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AUT OVIS AUT CAPRA: PERSONAL REPRESENTATIVE OR TRUSTEE?



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Introduction

The practical importance of being able to distinguish between the offices of trustee and personal representative can be simply illustrated. Consider the following:

A will contains a charging clause enabling a solicitor to charge professional fees for his services 'as executor.' Can he charge for services performed as trustee? And if not, when, if at all, does he cease to be the executor and become a trustee?

A surety guarantees that an administrator will well and truly administer a deceased estate. Does this guarantee extend to acts done as trustee? And if not, how can the surety tell when the person ceases to be acting as an administrator and becomes a trustee?

A solicitor is appointed to be both executor and trustee of a will. Can he accept the former and decline the latter? And if so, how can he tell which duties he has agreed to accept and which he has declined?

A power in a will or a statutory provision is expressed to apply to 'trustees,' does it also apply to a personal representatives? And if not, the same questions of status and timing apply as have been posed above.¹

A person applies for a grant de bonis non administratis in respect of an unadministered estate, and it is argued against this that the estate was held by the previous administrator as trustee by transition; should there be an appointment of a new trustee or an administrator de bonis non?²

A person dies in office with his duties uncompleted; should a new trustee be appointed or does the chain of executorship apply or should a grant de bonis non be made?

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¹ See *Re Hayes' Will Trusts* [1971] 1 WLR 758 for the answer.

² See *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon-hang* (1993) HCt, MP No 3515 of 1992, Rhind J. See the point anticipated in 1955 by B S Ker, 'Personal Representative or Trustee?' (1955) 19 Conv (NS) 199, 204.

A person wishes to retire from his office and appoint a successor in his place, a trustee can do so but a personal representative cannot, so which applies?

A beneficiary wishes to sue the office holder for an alleged breach of duty; is the applicable period of limitation six years, for breach of trust, or twelve years for breach of administration?³

The offices of personal representative and trustee are in many respects similar. Both are in a fiduciary position regarding property which is vested in them and they act in relation to such property on behalf of others rather than in their own personal interest.⁴ Many of the powers and duties are synonymous and there is some analogy with the rights and liabilities which are incidental to their respective offices. In many cases the same person is appointed to be both an executor and a trustee by the will and personal representatives sometimes become trustees by transition in respect of the same property.⁵ There are specific instances of such duality: a will, for example, can set up beneficial trusts to apply to part of the estate upon the completion of the administration. Section 9 of the Intestates' Estates Ordinance constitutes a personal representative trustee for the persons beneficially entitled to the residuary estate. The net residuary intestate estate to which a minor is beneficially entitled is directed to be held by the personal representatives upon the statutory trusts.⁶ There are also administrative trusts in deceased estates; the residuary testate estate is often put upon an express trust for sale for the purposes of liquidating the assets to pay debts and liabilities with the personal representatives directed to hold the net residue in trust for particular beneficiaries.

A similar process applies on intestacy and partial intestacy, where at the outset the whole of the residuary estate is directed to be held upon a statutory trust for sale for the purposes of the administration.⁷ In addition the Trustee Ordinance in the interpretation section, s 2, declares that 'trustee' where the context admits includes a personal representative.⁸

³ See the Limitation Ordinance, ss 20 and 21.

⁴ The somewhat elusive nature of a fiduciary relationship has been well defined by R P Meagher, W M C Gummow, and J R F Lehane, *Equity, Doctrines and Remedies* (Sydney: Butterworths, 2nd ed 1984), p 123, as follows. 'Broadly, it may be said that a fiduciary relationship exists, giving rise to obligations of that character, where the relationship is one of confidence, in which equity imposes duties upon the person in whom the confidence is reposed in order to prevent the abuse of the confidence.' See also L S Sealy, 'Fiduciary Relationships' [1962] CLJ 69.

⁵ It is recognised that a person can be a trustee or personal representative of property and a beneficiary at the same time.

⁶ See s 4(3), Intestates' Estates Ordinance. The phrase is defined in s 5. See also s 4 (4), (5), and (8) where property is likewise directed to be held upon 'the statutory trusts.'

⁷ See s 62, Probate and Administration Ordinance.

⁸ Although it can be noted that the Probate and Administration Ordinance in its interpretation section, s 2, does not include a trustee in the definition of personal representative which is confined to an executor original or by representation or an administrator for the time being of a deceased person.

But such similarities must not obscure the fundamental proposition that the two offices are distinct and must be regarded as such. It is vital to know for various purposes whether a particular person holding property at any one time is holding that property in the capacity of personal representative or in the capacity of trustee. Further it is essential to determine, where it is alleged that there has been a transition of the offices, at what time and by what process that transition has taken place.⁹

It is the purpose of this article to consider these questions in the light of the statutory provisions in the Trustee Ordinance and in the Probate and Administration Ordinance together with the applicable case law, including the recent decision of Rhind J in *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon-hang*.¹⁰

Specific differences between the offices

The following specific differences between the offices can be identified. First, a personal representative will hold the deceased's property which vests in him by force of law, in a quasi or true fiduciary position, in the sense of being accountable to the persons entitled respectively as creditors of the estate or beneficiaries to the property. But a trustee owes fiduciary duties only to the beneficiaries of the trust. The essential responsibility of a personal representative as embodied in the oath is to duly administer the estate, and this duty is owed initially to the creditors and to other persons to whom the estate has some liability and then to the beneficiaries who are entitled to the estate.¹¹

Although there is an initial contemporaneous duty towards the beneficiaries the estate of a deceased person is not held in trust for such persons in the sense of conferring a specific or defined beneficial interest in the assets in the beneficiaries.¹² The beneficiaries' interest in the inchoate estate is initially no more than a chose in action to ensure the due administration of the estate.¹³ A more defined interest as a beneficiary under a trust will only arise, if at all, after

⁹ It is submitted that the statement of Jessel MR in *Re Speight* (1883) 22 Ch D 727, 742 (affirmed as the well known case of *Speight v Gaunt* (1883) 9 App Cas 1) is no longer correct: 'In modern times the Courts have not distinguished between ... executors and trustees but they have put them all together and considered that they are all liable under the same principles.'

¹⁰ Note 2 above.

¹¹ The functions of a personal representative were stated as follows by Ungood-Thomas J in *Re Hayes' Will Trusts* [1971] 1 WLR 758, 765: 'Those functions are to get in the testator's estate, preserve its properties, discharge its liabilities and distribute the resulting net assets. The legal personal representatives would in due course be concerned to obtain a proper discharge for the net assets and thus to ascertain who were entitled to them and to ensure that the assets were distributed to those entitled.'

¹² The dual legal and equitable interests which were stated to exist in all property in *Commissioners of Stamp Duties v Livingston* [1965] AC 694, 712 per Viscount Radcliffe are combined not separated. See below.

¹³ See the English case law *Commissioner of Stamp Duties v Livingston* [1964] 3 All ER 692; *Eastbourne Mutual Building Society v Hastings Corporation* [1965] 1 All ER 779; *Lall v Lall* [1965] 3 All ER 330; *Re Leigh's Will Trusts* [1970] Ch 277; and *Re K (Deed)* [1986] Ch 180.

the debts and liabilities have been met and the free estate or the net residuary estate has been ascertained. It can thus be seen that a personal representative's fiduciary responsibilities are more complex than those of a trustee who only holds property in trust for beneficiaries and whose fiduciary responsibility lies wholly to the beneficiaries.¹⁴ Beneficiaries under a trust have a defined equitable interest, vested or contingent, in those assets and in general a trustee does not need to have regard or responsibilities to other third parties other than to observe the general provisions of law and equity.

Second, in respect of personal property, personal representatives can act either jointly or severally, ie if there is more than one personal representative an individual personal representative has full authority to act vis-à-vis the property and to carry out the function and duties of administrators. This does not apply to the sale of real property since, by s 54 of the Probate and Administration Ordinance, no conveyance of immovable property of a deceased person can be made without the concurrence of all the personal representatives of the deceased.¹⁵ Trustees on the other hand must always act jointly so that if there are two or more trustees they must collectively join in any transactions relating to the trust and cannot act alone. So, for example, a pledge of personal property by one of two office holders would be valid if the person were a personal representative but invalid if a trustee.¹⁶

Third, a new trustee can be appointed by the existing trustees, and trustees always have power to appoint new trustees to act with or in substitution to themselves. This provision in s 37 of the Trustee Ordinance does not apply to personal representatives and in general it is true to say that a personal representative does not have power to appoint a new trustee. Although, as noted above, the Trustee Ordinance in general declares that a reference to a trustee includes a personal representative, this does not apply to s 37. This is established by the provision in s 37(1)(b), which states that, if there is no person nominated to appoint new trustees by the instrument, then the surviving and continuing trustees 'or the personal representatives of the last surviving or continuing trustee' have the power to appoint new trustees. The section does not specify that personal representatives have a general power to appoint new trustees, indeed this is excluded by inference by the express inclusion of the personal representatives of deceased trustees. In other words,

¹⁴ See *Re Hayes' Will Trusts* [1971] 1 WLR 758.

¹⁵ See, on the English legislation, *Fountain Forestry Ltd v Edwards* [1975] Ch 1.

¹⁶ See *Attenborough v Solomon* [1913] AC 76, where one of the executors, without the knowledge of his co-executor, pledged certain plate forming part of the testator's residuary estate with a firm of pawnbrokers. This being personal property, if the transaction had been performed in the capacity of executor it would have been valid; however, the court decided that at the time of the pledge the executors had become trustees and thus the pledge was invalid unless made by the joint authority of all of the executors. This conclusion was assisted by the fact that the transaction had taken place fourteen years after the testator's death and the executor was deemed to have assented to the passing of the property to himself as trustee.

personal representatives by the words of the section only have power to appoint a new trustee when they are the personal representatives of a last or surviving trustee and this excludes a general power for personal representatives to appoint trustees in their own rights.

The only statutory power conferred on personal representatives to appoint trustees is found in s 69 of the Probate and Administration Ordinance, which states that where an infant is absolutely entitled under a will or on the intestacy of a person then the personal representatives of the deceased may appoint a trust corporation or two or more individuals not exceeding four to be the trustees of such a gift. This by its terms is confined to situations where the infant is absolutely entitled to the property which in fact is rarely the case. The most common situation is where property is left to an infant contingently upon him or her obtaining his or her majority or marrying and in such cases it is frequently necessary to appoint trustees of the property to hold for the infant in order that the personal representative can get a valid receipt for the property from the trustee. If the personal representative has become a trustee then in the capacity as trustee he or she can make such an appointment. If the personal representative is still in the capacity of personal representative, no appointment can be made under this section.

It is this general inability of personal representatives to appoint new trustees, perhaps above all others, which renders the question whether a person is a personal representative or a trustee of paramount importance.

The fourth difference is that a personal representative once appointed retains his office for the whole of his life unless the grant of probate or administration is revoked.¹⁷ He has no powers to appoint another person in substitution for himself nor has he any power to retire from the office.¹⁸ A trustee can either act personally for as long as he wishes, or, in accordance with the power in s 37, Trustee Ordinance, he can appoint new trustees in substitution for himself, or he can retire (s 40).

Fifth, it is expressly provided by the Trustee Ordinance that where a sole or last surviving trustee dies then until the appointment of a new trustee the personal representative for the time being of that person shall be capable of exercising or performing any power or trust which was given to, or was capable of being exercised by, the sole or last surviving trustee.¹⁹ This provision in s 20(2) confers a succession of the office of trustee from the original trustee to

¹⁷ See *Re Timmis* [1902] 1 Ch 176, 183; *Attenborough v Solomon* [1913] AC 76, 83; *Harvell v Foster* [1954] 2 QB 367; and *Re Aldous* [1955] 2 All ER 736. As Ker (note 2 above), p 202, put it: 'The personal representative remains abstractly the deceased's personal representative for the whole of his life.' But this is not inconsistent with holding the existing residue as trustee; any subsequent property will come to him as personal representative.

¹⁸ But there is now a limited power in England for the court to remove or to substitute a personal representative who is deemed not to be performing satisfactorily; see Administration of Justice Act 1985, s 50.

¹⁹ s 20(1).

his personal representative. However where a sole or last surviving personal representative dies there is no automatic succession to that person's personal representatives. A transmission of the office of executor can take place but only if the requirements governing the chain of executorships as provided by s 34 of the Probate and Administration Ordinance applies. By this provision an executor of a sole or last surviving executor of a testator becomes the executor of that testator. But this does not apply to administrators, and only applies to executors if the last executor dies having appointed a proving executor of his own. In cases where there is no qualifying executor a grant de bonis non administratis of the original estate will be made.

Sixth, the periods of limitation within which actions for breach or default must be brought vary depending upon whether the cause of action arises from a breach of trust by a trustee, where the period is six years, or whether the action is against a personal representative for breach of duty, in which case the period of limitation is twelve years.²⁰

Seventh, the liability of a surety who has been required to guarantee the due performance of the duties of a personal representative is limited to actions done in the capacity of personal representative. Thus if the personal representative is held to have become a trustee and commits a breach in that capacity the surety will not be liable for that default. This principle was established by the case of *Harvell v Foster*²¹ in which the testator's daughter was appointed the sole beneficiary and the executrix of his will. Because of her minority her husband was entrusted with the estate but misappropriated the assets. The sureties were held liable on the bond since the husband was still an administrator when the misappropriation took place; they would not have been liable if the assets had been held by the husband as trustee.²² At first instance Lord Goddard CJ was persuaded in favour of the sureties but the Court of Appeal were not so convinced. Per Lord Evershed MR:²³

²⁰ See Limitation Ordinance; the general period in respect of actions relating to trusts is six years, s 20, but twelve years in respect of deceased estates, s 21. See *Re Oliver, Theobald v Oliver* [1927] 2 Ch 323; *Re Timmis, Nixon v Smith* [1902] 1 Ch 176; *Re Swain, Swain v Bringeman* [1891] 3 Ch 233; *Re Richardson, Pole v Pattenden* [1920] 1 Ch 423; *Re Davis, Davis, Evans v Moore* [1891] 3 Ch 119.

²¹ [1954] 2 QB 367. The daughter was under the age of 21 and so could not take the grant but being married, letters of administration with the will annexed were granted to her husband for her use and benefit during her minority. The husband and two solicitors as sureties gave an administration bond in the usual form. The solicitors acted for the husband in the administration of the estate, paid the debts, and paid the balance of the estate of almost £1,000 to the husband. Under the terms of the will it should properly have belonged to the wife who was the testator's daughter. The husband transferred only a small part of the money to her and, after a quarrel, turned her out of the matrimonial home and disappeared with the rest.

²² It was accepted that, by the terms of the bond, the husband would 'well and truly administer the estate according to law,' the sureties' liability only extending to acts done by the husband as administrator. The sureties argued that once the husband had received the clear net residue he ceased to be an administrator and became a trustee, which discharged them from their responsibilities. So the simple question was whether the husband was, at the time of his default, an administrator or a trustee, which raised the more complex issues as to how and when, if at all, this transition had taken place.

²³ *Ibid*, p 379.

There is, moreover, to our minds, a manifest incongruity in the assertion that an administrator during minority has well and truly administered the estate according to law for the use and benefit of the infant, when what he has in fact done is to receive the net residue, from agents acting on his behalf in the administration, to convert the greater part, or, for that matter, the whole, of such residue to his own use and to abscond without accounting.

These points of specific differences between the offices substantiate the opening submission that it is important to know, at any particular time, whether the person holding the property holds it as personal representative or as trustee and to be able to mark precisely the time when the change in the capacity takes place.

Statutory provisions

The statutory provisions applicable to trustees and personal representatives are to be found, largely, in the Trustee Ordinance and the Probate and Administration Ordinance. The Trustee Ordinance (modelled on the English Trustee Act 1925) although mainly concerned with the position, powers and duties of trustees has relevance also to personal representatives. The definition section, s 2, states that 'trust' and 'trustee' extend 'to the duties incident to the office of a personal representative,' and 'trustee' where the context admits includes a personal representative. Section 3 of the ordinance states that it 'applies to trusts, including so far as this Ordinance applies thereto, executorships and administratorships constituted or created either before or after the commencement of this Ordinance.'

The effect of these two general sections is to create some analogy between the offices, and some uniformity of provision applicable to each, but qualified, as the ordinance states, only where the context admits.

General powers

Part III of the Trustee Ordinance is headed 'General Powers of Trustees and Personal Representatives,' but notwithstanding it seems clear that not all of the powers conferred apply equally to personal representatives since the context excludes this construction in some sections. Section 16 (which confers a number of miscellaneous powers) opens with the express words: 'A personal representative, or 2 or more trustees acting together ...' There is no such explicit reference to personal representatives in the three preceding or in the three following sections, so are we to assume that only s 16 applies to both? This reference to personal representatives in certain contexts and not in others is one of the confusing characteristics of the Trustee Ordinance. In addition to the sections which explicitly mention personal representatives it is clear that some of the others can apply implicitly.

Examples of this implicit inclusion are suggested to be the power to insure in s 21, and the application of insurance money in s 22, the deposit of documents in s 23, and the valuation and audit of reversionary interests in s 24. Sections 25, 26, and 27 all contain explicit references to personal representatives in connection with the power to employ agents. This is an important power which is equally relevant and applicable to trustees and personal representatives enabling both as principal to employ and pay agents, such as a solicitor, banker, stockbroker, or other person to transact any business or do any act required to be transacted or done in the execution of the trust or the administration of the testator's or intestate's estate. It is usually assumed that personal representatives have the same powers of investment that a trustee has.²⁴

This part of the ordinance continues with a section relating to indemnities and the first three sections, which include the important protection provided by advertising for claims, explicitly include personal representatives. But s 32, which confers indemnity for an agent's acts 'unless the same happens through his own wilful default,' does not, although *Re Vickery*²⁵ establishes that the analogous English provision does apply to an executor.

The next two sections confer the important statutory powers of maintenance, in s 33, and advancement, in s 34. Such powers will be applicable to both inter vivos and testamentary trusts and indeed to the statutory trusts which can arise on intestacy. There are no specific references to personal representatives in the sections and it is probable that the powers can only be invoked by trustees acting strictly as such. The statement of the terms of statutory trusts set out in s 5(1)(b) of the Intestates' Estates Ordinance expressly incorporates the statutory powers of maintenance and advancement to these trusts,²⁶ which would not be necessary if the general powers in ss 33 and 34 applied.

Part IV of the Trustee Ordinance is crucial to this discussion since it deals with the appointment and discharge of trustees. It seems clear from the wording

²⁴ The investment and proper management of the property subject to a trust is central to the duty of the trustee, and the trustee will hold the property for a continuing and extended time, during which the property which constitutes the trust fund has to be managed for the benefit of the beneficiaries. But investment of the assets in an unadministered estate is likely to be of much less significance, in terms of both the necessity to convert into authorised investments because of the power of appropriation, and the duration when any such investments will be held.

²⁵ [1931] 1 Ch 572. This celebrated case in English law concerned the liability of an executor for losses sustained in the administration of a deceased estate. A solicitor appointed to realise two small assets absconded with the money. *Maughan* gave an analogous meaning to 'wilful default' for this purpose as in company law cases on the same phrase in other statutes. It was confined to covering just intentional or reckless breach of duty excluding liability based merely on negligence. This interpretation might seem to be unduly favourable to trustees and executors and a wider standard was adopted in *Speight v Gaunt* (1883) 22 Ch D 727 and in *Re Lucking's Will Trusts* [1968] 1 WLR 866. There is no suggestion that a different standard should be applied to personal representatives than to trustees.

²⁶ This tends to imply that a person who was previously a personal representative holding property on such trusts becomes a trustee by some automatic process of transition. This would have the beneficial effect that the statutory trusts on intestacy would enjoy all the powers which are expressly set out in the Trustee Ordinance.

of the relevant ss 36 to 41 that these provisions do not in general apply to personal representatives; there is no express reference and the terms seem to exclude an implied reference. Section 37 provides that surviving or continuing trustees, or the personal representatives of a last surviving or continuing trustee, always have power to appoint new trustees, but personal representatives, as such, do not by the words of the section have a similar power.²⁷

This gives rise to one of the most crucial distinctions between personal representatives and trustees, and causes a particular practical difficulty since personal representatives often need to appoint trustees. Where the will or the intestacy creates or gives rise to beneficial trusts, the personal representatives will be looking to appoint trustees, to transfer relevant trust assets to them, and to take a receipt from them to discharge their obligations vis-à-vis that property. If no trustees are expressly appointed by the will, can the personal representatives, who continue to hold the property, claim that they do so as trustees and thus appoint new trustees in their place? Such a contention would require proof that an implicit transition from one office to the other is possible and problems of formality of transfer would have to be resolved.²⁸

This brief review of some of the provisions of the Trustee Ordinance reveals a somewhat confused picture. There is the general definitional inclusion of personal representatives with trustees (so far as the context allows) and this is reinforced in some sections by express inclusion of personal representatives with trustees for the purposes of particular sections. But in the crucial section regarding the appointment and discharge of trustees, personal representatives are not included. It would have been more helpful and certainly clearer for the Trustee Ordinance to have expressly stated in each section whether that provision does or does not apply to personal representatives.

The Probate and Administration Ordinance

The Probate and Administration Ordinance is headed 'To consolidate and amend the law related to probate and letters of administration and to the administration of the estates of deceased persons.' The general interpretation

²⁷ It could be argued, on the general wording in s 2, that the references to 'trustee' in the section apply also to 'personal representative,' but it seems clear from the particular wording of the provision that this construction cannot be applied. The reason is that s 37 confers a power to appoint a new trustee on the surviving or continuing trustees, and continues in para (b) to state that, if there is no such person or no such person is able or willing to act, then the personal representative of the last surviving or continuing trustee can exercise the power. This express provision identifying one specific situation where personal representatives can appoint new trustees is usually regarded as excluding any general power. A similar reference to the personal representative of the last surviving or continuing trustee is also to be found in sub-s (4).

²⁸ The remaining sections of the Trustee Ordinance, dealing with vesting, control by the court, the judicial trustee, the official trustee, trust companies etc, are not relevant to this discussion. None of these sections is expressed to apply to personal representatives and the context will exclude any implied reference.

section, s 2, does not define 'personal representative' to include 'trustee'²⁹ and there is nothing in the specific provisions which implies that any of the specific powers or duties in the ordinance are applicable to trustees. In general the ordinance reinforces the distinction between the offices by defining characteristics, powers, duties, and liabilities unique to personal representatives.

Intestacy: statutory trusts and trusteeships

There are three specific statutory provisions relating to intestacy to note. Section 62 of the Probate and Administration Ordinance imposes a statutory trust for sale on all intestate property, whether total or partial. This confers a specific trusteeship on personal representatives, but it is suggested that this is an administration trust, ie a trust created to facilitate the administration of the estate, as opposed to a beneficial trust for beneficiaries.

Once the net residue is ascertained the second trust arises by virtue of s 5 of the ordinance which creates the 'statutory trusts' which govern the beneficial entitlement of issue and other classes of beneficiaries under intestacy. This is a true beneficial trust which incorporates, for example, the statutory powers of maintenance and advancement in the Trustee Ordinance.

The third provision is s 9 which states that, subject to rights and powers for the purposes of administration, the personal representative of any person dying intestate shall be a trustee for the persons beneficially entitled under the ordinance in respect of the residuary estate of the deceased unless it appears from the will, if any, of the deceased that he is to take the residuary estate beneficially.³⁰

The effect of these provisions is that, on the death of a person intestate as to any property, such property will be held by the personal representative, as to the immovable property upon trust to sell the same, and as to movable property upon trust to call in, sell, and convert such property into money.³¹ The personal representatives are to use the net money to arise from such sale and conversion for the payment of debts and legacies etc, in other words for the purposes of administration. If the persons entitled are all of full age and absolutely entitled the assets will be passed to them and the trust will end, having fulfilled its administration purpose. But if the entitlement under the intestacy is to minority or life interests, the statutory trusts will come into play,³² the personal

²⁹ See *Re Trollope* [1927] 1 Ch 596 on the corresponding English provision. 'It is therefore plain that the expression "personal representative" does not include trustees in the ordinary sense.'

³⁰ This section has no parallel provision in the English Acts. To the extent that the ordinance expressly states the trusteeship, the position under Hong Kong law is clearer than under English law. Further, the English cases which consider the matter without benefit of such a provision must be viewed cautiously in Hong Kong. See *Re Trollope's Will Trusts* [1927] 1 Ch 596 on the English Administration of Estates Act 1925.

³¹ s 62, Probate and Administration Ordinance.

³² ss 4 and 5, Intestates' Estates Ordinance.

representatives will become trustees,³³ and these trusts will continue as beneficial trusts until all the beneficiaries are of full age and entitled.³⁴ In view of s 9, it would seem that the personal representatives holding property on such trusts become trustees, with the same powers and duties as ordinary trustees holding assets on express beneficial trusts. That being so, personal representatives would be entitled to exercise the statutory power of appointing new trustees, which is an important practical point since it will enable them to release themselves of the trust obligations by appointing new trustees. An assent to and receipt from the new trustees would enable the personal representatives to discharge themselves from further responsibility.³⁵

Testamentary estate

A similar dichotomy between administration trusts and beneficial trusts can arise where there are express provisions in a will. Many wills contain administration trusts which usually take the form of putting the residue upon trust for sale with a direction to pay all just debts etc and then to divide or hold the residue for beneficiaries. Sometimes the will expressly states that the same persons are to be both executors and trustees of the will.³⁶ Where there are such administration trusts it can be argued that the executors hold the property as trustees for the purposes of administration until such time as they complete the process of administration and hold the net residuary estate for the residuary legatees. Where the residue is immediately divisible between adult beneficiaries such trusts automatically come to an end but where there are minors or unborn persons the necessity for on-going trusts arises. Does the executorship continue, or do the executors assume the role and function of trustees, and do they now hold the property in the capacity of trustee or personal representative? They cannot hold the same property in both capacities at the same time, although they can be trustees of existing assets and take new or subsequent assets as personal representatives.³⁷ A crucial question is whether some formal-

³³ s 9, Intestates' Estates Ordinance.

³⁴ An interesting academic question is whether the administration trust and trusteeship created by s 62 for the purposes of the administration of a deceased estate is analogous to the trusteeship of a person holding property upon a beneficial trust. It can be argued that a trusteeship for the purpose of just administration is not the same as a holding of property pursuant to a beneficial trust and that it would be incorrect to assume that the personal representative in such a position has the same powers and duties as are conferred by the Trustee Ordinance on an ongoing trustee of a beneficial trust. Could such a trustee, for example, appoint new trustees for the purposes of continuing beneficial trusts?

³⁵ Many of the English cases (decided without benefit of an analogous provision to s 9, IEO) are concerned with these questions of transition and appointment but unfortunately provide inconsistent and inconclusive decisions on the issues which arise on intestacy.

³⁶ See *Re Hayes' Will Trusts* [1971] 1 WLR 758, where named persons ('my trustees') were appointed executors and trustees. Held, power given 'my trustees' was without limitation to their capacity as trustees.

³⁷ See J B Clark, *Parry and Clark: The Law of Succession* (London: Sweet & Maxwell, 9th ed 1988), p 278.

ity of transfer is required in order to establish the transition.³⁸ The specific question is whether the personal representatives at this stage of the administration can appoint new trustees and transfer the property to them as discussed above. The possible continuing liability of the personal representative as such must also be considered and guarded against.

A different way of posing the same question is to examine the nature of the beneficiaries' interest. If the former personal representatives are holding the property on trust, then the residuary beneficiaries should have defined equitable or other beneficial interests in the assets. The former personal representatives would shed their responsibilities for the due administration of the estate and become focused on the fiduciary interests of the beneficiaries.

Nature of the beneficiaries' interest in the estate

The general rule is that no beneficiary can assert that he or she has any legal or equitable interest in any of the assets which constitute an unadministered deceased estate, ie where the residue has not been ascertained. The whole right of property in the assets is vested in the personal representatives.³⁹ The beneficiary has merely a right, in the nature of a chose in action, to require that the deceased's estate be duly administered. This chose in action is capable of being transmissible by will⁴⁰ and can be enforced against the personal representatives. If this is the nature of the beneficiaries' rights it should follow that the personal representatives are not per se constituted trustees, at least whilst the estate is still unadministered. The initial obligation in an unadministered estate in Hong Kong is to pay the estate duty and the estate can be regarded as frozen until some form of estate duty clearance has been obtained. Then follows the obligation to pay all just debts and this duty to the creditors also establishes that the personal representatives hold all of the assets of the estate in full ownership both legal and equitable (albeit as a fiduciary). On this basis there is no initial separation of the equitable from the legal estate and no room for any beneficial ownership of the estate.

Several cases serve to support these principles. *Commissioner of Stamp Duties (Queensland) v Livingston*⁴¹ is the most frequently cited.⁴² The point arose in this case in the following context. Mr Livingston was domiciled in New South Wales and he died leaving his estate, which consisted of real and personal property in Queensland and in New South Wales, to his widow absolutely.

³⁸ In *Phillipo v Munnings* (1837) 2 My & Cr 309, 314 Lord Cottenham recognised this possibility. 'Now, the fund ceased to bear the character of a legacy as soon as it assumed the character of a trust fund. Suppose the fund had been given by the will to anybody else, as a trustee, and not to the executor, it would then be clearly the case of a breach of trust.' Compare *Re Barker, Buxton v Campbell* [1892] 2 Ch 491.

³⁹ See Ackner LJ in *Re K (deceased)* [1985] 2 All ER 833.

⁴⁰ *Re Leigh's Will Trusts* [1970] Ch 277, a somewhat surprising decision; see the discussion below.

⁴¹ [1965] AC 91.

While the estate was still in the process of being administered the widow died intestate. The question arose whether succession duty was payable on the widow's death in respect of the Queensland property that had been left to her under her father's will. The Queensland taxing statute stated that duty was payable in respect of 'every devolution by law of any beneficial interest in property ... upon the death of any person.' Thus the question arose whether the widow could be said to have any beneficial interest in the property which was part of her deceased's husband's unadministered estate at the time of her death on which duty should be payable. The case was appealed to the Privy Council and it was decided that no duty was payable on the basis that the widow did not have any defined interest in property in the unadministered estate of her deceased husband. Lord Radcliffe referred to the 'peculiar status' which the law conferred on the executor for the purpose of carrying out his duties of administration. Whatever property came to him as executor came in full ownership without distinction between legal and equitable interests. The whole property was his but he held it for the purpose of carrying out the functions and duties of administration, not for his own benefit. It is suggested that he was not in a fiduciary position with regard to the estate that came to him in the right of his office, but that for certain purposes and in some aspects he was treated by the court as a trustee.⁴³

In a much quoted passage Lord Radcliffe continued:

It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed 'duties in respect of the assets' as trusts. What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever there might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done.

⁴² Other cases on the same point include *Lord Sudeley v AG* [1897] AC 11; *Dr Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* [1921] 2 AC 1; *Eastbourne Mutual Building Society v Hastings Corporation* [1965] 1 WLR 861; *Crowden v Aldridge* [1993] 3 All ER 603. An interesting analysis can be found in Meagher et al (note 4 above), pp 97–106.

⁴³ It was stated that he was only a trustee 'in this sense': see Kay J in *Re Marsden* [1884] 26 Ch D 783, 789. Lord Radcliffe's statement was most recently cited in *Crowden v Aldridge* (note 42 above) at p 608.

Lord Radcliffe derived his authority and support for these conclusions from the earlier case of *Lord Sudeley v AG*.⁴⁴ This case concerned land in New Zealand which was mortgaged in favour of a Mr Tollemache and on his death became vested in his executors for the purposes of the administration of his estate. Analogous with the *Livingston* estate his widow was entitled, and she also died shortly after her husband while his estate was still unadministered. Lord Herschell stated simply, 'I do not think that they [Mrs Tollemache's executors] have any estate right or interest legal or equitable in these New Zealand mortgages so as to make them an asset of her estate.'

This statement by Lord Herschell did not meet with immediate and unanimous approval and some of the critical comments were noted by Lord Radcliffe in the *Livingston* case. However his Lordship chose to brush aside these criticisms and to endorse and adopt the principles established in the *Sudeley* case, thereby establishing the point as part of English law with the authority of the Privy Council. The *Livingston* case was followed shortly after in the first instance decisions of *Lall v Lall*,⁴⁵ *Eastbourne Mutual Building Society v Hastings Corporation*,⁴⁶ and *Re Leigh's Will Trusts*.⁴⁷ This case answers the obvious question: can a beneficiary under an unadministered estate bequeath by will or pass on intestacy the interest which he has in the unadministered estate? In other words, if a beneficiary is entitled to specific or residuary property in an estate, but dies before that estate has been administered, leaving a will which is expressed to pass property which is the subject of the gift to him in the first will, is the will valid and what is the nature of the interest which is transmitted? *Re Leigh's Will Trusts* answered this quite simply. It accepted the authority of the *Livingston* case that the beneficiary had only a chose in action to ensure the due administration of the estate but saw no reason why this chose of action could not be transmissible by will so as to vest in the beneficiaries' personal representatives and be enforceable by the latter. As Buckley J said, 'what she could transmit was her own right to require the administrator of her husband's estate whoever he might be to administer his estate in any manner she or her personal representative might require consistent with the rights of any other person having rights against the estate. This right she could transmit to her executor coupled with a duty to exercise it in a particular manner.'⁴⁸

⁴⁴ [1897] AC 11.

⁴⁵ [1965] 3 All ER 330.

⁴⁶ [1965] 1 All ER 779.

⁴⁷ [1970] Ch 277.

⁴⁸ This principle was applied to the will of the beneficiary who was the sole administratrix and the sole beneficiary of the unadministered estate of her husband and who had died intestate before completing the administration. By her will she had specifically bequeathed 'all shares which I hold and any other interest ... which I may have' in S Limited. The only shares or interests in S Limited that the widow had were the shares in S Limited which formed part of her husband's estate and a debt owed by S Limited to her husband which also formed part of her husband's estate. It was held that these shares and the debt should be used to satisfy this specific bequest in her own will. In other words her interest in her husband's unadministered estate could properly be specifically bequeathed by her in her own will. But is this correct? Can a chose in action of this nature be regarded as sufficient of a property right to be assignable or transmissible? It could be argued that it is in the nature of a personal right exclusive to the holder.

A further consequence of the denial of a trusteeship to a personal representative is that an executor holding property in the course of administering the estate is not necessarily subject to a trustee's duty of holding the balance evenly between the beneficiaries. Whether he has such a duty has to be independently considered in the light of his own different fiduciary functions and obligations. This principle was stated by Ungood-Thomas J in *Re Hayes' Will Trusts*.⁴⁹ In a useful passage, following a reference to the *Livingston* case, the judge identified these functions as to get in the testator's estate, preserve its properties, discharge its liabilities, and distribute the resulting net estate. The legal personal representatives would in due course be concerned to obtain a proper discharge for the net assets and thus to ascertain who were entitled to them and to ensure that the assets were distributed to those entitled. But the judge did not feel that the personal representative should be concerned with any conflicting interests of beneficiaries under testamentary trusts but only with the trustees of that trust.

Quite apart from the peculiar nature of the personal representative's office and the idiosyncratic functions that he has to perform, the fundamental principles of the law of trusts themselves preclude the creation of a trust in this circumstance. Trust law requires that there should be identifiable equitable interests in defined property. A trust should relate to specific subjects or properties identifiable as the trust fund and clearly an unadministered estate is incapable of satisfying this requirement. The physical extent of the property is in many cases practically unidentifiable initially after the death and in many large and complex estates only becomes certain at a much later stage in the administration. But the more fundamental difficulty is that, even if the physical extent of the property which is vested in the executor is ascertainable, it is not known during the first stage of administration how much of this property has to be paid or applied to meet liabilities, expenses, and debts on the one hand and how much of the property will constitute the net residuary estate available for distribution to the beneficiaries.⁵⁰ And so the principle was stated that it is impossible for there to be any form of defined trust in favour of testamentary beneficiaries, at least until all of the first stage of the administration has been completed and the executors are holding the clear net residue for the designated beneficiaries.⁵¹ Thus, 'Equity could control the executor of the

⁴⁹ [1971] 2 All ER 341.

⁵⁰ The only sort of trust which could be envisaged in such circumstances would be a 'floating trust' which would arise initially and then, in some way, 'float' over the assets of the estate. This might be regarded as being analogous to a floating charge taken as security, which will crystallise and fix on the assets charged when enforced. In like manner the 'floating trust' would become fixed to ascertainable assets once those assets had been identified as available for distribution to the beneficiaries. Equity has not developed any such concept of a floating trust in this context and certainly no hint of such a device was available to the Privy Council in 1964 when they were deciding the *Livingston* case. However, in the more recent case of *Ottaway v Norman* [1972] Ch 698, there is a suggestion from the Vice Chancellor that some form of floating trust might be operable in secret trust cases.

⁵¹ It has been suggested that there may be a single exception to the general rule in relation to specific bequests or devises. There is case law authority supporting the view that a specific legatee or devisee does take an equitable interest in the subject matter of his gift, when property has been allocated to the gift or possibly from the death of the testator.

unadministered estate by remedies which did not involve the admission or recognition of equitable rights in the property in the assets of the estate.⁵²

Transition from personal representative to trustee

The application of these principles has been considered in a number of cases specifically concerned with the transition from personal representative to trustee. If it is accepted that personal representatives are not per se or ex officio trustees, can they become trustees by a process of transition at some stage of the administration? If so, the importance of identifying or marking the moment of any such transition has been noted above. The answer to these questions has been much assisted by the recent Hong Kong decision in *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon-hang*,⁵³ which has clarified some of the somewhat inconsistent English case law in this area. The administration of the estate of Wong Ping-sun was protracted but there came a time when two daughters sought a grant of letters of administration with the will annexed, de bonis non. This was opposed by the previous administrator who contended that they had completed administering the assets some two years previously with the result that they had progressed from the role of administrator to that of trustee and there was no subject matter which could form the basis of a grant.⁵⁴ An interesting initial ruling was that the onus was on the previous administrator to establish the transition from administrator to trustee as a question of fact.⁵⁵ This, the court held, had not been done and the letters de bonis non were granted. Rhind J applied the principles noted above, that until the residue had been ascertained a will trust could not come into existence because there would be no certainty of subject-matter.⁵⁶ On the facts the residue had not been ascertained at the time when the transition was claimed to have occurred. Other factors in the case were also regarded as inconsistent with the claim to have become trustees. No written assent had been executed by the administrators to themselves in the capacity of trustees.⁵⁷ *Kleinwort Benson* continued to

⁵² Per Meagher et al (note 4 above) at p 103.

⁵³ Note 2 above.

⁵⁴ Analogous to *In Re Aldhous* [1955] 1 WLR 459.

⁵⁵ Applying *Attenborough v Solomon* [1913] AC 76.

⁵⁶ See *Lord Sudeley v AG and Dr Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* (note 42 above) and *Commissioner of Stamp Duties (Queensland) v Livingston* (note 41 above). *Kleinwort Benson* never produced a residuary account showing what was the ascertained residue it was supposed to have taken over as trustee.

⁵⁷ Section 66(1), (2), and (3) of the Probate and Administration Ordinance was examined and found to be identical in all material ways with s 36 of the English Administration of Estates Act 1925. Thus the decisions in *Re King's Will Trusts* [1964] ChD 542 and *Re Edwards Will Trusts* [1982] Ch 30 applied. Rhind J commented: 'On a literal interpretation of s 66(3) of the Probate and Administration Ordinance, I see no conceptual or linguistic difficulty in using the word "pass" to describe what happens to a legal estate in land when a written assent changes the capacity in which the same person holds it from that of a personal representative to that of a trustee. On a purposive construction of s

be shown on the Land Register as administrator in respect of some land in the estate. Further they had disposed of land forming part of the estate as administrators subsequent to the time when they claimed to have become trustees.

These points would, of course, be sufficient to destroy Kleinwort Benson's claim to have become trustees. The judge referred also to the fact that the claim to be a trustee had been made only belatedly⁵⁸ and by the circumstance that Kleinwort Benson had not as a matter of fact, completed administering the estate. Thus the claim to have become a trustee failed and with it the power to appoint a successor to continue the administration as trustee; an administrator, as noted above, has no power to appoint a successor whether as trustee or as administrator. A grant de bonis non was the answer.

The English authorities: testate succession

In the light of this decision some of the English authorities can be shortly reviewed, and it can be noted at the outset that the Court of Appeal decision in *Harvell v Foster*⁵⁹ (where the issue arose exactly and a very precise and clear ruling was given on the matter) causes difficulties, because it is out of line with the main thrust of the authorities. In reviewing these decisions it is probably necessary to go no further back than the 1894 decision in *Eaton v Daines*.⁶⁰ This was a case where executors purported to appoint new trustees of the will, a power which they could only exercise as trustees and which capacity they could only have assumed by transition, in the absence of an express appointment. Kekewich J upheld the validity of the appointment, apparently taking the view that, since at the time of the appointment the estate had been cleared of payment of debts and expenses and the executors were in effect holding the net residue for distribution to the beneficiaries, they held the residue as trustee.⁶¹

66(3) of the Ordinance, too, I think there is everything to be said for interpreting it in such a way that the only type of assent capable of bringing about a change in the capacity in which a person holds a legal estate in land is one of the written variety. A principal objective of the raft of property legislation passed in England in 1925 — and s 66(3) of the Ordinance is a word-for-word borrowing from it — was to simplify conveyancing. A system which produces the cut-and-dried result in relation to land that no writing means no assent is immeasurably easier to operate than one where a complex weighing exercise can be required to determine whether, and, if so, when, the transition from personal representative to trustee occurred.¹

⁵⁸ Correspondence from Kleinwort Benson was examined to determine the date when the first claim to be acting as a trustee was made.

⁵⁹ [1954] 2 QB 367.

⁶⁰ [1894] WN 2.

⁶¹ The case concerned the power to appoint new trustees, as did *Re Ponder* [1921] 2 Ch 59 and *Re Cockburn's Will Trusts* [1957] 1 Ch 438. Chantal Stebbings, 'The Transition from Personal Representative to Trustee' [1984] Conv 423, argues that such cases simply involve a change of capacity, or office, or status and become trustees without formality. Other cases, eg *Attenborough v Solomon* [1913] AC 76, involve a transfer of title and thus a formal assent is required. The argument which suggests that the change of capacity and the question of assents should be kept separate and distinct is unconvincing.

A major decision is that of the House of Lords in *Attenborough v Solomon*.⁶² The case concerned the capacity in which plate was held at the time it was pledged. If held by trustees the transaction was void unless effected by both parties, but valid if effected by one of two personal representatives. The House of Lords' conclusion was that the property, at the time the pledge was made, was vested in Alfred Abraham Solomon and J D Solomon as co-trustees jointly. In such circumstances Alfred Abraham had no power to make the pledge which was consequently a void transaction, leaving the co-trustee free to recover possession of the chattels. In arriving at this conclusion Lord Haldane LC stated:⁶³

The office of executor remains, with its powers attached, but the property which he had originally in the chattels that devolved upon him and over which these powers extended, does not necessarily remain. So soon as he has assented, and this he may do informally and the assent may be inferred from his conduct, the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent.

The House thought that the true inference to be drawn from the facts was that the executors considered that they had done all that was due from them as executors by 1879, which was the date when the residuary account was sent by J D Solomon and duly passed.⁶⁴ This indicated that they were content that

⁶² [1913] AC 76. Mr Moses Solomon's estate included some plate and this had been pledged by one of the executors with a firm of pawnbrokers. On the death of the pledgor the transaction was discovered and the plate was claimed back from the pawnbrokers by the other co-executors. An executor would have power to make such a pledge but a trustee would not and the question arose whether at the time the pledge was made the pledgor was still in the position of an executor or whether he had become a trustee. The will in this case expressly appointed the two sons both executors and trustees and although it does not seem possible for a person to hold both offices contemporaneously, at least so far as beneficial trusts as supposed to administrative trusts are concerned, it is perfectly possible to hold the offices sequentially. The express appointment to both offices greatly assisted the finding that at some stage the executors ceased to be executors and became trustees. The executors administered the estate and in due course a residuary account was sent and duly passed. The plate, the property in question, was in the sole possession of Alfred Abraham Solomon pending the ultimate division of the trust estate and some fourteen years after the testator's death Alfred Abraham Solomon pledged this plate to a firm of pawnbrokers in his own name to secure an advance of money. The pledgees had no notice that this plate formed part of the testator's residuary estate or that Alfred Abraham was not the absolute beneficial owner thereof. The money so raised was misapplied by Alfred Abraham for his own purposes and the transaction only came to light on his death many years later. At that point the original testator's estate had not yet been completely distributed and the co-executor J D Solomon took steps to recover the plate from the pawnbrokers on the grounds that the pledgor as trustee had no powers to enter into the transaction. Applied in *Wise v Whitburn* [1924] 1 Ch 460.

⁶³ At p 83. No authority was cited on the main issue. The only case cited by Viscount Haldane LC was *Coggs v Bernard* (1703) 2 Ld Raym 909, a case on bailment.

⁶⁴ 'When an executor carries in the residuary account, it seems to me, looking at the form of it and at its purpose, that prima facie he must be taken to be declaring that he has brought the administration to an end and that he is going to hold the property thereafter as a trustee': per Rowlatt J in *Re Leopold Adolph Claremont* [1923] 2 KB 718, 721.

the dispositions of the will should then take effect. This inference was reinforced by the fact that from that date onwards nothing was done by either of the executors purporting to be an exercise of the powers of executors, albeit that the executors assented at a very early date the dispositions of the will taking effect. Since the subject matter in dispute was chattels there was no particular formality required for the assent which could be implied from the conduct of the parties, as indeed was the case on these facts. Accordingly the residuary estate, including the chattels in question, became vested in the trustees as trustees, and the fact that they were the same persons as the executors did not affect the point or present any obstacle to the inference which had been drawn. This principle were treated as axiomatic by Sargant J in the subsequent decision of *Re Ponder*,⁶⁵ a case on intestacy.

But unfortunately the waters were muddied by the Court of Appeal in *Harvell v Foster*,⁶⁶ which concerned the liability of a surety to an administration bond; if the alleged irregularity took place whilst the miscreant was an administrator the sureties were liable. If however the misdeeds took place when the administrator had become a trustee, then the sureties were not liable.⁶⁷ Lord Goddard CJ initially dismissed the action, holding that once the clear residue was in the husband's hands his character changed from that of administrator to that of trustee and therefore the deponent's obligations under the bond ceased. This view is consistent with the previous understanding from *Attenborough v Solomon*⁶⁸ and *Re Ponder*.⁶⁹

On appeal the decision was reversed. Lord Evershed MR, in giving the judgment of the court, thought there was no doubt that in the ordinary case a personal representative, once appointed, retained for all time that character, though he may, and at some stage presumably will, have exhausted all his duties or functions as such. The administration in *Harvell v Foster*⁷⁰ was not an 'ordinary' case, for the husband by the terms of his appointment as administrator would cease altogether to have that character when the plaintiff, who was appointed executor, became of age. The judge then continued that he was unable to accept the view which Sargant J was putting forward in *Re Ponder*⁷¹

⁶⁵ [1921] 2 Ch 59. Also citing in support *Re Smith* (1889) 42 Ch D 302 and *Re Adams* [1906] WN 220.

⁶⁶ [1954] 2 QB 367.

⁶⁷ The facts can be shortly stated as follows. A testator gave all his estate to his daughter the plaintiff and appointed her as sole executrix. He died in 1948 when the plaintiff was under 21 years of age and consequentially administration, with the will annexed, was granted to the plaintiff's husband during her minority. The husband swore the usual oath to 'well and truly administer' the estate 'according to law' and that he would 'make or cause to be made a just and true account of the administration of the said estate.' Two solicitors acted as sureties. The estate was duly administered and some £950 was paid to the husband. He subsequently quarrelled with his wife, the plaintiff, paid her £300, and turned her out of the matrimonial home. He then disappeared with the remainder of the money and never accounted for the balance of the estate. When the plaintiff attained her majority, the bond having been assigned to her, she claimed against the solicitors as sureties under the bond.

⁶⁸ Note 16 above.

⁶⁹ Note 61 above.

⁷⁰ Note 66 above.

⁷¹ Note 61 above (a case on intestacy that will be considered in the next section).

that the clearing of the estate by a personal representative necessarily and automatically discharged him from his obligations as personal representative, in particular from the obligation of any bond he may have entered into for the due administration of the estate. The judge continued:

We would add that, in our view, the duty of an administrator, as such, must at least extend to paying the funeral and testamentary expenses and debts and legacies (if any) and where, as here, immediate distribution is impossible owing to the infancy of the person beneficially entitled, retaining the net residue in trust for the infant. At least until the administrator can show that he has done this, it cannot, in our judgment, be said of him that he has duly administered the estate according to law.⁷²

Lord Evershed MR questioned Sargant J's observations in *Re Ponder*⁷³ on when an administrator becomes *functus officio*. He quoted Sargant J's⁷⁴ conclusion, 'that the administrator holds the residue after the debts and legacies are paid in the capacity of trustee and not of administrator,' and continued:

We have come to a different conclusion. In our opinion, upon the failure on March 26, 1950 (when the plaintiff attained the age of 21 years), of her husband to account for the proceeds of realization of the testator's estate, having in fact (save as to £300) mis-appropriated it to his own use, the latter was shown not to have 'well and truly administered' the estate 'according to law' within the true meaning and intent of the bond. Upon the more general question, it is unnecessary in the present case for us to attempt any formulation of the circumstances in which a personal representative may be said to cease to act as such and to assume the office and function of a trustee; but if Sargant J in *In Re Ponder* is to be taken to have decided that once a personal representative, by clearing the estate, has discharged all his

⁷² The rejection of the authority of *Re Ponder*, *ibid*, pointing to a transition by way of clean break from one office to another was not followed but it is suggested that this is exactly what principle dictates must be the correct position. If the offices are distinct and if the holder of the office has quite different fiduciary obligations in respect of the property which he holds, he must hold them in one capacity or the other but cannot hold them in a blurred joint capacity. The difficulty in the case is, perhaps, that the facts clearly suggested that justice lay on the part of the plaintiff and that the surety should have been held accountable for the administrator's misappropriation of the money. It has been suggested that this conclusion could have been arrived at by saying that, after the residue had been ascertained, the husband held as trustee, although he could still be sued as personal representative for action during the period leading up to the ascertainment of the residue. It might be an acceptable proposition to say that a personal representative remains liable as such and the sureties remain liable for his action as such for all misfeasances notwithstanding that at the time of the action he has ceased to be personal representative and become a trustee.

⁷³ [1921] 2 Ch 59, despite the fact that the case had been followed in *Re Pitt* (1928) 44 TLR 371, where it was held that an appointment of trustees by an administratrix who had paid all the debts and cleared the estate was good. See also *Re Yerburgh* [1928] WN 208.

⁷⁴ Citing *Eaton v Daines* [1894] WN 32.

functions other than those of a trustee for the persons beneficially interested in the net residue, and has thus become a trustee for those persons, he must be regarded, merely by virtue of such clearance, to have discharged himself from all his obligations as personal representative, because the capacities of personal representative and trustee are mutually exclusive, then we think the proposition too widely stated.

This categorical difference of opinion between *Harvell v Foster*⁷⁵ and *Re Ponder*⁷⁶ (and implicitly *Attenborough v Solomon*⁷⁷) causes confusion and has led very largely to the present undesirable state of the law in this area.

The controversy was revisited by Danckwerts J in *Re Cockburn's Will Trust*⁷⁸ where the judge was faced with the straightforward decision whether an administrator who had cleared the estate some ten years previously could exercise the statutory power of appointing new trustees. If the administrator had made the transition to a trustee then the simple answer would be yes, and this was how Danckwerts J decided the case. He referred to the difference of opinion apparent in *Harvell v Foster*⁷⁹ and *Re Ponder*⁸⁰ and clearly preferred the latter decision. He stated quite simply, 'I feel no doubt about the matter at all. Whether persons are executors or administrators, once they have completed the administration in due course, they become trustees holding for the beneficiaries either on an intestacy or under the terms of the will, and are bound to carry out the duties of trustees.'

Intestate estates

The decision in *Re Ponder*⁸¹ has been referred to above. The court followed *Eaton v Daines*⁸² to the effect that when an estate has been wound up and the trust property is in the hands of an executor free from the administration of the estate, the office then changes from that of executor to that of a trustee and therefore a power exists to appoint a trustee. The court could see no reason why the same principle should not apply in the case of an administratrix since they were faced in that case with an intestacy and an administratrix who had paid all expenses and debts and cleared the intestate estate. The administratrix, the widow of the deceased, had divided the residue into three portions, for herself and her two infant sons, and it was thought that from the time she did this she became a trustee of each of the two shares for her sons. That being so, the court

⁷⁵ Note 66 above.

⁷⁶ Note 61 above.

⁷⁷ Note 16 above.

⁷⁸ [1957] Ch 438.

⁷⁹ Note 66 above.

⁸⁰ Note 61 above.

⁸¹ *Ibid.*

⁸² Note 66 above. See also *Cooper v Cooper* (1874) LR 7 HL 53.

thought able to accede to the application for the Public Trustee to be appointed as a trustee jointly with the applicant as a trustee of the funds specified, the court having power to appoint a new trustee to act with an executor where the transition from executor to trustee has been made.⁸³

*Re Ponder*⁸⁴ was followed in *Re Yerburgh*⁸⁵ where Romer J stated that legal personal representatives became trustees when the estate had been fully administered. B S Ker, writing in 1955,⁸⁶ thought that these two cases were authority for the general rule that on an intestacy an administrator becomes a trustee when he has cleared the estate even when there are (as there were in *Re Yerburgh*) life and minority interests still extant.⁸⁷

Assent to land

Where the subject of the dispute is personalty as in *Attenborough v Solomon*⁸⁸ and *Harvell v Foster*,⁸⁹ no formality is required for an assent from the personal representative to a trustee or to the person entitled. An implied assent by conduct and dealing with the assets will be sufficient.⁹⁰ But where the subject matter of the estate is or includes land the statutory requirement in s 66 of the Probate and Administration Ordinance is that the assent must be in writing. The logical application of this principle to the transition from personal representative to trustee is that, in the case of land, a written assent from the personal representative in that capacity to himself in his capacity of trustee is required.⁹¹ This has now been confirmed by *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon-hang*,⁹² following and affirming the decision in *Re King's Will Trusts*⁹³ in 1964. The English case centred on the familiar point that an executor has no power to appoint a trustee but a trustee does, and thus an appointment of a new trustee via a person who is acting in the capacity of

⁸³ Although *Attenborough v Solomon* (note 16 above) does not appear to have been cited in the case the decision is clearly consistent with the conclusion reached there and it was in effect extended to apply to an administratrix of an intestate estate who had not been expressly appointed either executor or trustee of the residuary estate.

⁸⁴ Note 66 above.

⁸⁵ [1928] 44 TLR 371 and in *Re Cockburn's Will Trusts* [1957] 1 Ch 438.

⁸⁶ Note 2 above, p 203.

⁸⁷ The practical effect of this, as he points out, is that there is no need for a grant de bonis non to be taken out if a sole or surviving administrator dies after administration but before the period of distribution has arrived. But the writer's conclusions (ibid, p 205) are confusing and, it is submitted, not supported by the preceding arguments.

⁸⁸ Note 16 above.

⁸⁹ Note 66 above.

⁹⁰ See Stebbings (note 61 above), p 427.

⁹¹ See Stebbings, *ibid*, who suggests that no assent was needed in *Eaton v Daines* [1894] WN 32, *Re Ponder* [1921] 2 Ch 59, or *Re Cockburn's Will Trusts* [1957] 1 Ch 438, because the cases only concerned the change of status necessary to appoint a new trustee and not the title to property.

⁹² s 66(1), (2), and (3) of the Probate and Administration Ordinance was thought to be the same as s 36 of the English Administration of Estates Act 1925.

⁹³ [1964] Ch D 542. See E C Ryder, 'Re King's Will Trusts: A Reassessment' (1976) 29 CLP 60; J F Garner, 'Assents Today' (1964) 28 Conv (NS) 298.

executor will be invalid unless that person can show that the property has been properly vested in him as a trustee and that the appointment has been made in the latter capacity.⁹⁴ The question was whether the property vested in a person as trustee by virtue of the successive appointments of trustees or whether the property remained in the surviving personal representative of the original testatrix. It was held that the purported appointment by the original personal representative was ineffective to vest the legal estate held as personal representative in a trustee. The reason was that the appointee could only appoint a new trustee if the property had been formally vested in the appointee as trustee enabling him to take advantage of the statutory power to appoint new trustees. Since the subject matter in dispute was land a formal assent in writing was necessary for the property to pass in the capacity as trustee and this had not been done. Accordingly the appointee retained the property throughout in the capacity of personal representative and on his death the property passed by representation to his executor, in whom the title was vested.⁹⁵ The point in issue is clearly more of a conveyancing point on the proof of title traced through a chain of documents and the decision suggests that failure to execute the assent in writing will be fatal to the continuation of that chain. *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon-hang*⁹⁶ confirms this point.

The case will however apply with equal force to situations where the subject of the estate is or includes land and it is alleged there has been an implied transition of the offices. It is true to say that *Re King's Will Trusts*⁹⁷ came as something of a surprise to practitioners when decided since it had previously been assumed that no formality of written assent was required in such cases. However, the correctness of the decision has in general being accepted. Conveyancers should certainly take note of the decision since the absence of a written assent can constitute a flaw in the title which is not infrequently

⁹⁴ The testatrix appointed C, H, and J to be the executors of her will and C and H to be the trustees of the will. The will was proved by C and H, power being reserved to J who did not exercise that right. The trustees held certain properties specifically devised in accordance with the provisions of the will and subsequently H died leaving C as the sole trustee. C purported to appoint by a deed of appointment, J to be a trustee of the will jointly with himself. C then died and his will was proved by GEC and HDC who were the defendants in the action. Subsequently by deed of appointment J appointed A as trustee jointly with himself and J subsequently died. GEC also predeceased, leaving HDC as the sole surviving personal representative of the original testatrix by representation.

⁹⁵ It will be noticed that the appointee was originally appointed by the will to be both the executor and the trustee and thus the question of whether there had been an implied transition of the office of personal representative to trustee did not arise.

⁹⁶ See above. Rhind J defended the decision in *Re King*: 'In my view, Pennycuik J's reasoning cannot be faulted. His insistence that there had to be a divesting of title from the personal representative in that capacity and a re-vesting in the same person but in the different capacity of trustee has resonances of what Viscount Haldane said in the House of Lords' case of *Attenborough v Solomon* about the way assents worked under the common law.' In addition, the judge thought that both a literal and a purposive construction of s 66(3) of the PAO also supported the conclusion.

⁹⁷ Note 57 above. The only case cited by Pennycuik J which bore on the issue was *Re Yerburgh* [1928] WN 208, which recognised that a personal representative may make a written assent in favour of himself in some other capacity. *Re Cockburn's Will Trusts* (note 61 above) was surprisingly not cited in the judgment.

encountered in practice, particularly where the administration has been conducted by lay persons without the benefit of legal advice.

Just such a situation was highlighted by *Re Edward's Will Trusts*⁹⁸ where a husband was both the administrator of his deceased's wife's intestate estate and her sole beneficiary. The husband did not make any formal assent in writing of her estate from himself and the capacity of administrator to himself and the capacity of beneficiary, and many years later this flaw in the title was identified. The court decided that even though the husband had never assented to the vesting of the legal estate in himself an assent to the vesting of the equitable estate was not required to be in writing. By his conduct and enjoying beneficial occupation of the plots over a period of twenty years, it was to be inferred that the husband had assented to the vesting of the equitable estate in himself, and accordingly, the equitable estate in the two plots could pass on his death to his executor and become subject to the will trusts.⁹⁹ This is obviously not a very satisfactory solution since it is with the transmission of the legal estate that a subsequent conveyancer will be concerned, but it did at least provide some solutions to the otherwise insoluble practical problem presented by the failure to observe the required conveyancing steps identified by *Re King*.¹⁰⁰

Conclusion

The distinction between a trustee and a personal representative is conceptionally clear but one that remains, despite the extensive case law, difficult to draw in practice. The will draftsman can assist by differentiating between administration trusts (as where the residue is put upon express trust for sale to pay debts) to be administered by the executor and beneficial trusts (in favour of the testamentary beneficiaries) to be executed by a trustee, whether as a separate appointment or as a distinct transition of office by the person appointed to be both executor and trustee. The intestacy legislation already provides for this dichotomy of function. The personal representative can assist by recognising the need to execute a written assent to mark any transition of office. In the absence of such an instrument the personal representative will remain as such until the net residue has been ascertained and residuary accounts drawn up and signed by the residuary beneficiaries.

⁹⁸ [1982] Ch 30, citing *Re Hodge* [1940] Ch 260. The case assumed that *Re King's Will Trusts* (note 57 above) was correctly decided, despite some robust criticism. And see *Re Scott* [1915] 1 Ch 592, comment by Astbury J at p 607.

⁹⁹ This assumes that no formality of transfer is required for the transfer of the equitable estate and that s 5(1)(a) of the Conveyancing and Property Ordinance (s 53(1)(c) of the English Law of Property Act 1925) does not apply.

¹⁰⁰ Note 57 above.