation in paragraph 4.15 of the Report. It defines when a person acting alone cannot satisfy the statutory requirements of the "two-trustee rules".

Subsection (1)

2. One person alone who is "a relevant attorney" (defined in subsection (2)) cannot satisfy a statutory requirement for two trustees in the following cases:

(a) capital monies arising from land must be paid to, or at the direction of, at least two trustees (Settled Land Act 1925, ss.18(1)(c), 94(1); Law of Property Act 1925, s.27(2));

(b) a valid receipt for such capital monies must be given otherwise than by a sole trustee (Trustee Act 1925, s.14(2)); and

(c) to overreach any powers or interests affecting a legal estate in land a conveyance or deed must be executed by at least two trustees (Law of Property Act 1925, s.2(1)(ii)).

Subsection (2)

3. "A relevant attorney" is one person acting as attorney for his sole co-trustee or for more than one trustee. A trust corporation (see note 8 to paragraph 2.5 of the Report) is an exception.

(b) as attorney for two or more trustees,

and who is not acting together with any other person or persons.

(3) This section applies whether a relevant attorney is acting under a power created before or after the commencement of this Act (but in the case of such an attorney acting under an enduring power created before that commencement is without prejudice to any continuing operation of section 3(3) of the Enduring Powers of Attorney Act 1985 after that commencement by virtue of section 4 above). 1985 c. 29.

Appointment of additional trustee by attorney. 1925 c. 19.

8.—(1) In section 36 of the Trustee Act 1925 (appointment of trustees), after subsection (6) (additional trustees) insert—

"(6A) A person who is either—

(a) both a trustee and attorney for the other trustee (if one other), or for both of the other trustees (if two others), under a registered power, or

(b) attorney under a registered power for the trustee (if one) or for both or each of the other trustees (if two or three),

and who intends to exercise any function of the trustee or trustees by virtue of section 1(1) of the Trustee Delegation Act 1993 may make an appointment under subsection (6)(b) of this section on behalf of the trustee or trustees.

(6B) In subsection (6A) of this section "registered power" means a power of attorney created by an instrument which is for the time being registered under section 6 of the Enduring Powers of Attorney Act 1985.

(6C) Subsection (6A) of this section—

(a) applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney (or, where more than one, any of them) or the instrument (if any) creating the trust, and

(b) has effect subject to the terms of those instruments."

(2) The amendment made by subsection (1) above has effect only where the power, or (where more than one) each of them, is created after the commencement of this Act.

Attorney acting for incapable trustee. 1925 c. 20.

9.—(1) In section 22 of the Law of Property Act 1925 (requirement, before dealing with legal estate vested in trustee who is incapable by reason of mental disorder, to appoint new trustee or discharge incapable trustee), after subsection (2) insert—

"(3) Subsection (2) of this section does not prevent a legal estate being dealt with without the appointment of a new trustee, or the discharge of the incapable trustee, at a time when the donee of an enduring power (within the meaning of the Enduring Powers of Attorney Act 1985) is entitled to act for the incapable trustee in the dealing."

(2) The amendment made by subsection (1) above has effect whether the enduring power was created before or after the commencement of this Act.

Subsection (3)

4. This subsection provides that clause 7 takes effect in relation to all powers of attorney whenever created. However, it does not prevent an attorney under an enduring power to which section 3(3) still applies (see clause 4) from acting pursuant to that section.

Clause 8

1. This clause implements the recommendation in paragraph 4.41 of the Report. It gives the donee of a power of attorney a limited power of appointment of new trustees in certain circumstances.

Subsection (1)

2. If all the trustees, or all other than the donee, have granted enduring power(s) of attorney and are, or are becoming, mentally incapable so that the registration provisions have taken effect, the donee who intends to exercise a trustee function under clause 1 can appoint an additional trustee (subject to not exceeding a maximum of four trustees).

Subsection (2)

3. The power to appoint a new trustee does not apply to an attorney appointed by a power granted before the commencement of the Bill.

Clause 9

1. This clause implements the recommendation in paragraph 4.42 of the Report. It amends section 22(2) of the Law of Property Act 1925 to make it clear that land held on trust for sale (whether alone or jointly) by a person who is incapable, by reason of mental disorder, of exercising his functions as a trustee may nevertheless be dealt with under an enduring power.

Authority of attorney to act in relation to land

Extent of attorney's authority to act in relation to land.

10.—(1) Where the donee of a power of attorney is authorised by the power to do an act of any description in relation to any land, his authority to do an act of that description at any time includes authority to do it with respect to any estate or interest in the land which is held at that time by the donor (whether alone or jointly with any other person or persons).

(2) Subsection (1) above—

(a) applies only if and so far as a contrary intention is not expressed in the instrument creating the power of attorney, and

(b) has effect subject to the terms of that instrument.

(3) This section applies only to powers of attorney created after the commencement of this Act.

Supplementary

Interpretation.

1925 c. 19.

1985 c. 29.

11.—(1) In this Act—

"land" has the same meaning as in the Trustee Act 1925, and

"enduring power" has the same meaning as in the Enduring Powers of Attorney Act 1985.

(2) References in this Act to the creation of a power of attorney are to the execution by the donor of the instrument creating it.

Repeals.

12. The enactments specified in the Schedule to this Act are repealed to the extent specified in the third column, but subject to the note at the end.

Short title, commencement and extent.

13.—(1) This Act may be cited as the Trustee Delegation Act 1993.

(2) This Act comes into force on such day as the Lord Chancellor appoints by order made by statutory instrument.

(3) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 10

1. This clause implements the recommendations made in paragraphs 4.44 and 4.45 of the Report.

Subsection (1)
2. A reference to land (as defined in clause 11(1)) in a power of attorney includes every estate and interest (whether legal or equitable) which the donor has in that land for the time being.

Subsection (2)
3. The donor of a power of attorney may exclude or restrict the effect of subsection (1) by expressing a contrary intention in the power.

Subsection (3)
4. The rule of interpretation does not apply to powers of attorney granted before the commencement of the Bill.

Clause 11

Subsection (1)
1. "Land" is defined for the purposes of the Bill as including land of any tenure, and mines and minerals, whether or not severed from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way, and corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land, but not an undivided share of land (Trustee Act 1925, s.68(6)).

2. In this Bill, the expression "enduring power" is defined by reference to the Enduring Powers of Attorney Act 1985, which provides that an enduring power must be granted in the prescribed form and be executed in the prescribed manner by the donor and the attorney (Enduring Powers of Attorney Act 1985,s.2(1)).

SCHEDULE

Section 12.

REPEALS

Chapter	Short title	Extent of repeal
15 & 16 Geo.5 c. 19.	The Trustee Act 1925.	In section 25— in subsection (1), the words "for a period not exceeding twelve months", in subsection (2), the words "but not" onwards, and subsection (3).
1985 c. 29.	The Enduring Powers of Attorney Act 1985.	Section 2(8). Section 3(3).

The repeal of section 3(3) of the Enduring Powers of Attorney Act 1985 has effect in accordance with section 4 of this Act and the remaining repeals have effect in relation to powers of attorney created after the commencement of this Act.

APPENDIX B

SECTION 25 OF THE TRUSTEE ACT 1925
as Amended by Section 9 of the Powers of Attorney Act 1971

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 12 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 power, 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.

APPENDIX C

Individuals and Organisations who Commented on Consultation Paper No. 118

Association of Corporate Trustees
Bank of England
Barclays Bank Trust Company Limited
Bristol Law Society
British Bankers' Association
Chancery Bar Association
Council of Her Majesty's Circuit Judges
Council of Mortgage Lenders
The Master of the Court of Protection
Professor SM Cretney, University of Bristol
Department of Trade and Industry
Mr S Gardner, Lincoln College, Oxford
Professor DJ Hayton, King's College, London
H.M. Land Registry
Holborn Law Society
Institute of Legal Executives
Law Reform Advisory Committee for Northern Ireland
Law Reform Committee of the General Council of the Bar
The Law Society
Lord Chancellor's Department
Mr DA Lush, solicitor
Mr C McCall, QC
Mr Justice Millett
Mr EG Nugee, TD, QC
Mr RT Oerton, solicitor
Official Solicitor to the Supreme Court
Mr PG Totty, solicitor
Mr RP Towns, solicitor
Mr Justice Vinelott
Mr R Walker, QC
Mr K Wallace, solicitor

Printed in the United Kingdom for HMSO

Dd 5061658, 1/94, C14 3398/1 17647 Ord 269986

LAW COMMISSION REPORT No 220 The Law of Trusts: DELEGATION BY INDIVIDUAL TRUSTEES

HMSO publications are available from:

HMSO Publications Centre
(Mail, fax and telephone orders only)
PO Box 276, London, SW8 5DT
Telephone orders 071-873 9090
General enquiries 071-873 0011
(queuing system in operation for both numbers)
Fax orders 071-873 8200

HMSO Bookshops
49 High Holborn, London, WC1V 6HB
(counter service only)
071-873 0011 Fax 071-873 8200
258 Broad Street, Birmingham, B1 2HE
021-643 3740 Fax 021-643 6510
33 Wine Street, Bristol, BS1 2BQ
0272 264306 Fax 0272 294515
9–21 Princess Street, Manchester, M60 8AS
061-834 7201 Fax 061-833 0634
16 Arthur Street, Belfast, BT1 4GD
0232 238451 Fax 0232 235401
71 Lothian Road, Edinburgh, EH3 9AZ
031-228 4181 Fax 031-229 2734

HMSO's Accredited Agents
(see Yellow Pages)

and through good booksellers

ISBN 0-10-211094-8

9 780102 110944

HMSO