Problem scenario

Wilhelm, who died in 2011, left the residue of his estate in trust for his grandchildren, Betty and Andrew, at the age of 25, in equal shares absolutely. The trustees have invested the fund and accumulated all the income on it. The capital value of the fund is now £20,000.

Betty is 19 years old; Andrew is 12.

The trustees have received the following requests:

First, they have been asked to transfer £4,000 into a trust fund set up by the children's uncle in 1999 under which the fund trustees may, in their sole discretion, pay income or capital to any of his nephews or nieces who are students at university, and any capital remaining after a period of 21 years will be divided equally between all his nephews and nieces. At present the fund is valued at £6,000 and Betty is the only eligible beneficiary.

Secondly, Andrew's parents have asked the trustees to pay all the income of the fund to them for 10 years to enable them to meet the initial running costs of a riding school which they propose to establish at their home. Andrew is interested in riding and supports the proposal.

Advise whether the trustees may comply with these requests.

Guidance

The trustees have been asked to exercise their powers of advancement and maintenance.

In the first place, they have been asked to resettle £4,000 out of capital into a trust set up by the children's uncle. The lump sum may be paid out under Trustee Act 1925, s.32 which empowers trustees to apply capital money for the 'advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust'. This section is clearly wide enough to permit capital to be resettled on new trusts, but only if such a resettlement would genuinely be for the advancement or

benefit of the persons entitled to the capital under the original trusts. Betty is currently 19 years old and attending university and therefore if the £4,000 is resettled on the terms of the uncle's trust she will have the opportunity to receive it for her use today, instead of having to wait until she reaches 25. This could be a real benefit to her. It is less likely that the resettlement would be of benefit to Andrew, who is now only twelve. The £4,000 could, if necessary, be paid entirely out of Betty's share (according to s.32(1)(a) up to one-half of Betty's presumptive share may be advanced, her presumptive share being £10,000). The main problem with the proposed settlement is that the uncle's trust confers on the trustees of that trust an unfettered discretion as to whether or not to make payments out of it. This could mean that other 'nieces and nephews' will benefit, in the future, from the £4,000 of Wilhelm's Will Trust which would otherwise have been Betty's alone. That in itself is not fatal to the proposal, as Viscount Radcliffe has stated: 'it is no objection to the exercise of the power that other persons benefit incidentally from the exercise of the power' (*Pilkington* v *IRC* [1964] AC 612), but the fundamental difficulty with the proposed resettlement on the terms of the uncle's trust is that there is no guarantee that Betty will get anything at all from the fund! The risk that Betty will receive no benefit from the advancement, or that her cousins will be the principle beneficiaries, flows directly from the extensive discretion given to the trustees of the uncle's trusts. And, as Upjohn J has stated, 'unless upon its proper construction the power of advancement permits delegation of powers and discretion, a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretion, at any rate in relation to beneficial interests' (per Upjohn J, *Re Wills* [1959] Ch 1). The power of advancement applicable in the present case is the basic statutory power of advancement, there is nothing in that power to authorise the delegation of dispositive discretions and so the trustees in the present case should be advised to turn down the first request. Even the enlarged powers of delegation provided by the Trustee Act 2000 do not permit the delegation of fundamental discretions relating to the distribution of the trust fund. (Section 11(2) provides that in the case of non-charitable trusts, one of the few non-delegable functions is the distribution of trust assets (e.g. under a discretionary trust).

The second request comes from Andrew's parents. They have asked the trustees to pay all the income to them for 10 years to assist in setting up a riding school. The payment of income is authorised by the Trustee Act 1925, s. 31 but only where the payment is made

for the maintenance of an infant beneficiary. There are a number of problems, therefore, with the parents' request. First, Andrew will only be an infant for the next six years, after which the trustees will not be able to pay over income for his maintenance. Secondly, Betty is an adult and income arising on her share of the fund must be accumulated and added to her share of the capital until she reaches 25, this income will not be available to Andrew. Thirdly, the power to maintain infant beneficiaries is discretionary and trustees must not fetter unduly the future exercise of this discretion. They cannot commit themselves to a 10-year scheme of payments.

There are other potential difficulties with the parents' request. First, the power of maintenance under s.31 can only be used where the infant is the beneficiary of a gift which carries the intermediate income. Andrew's gift is a testamentary (by will) contingent gift of residue valued at £20,000. Such gifts will carry the intermediate income, and so Andrew will be able to be maintained out of that income unless there is an expressed contrary intention in the trust instrument (Trustee Act 1925, s. 69(2)). There being no evidence that Wilhelm did not wish Andrew to be maintained out of the fund, the trustees may maintain him if they so decide. In reaching their decision the trustees must be satisfied that the payment of income would genuinely be for the infant's 'maintenance, education or benefit' and the trustees in so deciding, 'shall have regarded to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes'. Perhaps the most crucial of the circumstances of the present case is the fact that Andrew is still under parental influence. It follows that the trustees should be very wary of paying over monies directly to the parents, even if Andrew 'consents'. If the trustees genuinely believe that the payments should be made, they should make the payments to the contractors, horse breeders and so on, whose activities make up the 'initial running costs' of the riding school, and not to the parents direct. If the trustees do pay the income to the parents direct they will be under a duty to make inquiries to establish that the monies have indeed been applied in keeping with the terms of the maintenance payment. The final problem with the request is the suggestion that the trustees should pay all Andrew's income entitlement in any given year. The risk is that a fundamental need will arise, such as money for a school uniform, and that there will be no income left to meet it.

In conclusion, on the facts as we have them, the trustees should be advised not to commit themselves to make payments for more than, say, two years, not to pay out Andrew's full income entitlement for the purpose of establishing the riding school, and not to pay any income if it is not genuinely for his maintenance, education or benefit. Additionally, if there are other funds available to establish the riding school the trustees should expect those funds to meet a reasonable amount of the expenditure.