

## CHAPTER 5

**LEGALITY OF OBJECT OF TRUST****2. TRUSTS AGAINST THE POLICY OF THE LAW****Conditions in restraint of marriage**

- 5–13** NOTE 50. AT THE END ADD: In England a provision terminating a beneficiary's interest in the event of his marriage outside a specified religious faith has been upheld: *Hodgson v Halford* (1879) 11 Ch.D. 959. In the United States, though such a provision may be void, a provision under which a person does not become a beneficiary of the trust at all if he has previously married outside a specified religious faith is valid since it does not seek to restrain that person's future decisions about marriage: *Re Estate of Feinberg* (2009) 235 Ill 2d 256; (2010–11) 13 I.T.E.L.R. 21, Illinois SC.

**Name and arms clause**

- 5–17** NOTE 61. AT THE END ADD: See too *Howard v Howard-Lawson* [2011] EWHC 63 (Ch); [2011] All E.R. (D) 172 (Jan).

**Trusts created to facilitate an unlawful and fraudulent ulterior purpose**

- 5–30** AT THE END OF THE TEXT ADD: For further proposals for reform, see Law Commission Consultation Paper No.189 on the Illegality Defence (2009) and Law Commission Report No.320 on the Illegality Defence (2010). By its 2010 Report, the Law Commission proposes to abolish the reliance principle established by *Tinsley v Milligan*<sup>96a</sup> described in §§ 5–31 to 5–33 and to replace it by provisions conferring a statutory discretion on the court. The court is to have a discretion where a trust arrangement is created in order to conceal the beneficiary's interest in the trust property in connection with a criminal purpose, whether or not the criminal purpose has been acted upon, whether it is the beneficiary or the trustee who intends to use the trust arrangement to conceal the real ownership of the trust property and

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<sup>96a</sup> [1994] 1 A.C. 340, HL. The application of the reliance principle under the existing law to express trusts is considered in Law Commission Consultation Paper No.189 on the Illegality Defence (2009) at §§ 6.37 to 6.51.

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when the trust arrangement is created for other purposes in addition to concealment of the real ownership. The statutory discretion is also to apply where the intention to use the trust arrangement to conceal the beneficial ownership for a criminal purpose was formed after the trust was made, but only where the beneficiary has taken steps to ensure that the trust arrangement continues in place so that the concealment can be made, and the criminal purpose has been carried out by the beneficiary or by someone else with the beneficiary's consent. In a case where the statutory discretion applies, the court is to declare the intended beneficiary entitled to the equitable interest under the trust but has a discretion, exercisable in exceptional circumstances, to determine that the beneficiary ought not to be entitled to enforce the interest and that the interest should instead vest in the legal owner or, in a case where the settlor and the beneficiary are different people, or if there is another beneficiary, in the legal owner, settlor or another beneficiary.

**5-31** NOTE 1. AT THE END ADD: See too *Poojary v Kotecha* [2002] All E.R. (D) 154 (May).

NOTE 2. AT THE END ADD: *Barrett v Barrett* [2008] EWHC 1061 (Ch); [2008] B.P.I.R. 817.

**5-32** NOTE 5. AT THE END ADD: The presumption of advancement is prospectively abolished by Equality Act 2010, s.199. See §§ 9-03A and 9-03B (online supplement).

### 3. PERPETUITIES

#### The rule against perpetuities

**5-35** DELETE THE LAST SENTENCE OF THE TEXT AND N.14 AND REPLACE BY: The Perpetuities and Accumulations Act 2009,<sup>14</sup> which came into force on April 6, 2010,<sup>14a</sup> makes further modifications to the common law rule, principally in relation to most instruments taking effect after the commencement of the 2009 Act, but also in one respect, under section 12 of the 2009 Act, in relation to pre-commencement instruments.<sup>14b</sup> The 2009 Act restricts the

<sup>14</sup> The 2009 Act implements with modifications proposals made by Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998).

<sup>14a</sup> Perpetuities and Accumulations Act 2009, s.22; Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37).

<sup>14b</sup> See § 5-36A (online supplement).

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operation of the rule against perpetuities<sup>14c</sup> so that it applies only to trusts, powers of appointment and executory bequests.<sup>14d</sup>

AFTER § 5–35 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADINGS:

**The three perpetuity regimes**

**5–35A** Consequently, there are now three perpetuity regimes applicable to trusts:

- (1) *The common law rule regime.* Under this regime the common law rule as modified by section 12 of the 2009 Act has effect.
- (2) *The 1964 Act regime.* Under this regime the common law rule as modified by the 1964 Act and section 12 of the 2009 Act has effect.
- (3) *The 2009 Act regime.* Under this regime the common law rule as modified by the 2009 Act (except section 12) has effect.

*Which perpetuity regime applies*

**5–35B** The common law rule regime applies to following instruments:

- (1) the will or codicil of a testator who died before July 16, 1964;<sup>14e</sup>
- (2) a lifetime instrument taking effect before July 16, 1964;<sup>14f</sup> and
- (3) an instrument made on or after July 16, 1964 in the exercise of a special power of appointment as defined by the 1964 Act<sup>14g</sup> created by an instrument taking effect before July 16, 1964.<sup>14h</sup>

<sup>14c</sup> Perpetuities and Accumulations Act 2009, s.1(1).

<sup>14d</sup> Perpetuities and Accumulations Act 2009, s.1(2)–(8), and for exceptions see s.2 and s.3. See §§ 5–35D to 5–35H (online supplement). For exceptions, see Perpetuities and Accumulations Act 2009, ss. 2 and 3; § 5–92A (online supplement).

<sup>14e</sup> This is the effect of Perpetuities and Accumulations Act 1964, s.15(5), read with s.15(2); Perpetuities and Accumulations Act 2009, s.15(2)(a) and s.20(7).

<sup>14f</sup> This is the effect of Perpetuities and Accumulations Act 1964, s.15(5); Perpetuities and Accumulations Act 2009, s.15(2)(b).

<sup>14g</sup> Perpetuities and Accumulations Act 1964, s.7 and s.15(2). See §§ 5–84A and 5–85 (online supplement).

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The 1964 Act regime applies to the following instruments, other than an instrument within sub-paragraph (3) above:

- (4) the will or codicil made before July 16, 1964 of a testator who dies on or after that date;<sup>14i</sup>
- (5) the will or codicil made on or after July 16, 1964 but before April 6, 2010 of a testator dying on, before or after April 6, 2010;<sup>14j</sup>
- (6) a lifetime instrument made on or after July 16, 1964 but before April 6, 2010;<sup>14k</sup> and
- (7) an instrument made on or after April 6, 2010 in the exercise of a special power of appointment as defined by the 2009 Act<sup>14l</sup> created by an instrument taking effect before April 6, 2010.<sup>14m</sup>

The 2009 Act regime applies to the following instruments, other than an instrument within sub-paragraph (3) or (7) above:

- (8) a will or codicil executed on or after April 6, 2010 (but not the will or codicil made before April 6, 2010 of a testator who dies on or after that date);<sup>14n</sup> and

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<sup>14h</sup> This is the effect of Perpetuities and Accumulations Act 1964, s.15(5), read with s.15(2); Perpetuities and Accumulations Act 2009, s.15(2)(a) and s.20(7).

<sup>14i</sup> Perpetuities and Accumulations Act 1964, s.15(5), read with s.15(2); Perpetuities and Accumulations Act 2009, s.15(2)(a) and (b) and s.20(7).

<sup>14j</sup> Perpetuities and Accumulations Act 1964, s.15(5), read with s.15(2); Perpetuities and Accumulations Act 2009, s.15(2)(a) and s.20(7); Perpetuities and Accumulations Act 1964, s.15(5A)(a), inserted by Perpetuities and Accumulations Act 2009, s.16.

<sup>14k</sup> Perpetuities and Accumulations Act 1964, s.15(5); Perpetuities and Accumulations Act 1964, s.15(5A), inserted by Perpetuities and Accumulations Act 2009, s.16; Perpetuities and Accumulations Act 2009, s.15(1) and s.15(2)(a).

<sup>14l</sup> Perpetuities and Accumulations Act 2009, s.11 and s.20(2). See §§ 5–84C and 5–85 (online supplement).

<sup>14m</sup> Perpetuities and Accumulations Act 1964, s.15(5) read with s.15(2); Perpetuities and Accumulations Act 1964, s.15(5A)(b), inserted by Perpetuities and Accumulations Act 2009, s.16; Perpetuities and Accumulations Act 2009, s.15(1)(b), s.15(2) and s.20(7). This differs from the recommendation made by the Law Commission in its Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at 8.23.

<sup>14n</sup> Perpetuities and Accumulations Act 1964, s.15(5A)(a), inserted by Perpetuities and Accumulations Act 2009, s.16; Perpetuities and Accumulations Act 2009, s.15(1), s.15(1)(a), s.15(2)(a) and s.20(7).

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- (9) a lifetime instrument made on or after April 6, 2010.<sup>14o</sup>

If a disposition is made otherwise than by an instrument, the 1964 Act applies, and if provision is made in relation to property otherwise than by an instrument, the 2009 Act applies, as if the disposition or provision had been contained in an instrument taking effect when the disposition or provision was made.<sup>14p</sup>

**5-35C** The same perpetuity regime does not necessarily apply to all the trusts and powers in the same settlement. For example, if an addition is made by the settlor on or after April 6, 2010 to a settlement made before that date but after July 16, 1964, whether by an instrument of addition, or oral provision directing the added property to be held as an addition to the trust fund, then the 1964 Act regime would apply to the original trust fund and the property representing it, while the 2009 Act regime would apply to the additional trust fund and the property representing it. And if there is a variation on or after April 6, 2010 of a settlement made before July 16, 1964 by agreement between the beneficiaries and the trustees, or by a variation approved under the Variation of Trusts Act 1958,<sup>14q</sup> of the trusts of part of the trust fund, or some but not all of the trusts, the 2009 Act regime will apply to the part of the trust subject to the variation or the trusts so far as varied, while the common law rule regime will continue to apply to the unvaried part of the trusts and the unvaried trusts. But where a variation is effected on or after April 6, 2010 by an exercise of a special power of appointment created before that date, the variation will, contrary to the recommendations of the Law Commission,<sup>14r</sup> be subject to the same regime as that applicable to the instrument creating the power and not to the 2009 Act regime.<sup>14s</sup>

#### **Application of the rule against perpetuities under the 2009 Act**

**5-35D** Section 1(1) of the 2009 Act provides that the rule against perpetuities applies (and applies only) as provided by section 1 of the 2009 Act. So far as trusts and powers are concerned,

<sup>14o</sup> Perpetuities and Accumulations Act 1964, s.15(5A), inserted by Perpetuities and Accumulations Act 2009, s.16; Perpetuities and Accumulations Act 2009, s.15(1) and s.15(2). The different language used in the two provisions does not appear to be of practical significance.

<sup>14p</sup> Perpetuities and Accumulations Act 1964, s.15(6); Perpetuities and Accumulations Act 2009, s.19.

<sup>14q</sup> See § 45-57 (including online supplement).

<sup>14r</sup> Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at § 8.23.

<sup>14s</sup> See § 5-35B(3) and (7) (online supplement).

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and subject to exceptions contained in sections 2 and 3 of the 2009 Act, the rule applies to the following instruments:<sup>14t</sup>

*Successive estates or interests*

**5–35E** Section 1(2) of the 2009 Act provides:

“If an instrument limits property in trust so as to create successive estates or interests the rule applies to each of the estates or interests.”

For these purposes an estate or interest includes an estate or interest which arises under a right of reverter on the determination of a determinable fee simple, or under a resulting trust on the determination of a determinable interest.<sup>14u</sup>

*Estates or interests subject to a condition precedent*

**5–35F** Section 1(3) of the 2009 Act provides:

“If an instrument limits property in trust so as to create an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests, the rule applies to the estate or interest.”

This category may include the interests of beneficiaries under a discretionary trust.<sup>14v</sup>

*Estates or interests subject to a condition subsequent*

**5–35G** Section 1(4) of the 2009 Act provides:

“If an instrument limits property in trust so as to create an estate or interest which is subject to a condition subsequent, the rule applies to—

(a) any right of re-entry exercisable if the condition is broken, or

<sup>14t</sup> For the purposes of the 2009 Act, an instrument includes an trust or other provision relating to property: see Perpetuities and Accumulations Act 2009, s.19.

<sup>14u</sup> Perpetuities and Accumulations Act 2009, s.1(7). See § 5–84A (online supplement).

<sup>14v</sup> Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at § 3.3. If not, the relevant category for such interests is s.1(6) (powers of appointment), see § 5–84C.

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- (b) any equivalent right exercisable in the case of property other than land if the condition is broken.”

The remoteness of a condition subsequent does not render the estate or interest void, but rather renders the rights ensuing from a breach of the condition void and thereby frees the estate or interest from the condition. The rights ensuing from a breach of a condition subsequent are, however, subject to wait and see provisions so that they will take effect if exercised during the perpetuity period under the 2009 Act.<sup>14w</sup>

*Powers of appointment*

**5–35H** Section 1(6) of the 2009 Act provides:

“If an instrument creates a power of appointment the rule applies to the power.”

Powers of appointment are considered later.<sup>14x</sup>

**Traditional perpetuity period**

**5–36** DELETE THE FIRST SENTENCE OF THE TEXT AND NN.15 AND 16 AND REPLACE BY: Except for dispositions subject to the 1964 Act regime where an alternative period is chosen,<sup>15</sup> and except for dispositions subject to the 2009 Act regime,<sup>15a</sup> the perpetuity period allowed is a life or any number of lives in being at the creation of the trust, plus 21 years, plus any actual periods of gestation.<sup>16</sup>

**Alternative periods**

**5–37** DELETE THE FIRST SENTENCE OF THE TEXT AND N.21 AND REPLACE BY: Where a disposition is subject to the 1964 Act regime and the instrument by which the disposition is made so

<sup>14w</sup> Perpetuities and Accumulations Act 2009, s.7(3) and (4).

<sup>14x</sup> See §§ 5–84B *et seq* (online supplement).

<sup>15</sup> See § 5–37.

<sup>15a</sup> See § 5–37A (online supplement).

<sup>16</sup> See *Duke of Norfolk’s Case* (1683) 3 Ch. Ca. 1 at 20, 28 and 48.

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provides, the perpetuity period, instead of being of any other duration, is of a duration equal to such number of years not exceeding 80 as is specified in that behalf in the instrument.<sup>21</sup>

AFTER § 5–37 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADINGS:

**Section 12 of the 2009 Act—pre-commencement instruments**

**5–37A** Where the common law rule regime applies to an instrument, and where the 1964 Act regime applies and no alternative period has been chosen,<sup>24a</sup> section 12(1) of the 2009 Act confers a power on the trustees, if certain conditions are satisfied, to apply section 12(2) of the 2009 Act so that the trusts of the instrument become subject to a 100-year perpetuity period and to other rules concerning perpetuities (but not accumulations) taking effect under the 2009 Act regime. Section 12 does not apply if the terms of the trust were exhausted before April 6, 2010<sup>24b</sup> or became held on trust for charitable purposes by way of a final disposition of the property.<sup>24c</sup>

*Conditions for the exercise of the trustees’ power*

**5–37B** Three conditions must be satisfied. The first two conditions, contained in section 12(1)(a) and (b) of the 2009 Act, are as follows:

“If—

- (a) an instrument specifies for the purposes of property limited in trust a perpetuity period by reference to the lives of persons in being when the instrument takes effect,
- (b) the trustees believe that it is difficult or not reasonably practicable for them to ascertain whether the lives have ended and therefore whether the perpetuity period has ended, ...”

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<sup>21</sup> Perpetuities and Accumulations Act 1964, s.1. The rule applies also to a disposition made otherwise than by an instrument as if contained in an instrument taking effect when the disposition was made: s.15(6), and see § 5–35B (online supplement).

<sup>24a</sup> Perpetuities and Accumulations Act 2009, s.15(2); and see §§ 5–35A and 5–35B (online supplement).

<sup>24b</sup> Perpetuities and Accumulations Act 2009, s.15(3)(a). April 6, 2010 is the date of commencement, see s.22 and Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37).

<sup>24c</sup> Perpetuities and Accumulations Act 2009, s.15(3)(b).

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The third condition concerns the mode of exercise of the power and is considered in § 5–37C (online supplement). An example of an instrument satisfying the first condition is a trust utilising a royal lives clause.<sup>24d</sup> The wording of the second condition is odd in two related ways. The first oddity is the use of the word “therefore”. The end of the lives is most unlikely to be coterminous with the end of the perpetuity period. Normally the perpetuity period will end 21 years after the death of the last surviving measuring life. There may be difficulty in ascertaining whether the lives have ended, but no difficulty in ascertaining whether the perpetuity period has ended. That would be so where it is known that a measuring life, possibly but not certainly the last, has died within the last 21 years. The second oddity is the use of the past tense (twice) in the phrase “whether the lives have ended and therefore whether the perpetuity period has ended”. Though this derives from a bill drafted by the Law Commission, the use of the past tense does not accord with the recommendation of the Law Commission. The recommendation was that it would be sufficient for the trustees to believe that it is difficult or impracticable to ascertain the existence or whereabouts of the measuring lives in being so that they could not determine the date at which the perpetuity period would come to an end.<sup>24e</sup> The trustees might have such a belief, for example, in the case of a settlement made in 1927 using a perpetuity period expiring 21 years after the death of the last surviving descendant of Queen Victoria living at the date of the settlement. But on a literal reading the second condition could not be satisfied in the case of such a settlement since at least one of the measuring lives (namely the present Queen) is still living and so the trustees could not believe that there is any difficulty at all in ascertaining whether the lives *have* ended, nor could they believe that there is any difficulty at all in ascertaining whether the perpetuity period *has* ended until 21 years after the death of the present Queen. If read literally, the second condition is both odd and very restrictive and arguably it should be given a purposive construction so as to accord with the Law Commission’s recommendation.

*Exercise of the power*

**5–37C** If the conditions considered above are satisfied, the trustees may exercise the power conferred by section 12(1) of the 2009 Act by deed stating that they believe that it is difficult or not

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<sup>24d</sup> See § 5–42.

<sup>24e</sup> Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at §§ 8.19 and 8.20.

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reasonably practicable to ascertain whether the lives have ended and therefore whether the perpetuity period has ended, and stating that section 12(2) is to apply to the instrument.<sup>24f</sup> The power conferred by section 12(1) is conferred on the trustees by virtue of their office and so is a fiduciary power which must be exercised in the best interests of the beneficiaries.<sup>24g</sup> It is thought that material factors for the trustees to take into consideration are the degree of difficulty in ascertaining whether the lives have ended, the effect of the exercise of the power on beneficial interests, the effect of the exercise of the power on potential unborn and unascertained beneficiaries, possible alternative methods of resolving any uncertainty arising whether through the exercise of other powers or agreement between the beneficiaries, and the tax position. It is to be noted that in some circumstances an exercise of the power could have a dramatic, even perverse, effect on beneficial interests, as where the effect of the imposition of a 100-year perpetuity period is to eliminate the interests of beneficiaries who are bound to take under the existing trusts and to vest the interests of beneficiaries whose interests are bound to fail under the existing trusts.<sup>24h</sup> It is doubtful whether the power could be properly exercised in such circumstances.

*Which trustees are to exercise the power*

**5-37D** In view of the way section 12(1) of the 2009 Act is worded, it seems that all trustees must execute the deed even if the terms of the trust authorise the trustees to act by majority. In view of the wording of the power and the terms of section 12(2) it seems doubtful whether, in a case where separate sets of trustees have been appointed for different funds held under different trusts contained in the same instrument, one set of trustees can exercise the section 12(1) power as regards the separate trusts.

*Effect of exercise of the power*

**5-37E** The exercise of the power in relation to a pre-commencement instrument causes the instrument to have effect as if it had specified a perpetuity period of 100 years (and no other period),<sup>24i</sup> and the rule against perpetuities has effect as if the only perpetuity applicable to the

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<sup>24f</sup> Perpetuities and Accumulations Act 2009, s.12(1)(c).

<sup>24g</sup> See § 29-19; Parliamentary Explanatory Notes, § 66.

<sup>24h</sup> See supplementary memorandum by Lord Millett filed in HL Appeal Committee Minutes of Evidence on the Perpetuities and Accumulations Bill dated June 9, 2009.

<sup>24i</sup> Perpetuities and Accumulations Act 2009, s.12(2)(a).

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instrument were 100 years.<sup>24j</sup> Further, the provisions in the 2009 Act concerning the start of the perpetuity period,<sup>24k</sup> the wait and see rule,<sup>24l</sup> the exclusion of class members to avoid remoteness,<sup>24m</sup> the saving of expectant interests,<sup>24n</sup> determinable interests<sup>24o</sup> and powers of appointment<sup>24p</sup> apply to the instrument<sup>24q</sup> in place of the corresponding provisions in the 1964 Act (if otherwise applicable).<sup>24r</sup>

**The perpetuity period under the 2009 Act**

**5-37F** Section 5(1) of the 2009 Act provides that:

“The perpetuity period is 125 years (and no other period).”

The perpetuity period applies to an instrument subject to the 2009 Act regime whether or not the instrument specifies a perpetuity period, and a specification of a perpetuity period in the instrument is ineffective.<sup>24s</sup> Although the perpetuity period is fixed there is no reason why a trust should not contain interests or powers which will vest within a shorter period, whether or not by reference to lives. For instance, if it is contemplated that property might be transferred into a trust subject to the 2009 Act regime from a trust subject to the common law rule regime, a provision for a trust period ending on the date of expiry of a period of 125 years from and including the date of the trust instrument, or the date of expiry of a period of 21 years commencing on the death of the last survivor of lives in being at the date of the creation of the proposed transferor trust, whichever is the earlier, would ensure that the trust period complied both with the perpetuity period applicable to the trust subject to the 2009 Act regime and with the common law perpetuity period applicable<sup>24t</sup> to the property received from the proposed transferor trust.

*Start of the perpetuity period*


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<sup>24j</sup> *ibid.*, s.12(2)(b).

<sup>24k</sup> *ibid.*, s.6. See § 5-37G (online supplement).

<sup>24l</sup> *ibid.*, s.7. See § 5-38A (online supplement).

<sup>24m</sup> *ibid.*, s.8. See § 5-71A (online supplement).

<sup>24n</sup> *ibid.*, s.9. See § 5-78A (online supplement).

<sup>24o</sup> *ibid.*, s.10. See § 5-84A. (online supplement)

<sup>24p</sup> *ibid.*, s.11. See § 5-85A (online supplement).

<sup>24q</sup> *ibid.*, s.12(2)(c).

<sup>24r</sup> *ibid.*, s.12(2)(d).

<sup>24s</sup> *ibid.*, s.5(2).

<sup>24t</sup> See § 5-90.

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**5–37G** The 125-year perpetuity period starts when the instrument containing the relevant interest takes effect,<sup>24u</sup> or, if that instrument is made in exercise of a special power of appointment, when the instrument creating the power takes effect.<sup>24v</sup> Special rules apply to pension schemes.<sup>24w</sup> A will takes effect on the death of the testator.<sup>24x</sup> A deed will take effect when it has been signed and unconditionally delivered by all necessary parties. It is thought that the fact that a deed is revocable by the settlor makes no difference to the time when it takes effect and hence does not suspend the commencement of the perpetuity period.<sup>24y</sup> However, should beneficiaries contract to concur in a variation of beneficial interests if certain conditions become satisfied, for instance if the variation is approved on behalf of other beneficiaries under the Variation of Trusts Act 1958, the relevant instrument will be the instrument effecting the variation and the perpetuity period will start when that instrument is made,<sup>24z</sup> not the earlier time when the contract is made, since the contract by itself does not limit property in trust.

**The time to apply the rule**

**5–38** AT THE END OF THE TEXT ADD: The wait and see rule under section 3(1) of the 1964 Act applies only to dispositions subject to the 1964 Act regime.<sup>29a</sup>

AFTER § 5–38 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Wait and see under the 2009 Act*

**5–38A** Instruments within the 2009 Act regime are subject to a similar wait and see rule to that which is contained in section 3(1) of the 1964 Act considered above. The corresponding provisions of the 2009 Act are contained in section 7(1) and (2) which provide as follows:

<sup>24u</sup> Perpetuities and Accumulations Act 2009, s.6(1). Instrument includes an oral trust or other provision relating to property, see s.19.

<sup>24v</sup> *ibid.*, s.6(2).

<sup>24w</sup> See § 5–35B (online supplement).

<sup>24x</sup> Perpetuities and Accumulations Act 2009, s.20(6).

<sup>24y</sup> Compare § 5–92 as to the start of the perpetuity period under the common law rule.

<sup>24z</sup> See § 45–57 (including online supplement).

<sup>29a</sup> See §§ 5–35A and 5–35B (online supplement).

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- “(1) Subsection (2) applies if (apart from this section and section 8)<sup>29b</sup> an estate or interest would be void on the ground that it might not become vested until too remote a time.
- (2) In such a case—
- (a) until such time (if any) as it becomes established that the vesting must occur (if at all) after the end of the perpetuity period the estate or interest must be treated as if it were not subject to the rule against perpetuities, and
- (b) if it becomes so established, that does not affect the validity of anything previously done (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.”

Although these provisions are similar to those in the 1964 Act, they apply in a different way in that waiting under the 1964 Act is (if there is no fixed perpetuity period) by reference to a period of statutory lives,<sup>29c</sup> while the waiting under the 2009 Act is by reference to the 125-year perpetuity period<sup>29d</sup> applicable under the 2009 Act. The wait and see rule under the 2009 Act is therefore simpler to operate than the wait and see rule under the 1964 Act, though the period of waiting under the 2009 Act may well be substantially longer than under the 1964 Act. The wait and see rules under the 2009 Act concerning conditions subsequent and powers of appointment are considered elsewhere.<sup>29e</sup>

**Lives in being for the common law period**

*No lives expressly chosen*

- 5-41** NOTE 37. For the reference to Megarry and Wade, *The Law of Real Property*, see now (7th edn), §§ 9-044, 9-045.

<sup>29b</sup> See § 5-71A (online supplement) as to Perpetuities and Accumulations Act 2009, s.8.

<sup>29c</sup> See §§ 5-43 to 5-55 as to the statutory lives in being for the purpose of the wait and see rule under the 1964 Act.

<sup>29d</sup> See §§ 5-37E and 5-37F (online supplement).

<sup>29e</sup> See §§ 5-35G, 5-86A and 5-89A (online supplement).

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**Child-bearing age***Under statute*

- 5–60** NOTE 63. DELETE AND REPLACE BY: She would be its mother and her husband its father under Human Embryology and Fertilisation Act 2008, which is retrospective, see §§ 6–19A to 6–19E (online supplement).

AFTER § 5–61 INSERT THE FOLLOWING NEW PARAGRAPH:

- 5–61A** The provisions of section 2 of the 1964 Act considered in §§ 5–59 to 5–60 apply only to dispositions subject to the 1964 Act regime.<sup>64a</sup> There are no provisions corresponding to section 2 of the 1964 Act under the 2009 Act regime since the 125-year perpetuity period under the 2009 Act<sup>64b</sup> is not referable to lives in being.<sup>64c</sup>

**Gifts at ages over twenty-one**

- 5–70** AT THE END OF THE TEXT ADD: Section 4(1) of the 1964 Act applies only to dispositions subject to the 1964 Act regime.<sup>18a</sup> There is no provision corresponding to section 4(1) under the 2009 Act regime since the 125-year perpetuity period under the 2009 Act<sup>18b</sup> is not referable to lives in being.<sup>18c</sup> The omission of any corresponding provision in the 2009 Act means, however, that a gift to a person at an age which he will attain, if at all, after the end of the 125-year perpetuity period will fail and not be saved by reduction to a younger age. This omission will have a significant impact in cases where a gift in favour a person who is born towards the end of the perpetuity period is contingent on attainment of some age such as the age of 25 but the gift fails to provide for vesting of the gift if that person is living and under the age at the end of the perpetuity period.

<sup>64a</sup> See §§ 5–35A and 5–35B (online supplement).

<sup>64b</sup> See §§ 5–37E and 5–37F (online supplement).

<sup>64c</sup> See Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at §§ 8.27 and 8.29.

<sup>18a</sup> See §§ 5–35A and 5–35B (online supplement).

<sup>18b</sup> See §§ 5–37E and 5–37F (online supplement).

<sup>18c</sup> See Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at §§ 8.27 and 8.29.

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**Excluding members to save class gifts**

**5-71** AT THE END OF THE TEXT ADD: Section 4(3) and (4) of the 1964 Act apply only to dispositions subject to the 1964 Act regime.<sup>20a</sup>

AFTER § 5-38 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Exclusion of class members to avoid remoteness under the 2009 Act*

**5-71A** There is no provision corresponding to section 4(3) of the 1964 Act under the 2009 Act regime, since section 4(3) is dependent on the age reduction provisions considered in § 5-70.<sup>20b</sup> Section 8 of the 2009 Act does, however, substantially reproduce the effect of section 4(4) of the 1964 Act. Section 8(1) and (2) provide as follows:

- “(1) This section applies if—
- (a) it is apparent at the time an instrument takes effect or becomes apparent at a later time that (apart from this section) the inclusion of certain persons as members of a class would cause an estate or interest to be treated as void for remoteness, and
  - (b) those persons are potential members of the class or unborn persons who at birth would become members or potential members of the class.
- (2) From the time it is or becomes so apparent those persons must be treated as excluded from the class unless their exclusion would exhaust the class.”

For the purposes of section 8, a person is a member of a class if in that person’s case all the conditions identifying a member of the class is satisfied,<sup>20c</sup> and a person is a potential member of a class if in that person’s case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.<sup>20d</sup> Section 8 takes effect subject to the wait and see provisions in section 7 of the 2009 Act and so will become operative only if section 7 fails wholly to save the gift from invalidity. Note that where an age condition must be satisfied, it will be possible to determine at the outset that members of the class born after a

<sup>20a</sup> See §§ 5-35A and 5-35B (online supplement).

<sup>20b</sup> See Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at §§ 8.27 and 8.29.

<sup>20c</sup> Perpetuities and Accumulations Act 2009, s.8(4)(a).

<sup>20d</sup> *ibid.*, s.8(4)(b).

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certain date cannot take and so cannot be saved by the operation of section 7. For instance, if there is a condition of attainment of the age of 25 years, then no member of the class born more than 100 years after the time when the instrument took effect could take, and there is no reduction in the age so as to allow such persons to take. Where, however, section 7 is capable of operating so as to prevent exclusion from a class under section 8, for example where the contingency is marriage, section 8 does not affect the validity of anything done during the wait and see period (whether by way of advancement, application of intermediate income or otherwise) in relation to the estate or interest.<sup>20e</sup> In view of the length of the perpetuity period under the 2009 Act, section 8 is unlikely to become of practical significance for many years.

**After-born spouses**

**5–72** AT THE END OF THE TEXT ADD: Section 5 of the 1964 Act applies only to dispositions subject to the 1964 Act regime.<sup>20f</sup> There is no corresponding provision under the 2009 Act regime since the 125-year perpetuity period under the 2009 Act<sup>20g</sup> is not referable to lives in being.<sup>20h</sup> It is theoretically possible, but improbable, that a person who is living at the commencement of the 125-year perpetuity period under the 2009 Act will leave a spouse living at the end of that period, and the great majority of gifts of the kind at which section 5 of the 1964 Act were directed will in the case of instruments subject to the 2009 Act regime be saved by the wait and see provisions in section 7 of the 2009 Act.

**Subsequent trusts***Invalidity by contagion*

**5–78** AT THE END OF THE TEXT ADD: Section 6 of the 1964 Act applies only to dispositions subject to the 1964 Act regime.<sup>28a</sup>

<sup>20e</sup> *ibid.*, s.8(3).

<sup>20f</sup> See §§ 5–35A and 5–35B (online supplement).

<sup>20g</sup> See §§ 5–37E and 5–37F (online supplement).

<sup>20h</sup> See Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998) at §§ 8.27 and 8.29.

<sup>28a</sup> See §§ 5–35A and 5–35B (online supplement).

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AFTER § 5–78 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Avoiding invalidity by contagion under the 2009 Act*

**5–78A** Section 9 of the 2009 Act, however, substantially reproduces the effect of section 6 of the 1964 Act. Section 9 provides as follows:

- “(1) An estate or interest is not void for remoteness by reason only that it is ulterior to and dependent on an estate or interest which is so void.
- (2) The vesting of an estate or interest is not prevented from being accelerated on the failure of a prior estate or interest by reason only that the failure arises because of remoteness.”

**Terminable interests and resulting trusts**

**5–84** FIRST SENTENCE. DELETE THE REFERENCE TO post-June 15, 1964 provisions AND REPLACE BY A REFERENCE TO post-July 15, 1964 dispositions.

THIRD SENTENCE. DELETE THE REFERENCE TO a post-June 15, 1964 conveyance AND REPLACE BY A REFERENCE TO a post-July 15, 1964 conveyance.

AT THE END OF THE TEXT ADD: Section 12 of the 1964 Act applies only to dispositions subject to the 1964 Act regime.<sup>47a</sup>

AFTER § 5–84 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADINGS:

**5–84A** A similar effect to section 12 of the 1964 is produced by section 10 of the 2009 Act, read with section 1(2) and (7),<sup>47b</sup> and section 7(1) and (2),<sup>47c</sup> of the 2009 Act. In view of section 1(2) and (7) of the 2009 Act, an interest which arises under a right of reverter on the determination of a determinable fee simple, or which arises under a resulting trust on the determination of a determinable interest, is subject to the rule against perpetuities, like a gift over in the event of failure of a determinable interest. In view of the wait and see provisions of section 7(1) and (2) of the 2009 Act, such an interest is, however, valid until such time as it becomes

<sup>47a</sup> See §§ 5–35A and 5–35B (online supplement).

<sup>47b</sup> See § 5–35E (online supplement).

<sup>47c</sup> See § 5–38A (online supplement).

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established that the determination must occur, if at all, after the end of the perpetuity period. In view of section 10 of the 2009 Act, if it is established that such an interest is void for remoteness, then the determinable fee simple or interest becomes absolute.

**Definition of “power of appointment” in the 1964 and 2009 Acts**

**5–84B** The expression “power of appointment” is defined in the 1964 Act as including any discretionary power to transfer a beneficial interest in property.<sup>47d</sup> In the context of the 1964 Act this definition is mainly of importance for drawing distinctions between the treatment under the 1964 Act of general and special powers of appointment. In the context of the 2009 Act the definition of “power of appointment” is important for drawing similar distinctions under the 2009 Act. But in that context the definition has an additional importance since, under the provisions of section 1 of the 2009 Act, and in particular section 1(6) of the 2009 Act, a power of appointment is the only kind of power to which the rule against perpetuities applies under the 2009 Act.<sup>47e</sup> If a power is not a power of appointment within the meaning of the 2009 Act, the power is not subject to the rule against perpetuities under the 2009 Act regime.

**5–84C** The expression “power of appointment” is defined in the 2009 Act as including a discretionary power to create a beneficial interest in property without the provision of valuable consideration and a discretionary power to transfer a beneficial interest in property without the provision of valuable consideration.<sup>47f</sup> It is thought that this definition is wide enough to catch, in addition to conventional powers of appointment, and if exercisable without the provision of valuable consideration, powers of resettlement, powers of nomination, powers of advancement, powers to transfer to other trusts, powers of revocation or variation of interests in property, discretionary powers of application or distribution of property (including income), and discretionary trusts over property (including income) to the extent (if at all) that such trusts do not constitute interests subject to the rule against perpetuities by virtue of section 1(2) or (3) of the 2009 Act. Dispositive powers over trust property exercisable with the provision of valuable consideration, whether or not adequate

<sup>47d</sup> Perpetuities and Accumulations Act 1964, s.15(2).

<sup>47e</sup> See §§ 5–35D to 5–35H (online supplement).

<sup>47f</sup> Perpetuities and Accumulations Act 2009, s.20(2).

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consideration and whether or not on a commercial basis, are not, however, powers of appointment to which the rule against perpetuities applies under the 2009 Act.

**Powers of appointment – general and special powers**

**5–85** NOTE 53. For the reference to Megarry and Wade, *The Law of Real Property*, see now (7th edn), § 9–103.

AT THE END OF THE TEXT ADD: Section 7 of the 1964 Act applies only to dispositions subject to the 1964 Act regime.<sup>53a</sup>

AFTER § 5–85 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*The distinction between general and special powers under the 2009 Act*

**5–85A** Section 11 of the 2009 Act contains provisions distinguishing between general and special powers of appointment which are similar to, but more refined than, the provisions in section 7 of the 1964 Act. Section 11(1) and (2) are concerned with powers of appointment exercisable otherwise than by will and provide as follows:

- “(1) Subsection (2) applies to a power of appointment exercisable otherwise than by will (whether or not it is also exercisable by will).
- (2) For the purposes of the rule against perpetuities the power is a special power unless—
  - (a) the instrument creating it expresses it to be exercisable by one person only, and
  - (b) at all times during its currency when that person is of full age and capacity it could be exercised by that person so as immediately to transfer to that person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition (ignoring a formal condition relating only to the mode of exercise of the power).”

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<sup>53a</sup> See §§ 5–35A and 5–35B (online supplement).

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Section 11(3) and (4) are concerned with powers of appointment exercisable by will and provide as follows:

- “(3) Subsection (4) applies to a power of appointment exercisable by will (whether or not it is also exercisable otherwise than by will).
- (4) For the purposes of the rule against perpetuities the power is a special power unless—
- (a) the instrument creating it expresses it to be exercisable by one person only, and
- (b) that person could exercise it to transfer to that person’s personal representatives the whole of the estate or interest to which it relates.”

Sections 11(2) and (4) are not mutually exclusive since both apply to a power of appointment which is exercisable by will or otherwise. It is possible that a power of appointment might be a special power under one but not both of the sections 11(2) and (4); for example, where a power of appointment is conferred on one person only and is exercisable during his lifetime by deed in favour of himself with the consent of the trustees and is exercisable by will in favour of his personal representatives. In such a case the power of appointment is a special power for the purposes of the rule against perpetuities.<sup>53b</sup>

**General powers and appointments under them**

- 5–86** DELETE THE SECOND SENTENCE OF THE TEXT. AFTER THE TEXT TO N.57 ADD: As regards dispositions subject to the 1964 Act regime, section 3(2) of the 1964 Act provides that where, apart from the wait and see provisions of section 3 of the 1964 Act, a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time, the disposition shall be treated, until such time (if any) as it is established that the power will not be exercised within the perpetuity period, as if it were not subject to the rule against perpetuities. Consequently any exercise of a general power of appointment within the perpetuity period applicable to the disposition under the 1964 Act complies with the rule against perpetuities so far as the time of exercise of the power is concerned.

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<sup>53b</sup> Perpetuities and Accumulations 2009, s.11(5) and (6).

## LEGALITY OF OBJECT OF TRUST

AFTER § 5–86 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*General powers of appointment under the 2009 Act*

**5–86A** The rule against perpetuities applies to a general power of appointment contained in an instrument subject to the 2009 Act regime under section 1(6) of the 2009 Act. The 125-year perpetuity period starts under section 6(1) of the 2009 Act when the instrument containing the general power takes effect.<sup>58a</sup> Section 7(5) and (6) of the 2009 Act contain a wait and see rule in relation to the time of exercise of a general power of appointment similar to that contained in section 3(2) of the 1964 Act considered in § 5–86. Consequently, any exercise of a general power of appointment within the 125-year perpetuity period complies with the rule against perpetuities so far as the time of exercise is concerned. Trusts created by an exercise of a general power of appointment will be subject to a 125-year perpetuity period starting when the instrument containing the exercise of the power takes effect, not when the instrument creating the power took effect.<sup>58b</sup> In the case of an instrument taking effect on or after April 6, 2010<sup>58c</sup> under a general power of appointment, within the meaning of the 2009 Act,<sup>58d</sup> created before April 6, 2010, although the validity of the creation of the power and time of exercise of the power will be governed by the perpetuity regime applicable to the disposition creating the power, the trusts contained in the instrument exercising the power will be subject to the 2009 Act regime and so be subject to a 125-year perpetuity period starting when the instrument takes effect.

**Appointments under special powers**

**5–89** AT THE END OF THE TEXT ADD: Section 4 of the 1964 Act considered above, and section 3(3) of the 1964 Act considered in §§ 5–87 and 5–88, apply only to dispositions subject to the 1964 Act regime.<sup>74a</sup>

AFTER § 5–89 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

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<sup>58a</sup> See § 5–37G (online supplement).

<sup>58b</sup> Perpetuities and Accumulations 2009, s.6(2) has no application to an instrument made in exercise of a general power of appointment.

<sup>58c</sup> See § 5–35B (online supplement).

<sup>58d</sup> See § 5–85A (online supplement).

<sup>74a</sup> See §§ 5–35A and 5–35B (online supplement).

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*Special powers of appointment under the 2009 Act*

**5–89A** The 2009 Act regime is concerned solely with special powers of appointment created by a will made on or after April 6, 2010 or by other instrument taking effect on or after that date. The 2009 Act regime is not concerned with any exercise on or after April 6, 2010 of any special powers of appointment created before that date or contained in a will made before that date.<sup>74b</sup> The rule against perpetuities applies to a special power of appointment contained in an instrument subject to the 2009 Act regime under section 1(6) of the 2009 Act. The 125-year perpetuity period starts under section 6(1) of the 2009 Act when the instrument containing the special power takes effect.<sup>74c</sup> Section 7(3) and (4) of the 2009 Act contain a similar wait and see rule in relation to the time of exercise of a special power of appointment to that contained in section 3(3) of the 1964 Act considered in § 5–87. Consequently any exercise of a special power of appointment within the 125-year perpetuity period complies with the rule against perpetuities so far as the time of exercise is concerned. Trusts created by an exercise of a special power of appointments will be subject to a 125-year perpetuity period starting when the instrument creating the power took effect, not when the instrument exercising the power takes effect<sup>74d</sup>

**Advancements**

**5–90** AFTER THE TEXT TO N.75 ADD. A power of advancement (exercisable without the provision of valuable consideration) comes within the definition of “power of appointment” in section 20(2) of the 2009 Act<sup>75a</sup> and, if vested in trustees, comes within the definition of “special power of appointment” in section 11 the 2009 Act.<sup>75b</sup> Accordingly, if subject to the 2009 Act regime, such powers of advancement will be subject to the same rules as apply to special powers of appointment under the 2009 Act regime.<sup>75c</sup>

DELETE THE THIRD SENTENCE OF THE TEXT AND NN.76 AND 77 AND REPLACE BY: If the new trusts partially contravene the rule, and the remaining trusts cannot reasonably be regarded as

<sup>74b</sup> See §§ 5–35A and 5–35B (online supplement).

<sup>74c</sup> See § 5–37G (online supplement).

<sup>74d</sup> Perpetuities and Accumulations 2009, s.6(2).

<sup>75a</sup> See § 5–84C (online supplement).

<sup>75b</sup> See § 5–85A (online supplement).

<sup>75c</sup> See § 5–89A (online supplement).

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beneficial to the advanced beneficiary, the whole advancement will be void,<sup>76</sup> but otherwise the advancement will be valid as to the trusts not rendered void for perpetuity.<sup>77</sup>

**Administrative powers and trusts**

**5–91** AT THE END OF THE TEXT ADD: Section 8 of the 1964 Act applies only to dispositions subject to the common law regime and 1964 Act regime. Conventional administrative powers and trustee charging clauses are not powers of appointment within section 1(6) and 20(2) of the 2009 Act,<sup>78a</sup> nor estates or interests limited in trust within section 1(2) to (4) of the 2009 Act,<sup>78b</sup> and so the rule against perpetuities does not apply to them under the 2009 Act regime.<sup>78c</sup>

**Exceptions to the rule against perpetuities**

AFTER § 5–92 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Exceptions under the 2009 Act*

**5–92A** Section 1(2) to (4), (6) and (7) of the 2009 Act set out the estates or interests under trusts, and powers, which are subject to the rule against perpetuities. Section 1(8) provides that section 1 of the 2009 Act takes effect subject to the exceptions made by section 2 and to any exceptions made under section 3. The exceptions in section 2 are of two kinds. First, section 2(2) and (3) contain exceptions about property passing from one charity to another which are similar to the common law exception concerning charities mentioned in § 5–92. Secondly, section 2(4) and (5) contain provisions concerning pension funds and nominations and advancements under them considered in §§ 5–93A and 5–94A. Section 3 of the 2009 Act confers a power, not yet exercised, on the Lord Chancellor to make further exceptions to the rule against perpetuities with the approval of a resolution of each House of Parliament.

<sup>76</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch. 463; as interpreted in *Re Hastings-Bass* [1975] Ch. 25 at 41, CA; *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [39]–[45], [57] and [58].

<sup>77</sup> *Re Hastings-Bass*, above; considered in *Pitt v Holt*, above, at [46]–[67]. As to the circumstances in which an exercise of the power of advancement (or other power), though falling within the scope of the power, may be set aside on the ground of breach of duty in failing to take into account relevant consideration or taking into account irrelevant considerations, see §§ 29–238 *et seq.* (online supplement). See further § 32–21 (including online supplement).

<sup>78a</sup> See §§ 5–35H and 5–84C (online supplement).

<sup>78b</sup> See §§ 5–35E to 5–35G (online supplement).

<sup>78c</sup> See § 5–35D (online supplement).

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**Pension funds**

**5–93** AT THE END OF THE TEXT ADD: Section 163 of the Pension Schemes Act 1963 was repealed by the Perpetuities and Accumulations Act 2009.<sup>1a</sup> The repeal applies only in relation to instruments made on or after April 6, 2010,<sup>1b</sup> when the 2009 Act came into force,<sup>1c</sup> though not to instruments made on or after that date in exercise of a special power of appointment created before April 6, 2010.<sup>1d</sup> Section 163 will therefore continue to have effect in relation to pre-commencement pension schemes.

AFTER § 5–93 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Pension funds under the Perpetuities and Accumulations Act 2009*

**5–93A** As regards pension schemes subject to the 2009 Act regime, section 2(4) of the 2009 Act provides that the rule against perpetuities does not apply to an interest or right arising under a relevant pension scheme. A relevant pension scheme is an occupational pension scheme, a personal pension scheme or a public service pension scheme.<sup>1e</sup>

AFTER § 5–94 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

*Nominations and advancements under the Perpetuities and Accumulations Act 2009*

**5–94A** The exception from the rule against perpetuities for pension schemes under section 2(4) of the 2009 Act<sup>6a</sup> does not apply to an interest or right arising under an instrument nominating benefits under the scheme, or an instrument made in the exercise of a power of advancement arising under the scheme.<sup>6b</sup> In relation to such an interest or right, the 125–year perpetuity period under the 2009 Act starts<sup>6c</sup> when the member concerned became a member of the scheme, that member being the member in respect of whose interest in the scheme the

<sup>1a</sup> Perpetuities and Accumulations Act 2009, s.4(3), s.21 and Sch.

<sup>1b</sup> *ibid.*, s.15(1), s.21, Sch.

<sup>1c</sup> Perpetuities and Accumulations Act 2009, s.22; Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37).

<sup>1d</sup> Perpetuities and Accumulations Act 2009, s.15(1)(b).

<sup>1e</sup> *ibid.*, s.15(4) and (5).

<sup>6a</sup> See § 5–93A (online supplement).

<sup>6b</sup> Perpetuities and Accumulations Act 2009, s.5. See § 5–37F (online supplement).

<sup>6c</sup> *ibid.*, s.2(5).

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instrument is made.<sup>6d</sup> Since a power of nomination or advancement is a special power of appointment within the meaning of the 2009 Act,<sup>6e</sup> these provisions will apply only where the instrument creating the power took effect on or after April 6, 2010.<sup>6f</sup>

**Rule against inalienability**

**5–98** AT THE END OF THE TEXT ADD: These rules are not affected by the Perpetuities and Accumulations Act 2009.<sup>26a</sup>

**4. ACCUMULATIONS****Statutory restrictions on accumulations**

**5–100** DELETE THE SECOND TO FIFTH SENTENCES AND REPLACE BY: The statutory restrictions later became contained in sections 164 to 166 of the Law of Property Act and section 13 of the Perpetuities and Accumulations Act 1964. The restrictions are considered in §§ 5–101 to 5–127.

AFTER § 5–100 INSERT THE FOLLOWING NEW PARAGRAPHS AND HEADING:

**Repeal of statutory restrictions by the Perpetuities and Accumulations Act 2009**

**5–100A** The statutory restrictions on accumulations under the Law of Property Act 1925 and the Perpetuities and Accumulations Act 1964 were wholly repealed by the Perpetuities and Accumulations Act 2009,<sup>33a</sup> which came into force on April 6, 2010.<sup>33b</sup> The repeal draws no distinction between trusts for, and powers of, accumulation.

<sup>6d</sup> *ibid.*, s.6(3) and (4).

<sup>6e</sup> *ibid.*, s.11 and s.20(2). See §§ 5–84C and 5–85A (online supplement).

<sup>6f</sup> Perpetuities and Accumulations Act 2009, s.15(1)(b), s.21 and Sch. See §§ 5–35A and 5–35B (online supplement).

<sup>26a</sup> Perpetuities and Accumulations Act 2009, s.18.

<sup>33a</sup> Perpetuities and Accumulations Act 2009, s.13, s.21 and Sch. The repeal implements with modifications proposals made by Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998).

<sup>33b</sup> Perpetuities and Accumulations Act 2009, s.22; Perpetuities and Accumulations Act 2009 (Commencement) Order 2010 (SI 2010/37).

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*Instruments to which the repeal applies*

**5–100B** The repeal of the statutory restrictions by the 2009 Act applies to instruments taking effect on or after April 6, 2010,<sup>33c</sup> with two exceptions. The first exception is that the repeal does not apply to a will<sup>33d</sup> executed before April 6, 2010 of a testator who dies on or after that date.<sup>33e</sup> The second exception<sup>33f</sup> is that the repeal does not apply to an instrument made on or after April 6, 2010 in exercise of a special power of appointment created by an instrument taking effect before that date.<sup>33g</sup> The statutory restrictions continue to apply to pre-commencement instruments and instruments within the two exceptions. It makes no difference that the perpetuity provisions of the 2009 Act apply to a pre-commencement instrument under section 12 of the 2009 Act.<sup>33h</sup> For the purposes of the 2009 Act, a provision made in relation to property otherwise than by instrument, for instance an oral trust, is treated as taking effect as though contained in an instrument taking effect on the making of the provision.<sup>33i</sup> If it were desired to utilise the repeal of the statutory restrictions in relation to a trust in existence on April 6, 2010, it would be necessary either to have an agreed variation by all the beneficiaries interested in income and being of full age and capacity, or alternatively to have a variation approved by the court under the Variation of Trusts Act 1958.<sup>33j</sup>

*Charitable trusts*

**5–100C** The 2009 Act contains no replacement statutory restrictions on accumulations, save for charitable trusts. Section 14 contains replacement statutory restrictions for an instrument to which the repeal of the previous restrictions applies,<sup>33k</sup> to the extent that it provides for property to be held on trust for charitable purposes,<sup>33l</sup> unless the provision is made by the court or the Charity Commission.<sup>33m</sup> Under the new restrictions, a duty or power to accumulate income normally ceases to have effect at the end of a period of 21 years from the

<sup>33c</sup> Perpetuities and Accumulations Act 2009, s.15(1).

<sup>33d</sup> Includes a codicil, see Perpetuities and Accumulations Act 2009, s.20(7).

<sup>33e</sup> Perpetuities and Accumulations Act 2009, s.15(1)(a).

<sup>33f</sup> Made contrary to the recommendations of the Law Commission, see Law Commission Report No.251 on the Rules against Perpetuities and Excessive Accumulations (1998), § 10.16.

<sup>33g</sup> Perpetuities and Accumulations Act 2009, s.15(1)(b).

<sup>33h</sup> See §§ 5–37A to 5–37D (online supplement) on Perpetuities and Accumulations Act 2009, s.12.

<sup>33i</sup> Perpetuities and Accumulations Act 2009, s.19.

<sup>33j</sup> See § 45–57 (including online supplement).

<sup>33k</sup> See § 5–100B (online supplement).

<sup>33l</sup> Perpetuities and Accumulations Act 2009, s.14(1).

<sup>33m</sup> *ibid.*, s.14(2).

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time when the income must or may be accumulated.<sup>33n</sup> However, if the instrument provides for the duty or power to accumulate to cease to have effect on the death of the settlor or of one of the settlors, determined by name or the order of their deaths, that provision will apply in place of the provision for a 21-year period.<sup>33o</sup> If a duty or power to accumulate income ceases to have effect, the income to which the duty or power would have applied must go the person who would have been entitled, or be applied for the purposes for which it would have been applied, if there had been no such duty or power.<sup>33p</sup> Section 14 applies whether the instrument provides for simple or compound accumulation.<sup>33q</sup> There is no requirement for the application of section 14 that the property is held exclusively on charitable trusts. Accordingly, the section will apply while the trust property is held on temporary charitable trusts. But it is not thought that the section would apply merely because trustees have a discretion to apply income for a class of beneficiaries which includes a charity or charitable purpose.

*Effect of repeal on non-charitable trusts*

**5–100D** In consequence of the repeal, as regards instruments containing non-charitable trusts to which the repeal applies,<sup>33r</sup> income may be directed or authorised to be accumulated for all or any part of the 125-year perpetuity period<sup>33s</sup> under the 2009 Act. It remains necessary to limit accumulation under a settlement to the perpetuity period, since otherwise interests would fail to vest as required by the 2009 Act. In effect the position is the same as at common law<sup>33t</sup> save that a 125-year perpetuity period applies instead of a period expiring 21 years after the death of a person living at the date of the creation of the settlement.

**Where section 164 does not apply***Accumulations for portions*

**5–110** NOTE 70. DELETE THE LAST SENTENCE AND REPLACE BY: That exemption is to be read in accordance with Human Embryology and Fertilisation Act 1990, ss.27–29, and Human

<sup>33n</sup> *ibid.*, s.14(3) and (4).

<sup>33o</sup> *ibid.*, s.14(5).

<sup>33p</sup> *ibid.*, s.14(6).

<sup>33q</sup> *ibid.*, s.14(7).

<sup>33r</sup> See § 5–100B (online supplement).

<sup>33s</sup> Perpetuities and Accumulations Act 2009, s.5. See § 5–37F (online supplement).

<sup>33t</sup> See § 5–99.

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Embryology and Fertilisation Act 2008, ss.33 *et seq.*, both of which are retrospective, see §§ 6–15 to 6–19E.

## 5. RESTRICTIONS ON ALIENATION AND TRUSTS AGAINST THE POLICY OF INSOLVENCY LAW

### The statutory protective trusts

**5–151** NOTE 27. AT THE END ADD: and Human Fertilisation and Embryology Act 2008, ss.33 *et seq.*, as to which see §§ 6–19A to 6–19E.

### Attacks by creditors by reason of subsequent events on the ground of public policy or “piercing the veil of the trust” or remedial constructive trust

**5–155** NOTE 58. ADD: *Re Reynolds* [2008] NZCA 122; (2007–08) 10 I.T.E.L.R. 1064 at [66]–[70].

## 6. TRUSTS THAT PREJUDICE CREDITORS

### Section 423 applications

**5–156** AFTER THE REFERENCE IN THE FIRST SENTENCE TO section 423 of the Insolvency Act 1986 INSERT A NEW NOTE 61a: Amended by Civil Partnership Act 2004, s.261(1), Sch.27, para.121.

NOTE 62. DELETE THE SECOND SENTENCE AND REPLACE BY: As to the appropriate county court, see Insolvency Rules 1986, r.6.40A (as substituted by Insolvency (Amendment) Rules 2010 (SI 2010/686), r.2, Sch.1, para.217).

### *The scope of the section*

**5–157** NOTE 70. ADD: The execution of a declaration of trust over property in return for the forbearance to pursue a claim for ancillary relief has recently been held to be a transaction for which valuable consideration was given, such that there was no transaction at an undervalue: *Papanicola v Fagan* [2008] EWHC 313 (Ch); [2009] B.P.I.R. 320. See too *Haines v Hill* [2007] EWCA Civ 1284; [2008] Ch. 412.

AT THE END OF THE TEXT ADD: Where an application is made under this section, trustees should be aware that they will have a right of indemnity in relation to their costs of the

## LEGALITY OF OBJECT OF TRUST

application only if they remain neutral.<sup>32a</sup> They should carefully consider making a *Beddoe* application, in order to obtain the directions of the court as to how they should act in response to the section 423 application.<sup>32b</sup>

*The settlor's purpose*

**5–159** NOTE 81. AT THE END OF THE FIRST SENTENCE ADD: *Random House UK Ltd v Allason* [2008] EWHC 2854 (Ch); [2008] All E.R. (D); *Papanicola v Fagan* [2008] EWHC 313 (Ch); [2009] B.P.I.R. 320.

NOTE 83. ADD: The fact that the consequence of a declaration of trust was that the property concerned would be put out of the reach of creditors who later materialised was also not enough where the purpose of the transaction was to protect a matrimonial home against debts and liabilities that might result from the husband's alcoholism and gambling, see *Papanicola v Fagan* [2008] EWHC 313 (Ch); [2009] B.P.I.R. 320.

*The order made*

**5–161** NOTE 90. ADD: *4 Eng Ltd v Harper (No.2)* [2009] EWHC 2633 (Ch); [2010] 1 B.C.L.C. 176.

*Time-limits*

**5–162** NOTE 99. ADD: See too *Random House UK Ltd v Allason* [2008] EWHC 2854 (Ch); [2008] All E.R. (D), at [95], leaving open the question whether a party to litigation became a victim of a transaction whenever it incurred costs which may in due course become the subject of a costs order in its favour, or whether it was when a costs order was actually made.

**Sections 339 and 340 of the Insolvency Act 1986***Transactions at an undervalue*

**5–163** AFTER THE TEXT TO N.1 ADD: The satisfaction of a claim by a spouse or civil partner for ancillary relief, whether by consent or after a contest, constitutes consideration in money or

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<sup>32a</sup> See § 21–107.

<sup>32b</sup> See § 21–115.

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money's worth whose value can be ascertained in order to determine whether a transaction is made at an undervalue.<sup>1a</sup>

NOTE 2. DELETE AND REPLACE BY: Insolvency Act 1986, s.339 (as amended by Civil Partnership Act 2004, s.261(1), Sch.27, para.119) and s.341 (as prospectively amended by Criminal Justice Act 1988, s.170(2), Sch.16).

NOTE 4. AFTER THE SECOND SENTENCE ADD: See too *Papanicola v Fagan* [2008] EWHC 313 (Ch); [2009] B.P.I.R. 320.

AT THE END OF THE TEXT ADD: The court retains a discretion to make no order in respect of a transaction at an undervalue, where the interests of justice so require.<sup>6a</sup>

*Preferences*

**5-164** NOTE 8. DELETE AND REPLACE BY: As defined by Insolvency Act 1986, s.435 (as amended by Civil Partnership Act 2004, s.261(1), Sch.27, para.122, and Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941), art.2(1), Sch.1, para. 82).

**Other statutory provisions***Inheritance (Provision for Family and Dependents) Act 1975*

**5-167** NOTE 21. ADD: For a case involving the interaction between a claim under these provisions and a (potential) claim under Insolvency Act 1986, ss.339 and 423, see *Stow v Stow* [2008] EWHC 495 (Ch); [2008] Ch. 461.

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<sup>1a</sup> *Haines v Hill* [2007] EWCA Civ 1284; [2008] Ch 412 at [39].

<sup>6a</sup> *Singla v Brown* [2007] EWHC 405 (Ch); [2008] Ch. 357 at [59], where the court declined to reverse the effect of a notice of severance of a joint tenancy of property which split the beneficial ownership 99% to 1% (and which effect was acknowledged by the recipient of the notice), where the parties had failed to appreciate on the acquisition of the property the effect of that beneficial joint tenancy. The decision is significant as it shows that the court can effectively treat a valid declaration of trust as though it had been invalid for the purposes of the Insolvency Act 1986, if satisfied that the parties were mistaken as to its effect.