

PERPETUITIES AND ACCUMULATIONS ACT 2009

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Application of the rule against perpetuities

Section 1: Application of the rule

30. **Section 1** defines the circumstances in which the rule against perpetuities applies. Only the estates, interests, powers and rights mentioned in section 1 are subject to the rule against perpetuities. As a result the scope of the rule is narrowed where the Act applies (see section 15). Under the Act the rule does not apply, for example, to most future easements, options and rights of pre-emption, which will fall outside these categories. Most of the pre-Act exceptions to the rule do not need to be replicated, as they do not fall within section 1.
31. **Subsection (2)** applies the rule against perpetuities to each of the successive estates and interests created by an instrument which limits property in trust. This means that, where property is given to be held on trust for A, then for B, and thereafter goes to C absolutely, the rule has to be applied to the interests of A, B and C separately. Any of the successive estates or interests may be subject to a contingency. For example, a trust is created where the terms are that A will be entitled to the income for life from A's 18th birthday; then, subject to A's interest, the capital will pass to whichever of B and C survive A; or, if both survive, to B and C in equal shares; or, if neither survive, then to charity X. Here the interests of A, B, C and X are all subject to the rule under the Act. **Subsection (7)** provides that the following estates and interests are within the scope of subsection (2)—
- an estate or interest arising under a right of reverter on the termination of a determinable freehold interest in land. For example, Y grants land to trustees to be held on trust for a youth football club until the land ceases to be used as a football pitch. If in fact the land ceases to be so used, it reverts to Y (or to Y's estate, if Y is deceased). The effect of the Act is that Y's interest under a right of reverter is treated as a successive interest arising on the determination of the determinable estate and is therefore subject to the rule against perpetuities;
 - an estate or interest arising under a resulting trust on the determination of a prior determinable interest. For example, Y gives a painting to trustees to be held on trust for a specified museum until the painting ceases to be on display at the museum. If the painting ceases to be displayed, the interest of the museum ceases and the painting will be held on automatic resulting trust for Y or (if Y is deceased) for Y's estate. The Act subjects Y's interest under the automatic resulting trust to the rule against perpetuities.
32. **Subsection (3)** applies the rule against perpetuities to an estate or interest in property held on trust which is subject to a condition precedent but which is not one of successive

estates or interests, that is, where it is the sole estate or interest created by the trust instrument. The condition precedent might be a condition to be fulfilled by a particular person, for example, a gift “to X provided he becomes a train driver”. Or it might determine who should receive the property: for example, a gift “to the first person to land on Mars” or “to my first great-great-grandchild”.

33. *Subsection (4)* provides that, where an instrument creates an estate or interest subject to a condition subsequent, the rule against perpetuities applies to the rights of the persons who will become entitled to the property if the condition is broken. For example, A transfers a piano to trustees to hold on trust for A’s grandchildren in equal shares on condition that none of them becomes a solicitor by the age of 30. The trust instrument provides that if, in breach of the condition, one of A’s grandchildren does become a solicitor by the age of 30, the piano will pass to charity B. The effect of subsection (4) is that the rule against perpetuities applies to the right of charity B to take the piano on breach of the condition. If none of A’s grandchildren breaches the condition within the perpetuity period, charity B’s interest will fail to take effect, and each grandchild’s interest will become absolute.
34. Under the doctrine of executory bequests it is possible to create successive legal interests in personal property by will without using a trust. *Subsection (5)* applies the rule against perpetuities to each of the successive interests.
35. *Subsection (6)* applies the rule to powers of appointment, with the result that a power of appointment must become exercisable within the perpetuity period or it will be void (and, if it is a special power, may be exercised only within the perpetuity period – see section 7(3) to (6)). For example, C creates a trust with a special power of appointment exercisable by trustees once one or more of C’s grandchildren has attained the age of 40. The power of appointment will be void if none of the grandchildren reaches the age of 40 within the perpetuity period. Powers of appointment are defined in sections 11 and 20.
36. *Subsection (8)* provides that section 1 has effect subject to the exceptions made by sections 2 and 3.
37. *Subsection (9)* repeals the second limb of section 4(3) of the Law of Property Act 1925 which provides that rights of entry affecting a legal freehold estate are confined to the perpetuity period. The repeal is with reference to instruments taking effect on or after the commencement day for the Act (section 15) and is made because section 1 defines when the rule applies for such instruments.

Section 2: Exceptions to the rule’s application

38. **Section 2** provides for certain general exceptions to the application of the rule against perpetuities (*subsection (1)*).
39. *Subsections (2) and (3)* replicate pre-Act exceptions to the rule against perpetuities. The subsections apply in certain circumstances where provision has been made for property to pass from one charity to another. *Subsection (2)* applies where a charity is granted an estate or interest in property with a gift over to another charity on the occurrence of a specified determining event. A “charity” is defined by section 1(1) of the Charities Act 2006 as “an institution which is established for charitable purposes only and falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities”. In the 2006 Act, “institution” means “an institution whether incorporated or not, and includes a trust or undertaking” (section 78(5)). For example, land is given to be held on trust for charity A but, if charity A ceases to require the land for its charitable purposes, the land is to pass to charity B. The rule against perpetuities does not apply to charity B’s estate or interest. The same result follows if the gift over is for charitable purposes rather than to a named charity.

40. *Subsection (3)* applies where property is given to one charity subject to a condition subsequent, with a provision that, if the condition is broken, the property shall pass to another charity. For example, a painting is granted on trust to charity A on condition that it is displayed to the public, but to charity B if charity A breaks the condition. Charity B's right to claim possession of the painting is not subject to the rule.
41. *Subsections (4) and (5)* together define the exception from the rule against perpetuities for interests and rights arising under relevant pension schemes as defined in sections 1 and 181 of the Pension Schemes Act 1993 (section 20(4) and (5)). The basic exception is described in subsection (4) as covering interests and rights arising under such pension schemes.
42. *Subsection (5)* removes from the ambit of subsection (4) interests and rights arising under two types of private trust created in respect of property subject to a pension scheme. These are defined as interests and rights arising under an instrument (a) nominating benefits under the pension scheme or (b) made in the exercise of a power of advancement arising under the scheme. By way of example of the first, a member may make a nomination binding on the pension scheme trustees for a trust to be created with certain pension benefits in favour of a nominated person (typically death in service benefits). The interests under the trust are subject to the rule. An example of the second is that pension scheme trustees may exercise a power of advancement to make capital payments to trustees in favour of relatives of a member before any entitlement to a pension arises. This capital sum may be settled in such a way that it creates successive interests. These interests are also subject to the rule against perpetuities.

Section 3: Power to specify exceptions

43. **Section 3** gives the Lord Chancellor power to make an order specifying further exceptions to the rule against perpetuities. The power is exercisable by statutory instrument, subject to affirmative resolution by each House.
44. The power avoids the need for further primary legislation to deal with unforeseen arrangements that might arise in the future. For example, a new form of financial instrument might be devised which has considerable advantages over existing trust instrument vehicles, but which would be unworkable if the rule against perpetuities were to apply.

Section 4: Abolition of existing exceptions

45. **Section 4** provides that certain pre-Act exceptions to the rule against perpetuities cease to have effect. These exceptions are unnecessary in light of sections 1 and 2. However, they continue to be relevant to instruments which took effect before commencement, to wills that were executed before commencement, and to post-commencement instruments made in the exercise of a special power of appointment created by an instrument which took effect before commencement (section 15).

Perpetuity period of 125 years

Section 5: Perpetuity period

46. **Section 5** defines the length of the perpetuity period governing instruments to which the Act applies (see sections 1, 2 and 15). The perpetuity period for such instruments is 125 years.
47. *Subsection (2)* provides that subsection (1) applies whether or not the instrument specifies a perpetuity period, and that specifying a perpetuity period will be ineffective.

Perpetuities: miscellaneous

Section 6: Start of the perpetuity period

48. **Section 6** specifies when the 125-year perpetuity period will start. *Subsection (1)* sets out the general rule that the perpetuity period commences when the instrument creating the estate, interest, right or power referred to in section 1 takes effect. For this purpose a will takes effect on the death of the testator (section 20(6)). The general rule applies to instruments created in the exercise of a general power of appointment: the perpetuity period is 125 years beginning on the date on which the general power is exercised, not on the date on which the power was created.
49. *Subsection (2)* provides that the perpetuity period for an instrument created in the exercise of a special power of appointment (sections 11 and 20 define a special power of appointment) begins on the date on which the instrument creating the power took effect. The Act applies to such instruments only where the instrument which created the special power took effect on or after the commencement day (section 15(1)(b)).
50. *Subsections (3) and (4)* specify when the perpetuity period starts to run in the circumstances set out in section 2(5), that is, where the interests or rights arise under an instrument nominating benefits under a relevant pension scheme, or under an instrument made in the exercise of a power of advancement arising under such a scheme. In these cases the perpetuity period of 125 years (section 5(1)) runs from when the member joined the scheme.

Section 7: Wait and see rule

51. The operation of the rule against perpetuities was modified by the 1964 Act, which introduced the “wait and see” principle. The “wait and see” principle means that the rule against perpetuities does not affect an estate or interest in property unless and until it becomes certain that the estate or interest will not vest within the perpetuity period. Section 7 of the Act applies this principle of “wait and see” to instruments to which the Act applies.
52. The section asks in effect whether, within the terms of the instrument, the estate, interest, right or power in question might—
 - vest (in the case of an estate or interest);
 - be exercised (in the case of a right of re-entry or an equivalent right in property other than land exercisable if a condition subsequent is broken, or a special power of appointment); or
 - become exercisable (in the case of a general power of appointment);outside the perpetuity period applicable to it.
53. If the answer is “yes”, then the principle of “wait and see” (set out in *subsections (2), (4) and (6)*) applies, and the estate, interest, right or power is valid if in fact it vests, is exercised or becomes exercisable within the perpetuity period. Only when it is clear that this will not happen, is the estate, interest, right or power void for perpetuity. In such a case, *subsections (2)(b) and (4)(b)* preserve the validity of things already done in relation to the estate or interest, or by way of exercise of the right or power, during the “wait and see” period.

Section 8: Exclusion of class members to avoid remoteness

54. At common law, where a gift was made in favour of a group of people (a class) the whole gift was void if all of the possible members of the class of beneficiaries were not ascertainable during the perpetuity period. This was because at common law a gift would fail even if only a part of it might vest outside the perpetuity period. Class closing

prevents this result by artificially closing the class to prevent potential members (for example, those yet unborn) from being taken into consideration.

55. The 1964 Act applies the “wait and see” principle to the class closing rule, meaning that all of the members who qualify for the gift during the perpetuity period will benefit. If all of the potential beneficiaries do not qualify during the “wait and see” period, section 4(4) of the 1964 Act allows for the exclusion of any members who did not qualify during the perpetuity period.
56. **Section 8** replicates the effect of section 4(4) of the 1964 Act. Section 8 applies if it becomes apparent — whether at the time the instrument takes effect or at some later stage — that the estate or interest would be void for perpetuity if certain members (whether alive or unborn) are included in the class. Under *subsection (2)*, once it is clear that an interest will be void for perpetuity if certain potential members are included in the class, they are excluded, provided their exclusion does not exhaust the class. *Subsection (3)* provides that, if the “wait and see” rule (section 7(1) and (2)) also applies, section 8 does not invalidate anything done during the “wait and see” period (section 7(2)) in relation to the estate or interest. *Subsection (4)* specifies who is to be treated as a member or potential member of a class.

Section 9: Saving and acceleration of expectant interests

57. **Section 9** replicates the effect of section 6 of the 1964 Act. *Subsection (1)* provides that, where an estate or interest is void for remoteness, an estate or interest ulterior (or subsequent) to, and dependent on, the void estate or interest is not void for remoteness simply for that reason. This deals with the technical problem that, at common law, if a disposition was void for perpetuity, a subsequent disposition that depended on it was also void.
58. *Subsection (2)* provides that, where a prior disposition is void for remoteness, the subsequent interest may take effect earlier than it otherwise would have done (though it can do so only if any other conditions attached to it have been fulfilled).

Section 10: Determinable interests becoming absolute

59. **Section 10** provides that, if an estate (in land) arising under a right of reverter or an interest (in property other than land) arising under a resulting trust on the determination of a determinable interest is void under the rule, the determinable estate or interest becomes absolute. This replicates the effect of section 12 of the 1964 Act.

Section 11: Powers of appointment

60. The Act refers at various points to powers of appointment, special powers of appointment and general powers of appointment. Section 11 defines when a power of appointment is a “special power of appointment” for the purposes of the Act. The definition has substantially the same effect as section 7 of the 1964 Act, which does not apply by virtue of section 16. Powers of appointment not falling within the section 11 definition are classed as general powers; these are tantamount to outright ownership.
61. A power of appointment may be given so as to be exercisable in a variety of ways. The Act divides these into three categories.
62. *Subsections (1) and (2)* define when a power is a special power of appointment for the purposes of a power exercisable otherwise than by will. All such powers are special powers unless they are exercisable by one person only and that person (being of full age and capacity) could transfer all the property subject to the power to himself or herself without having to obtain consent from anyone else and without complying with any other condition.
63. *Subsections (3) and (4)* make analogous provision in relation to special powers exercisable by will.

64. *Subsections (5) and (6)* apply to powers exercisable by will or otherwise. In such cases, the power is a special power of appointment if it satisfies either subsection (2) or subsection (4).

Section 12: Pre-commencement instruments: period difficult to ascertain

65. **Section 12** applies to instruments which have taken effect (or, in the case of wills, been executed) before the Act came into force, and which have a “lives in being” perpetuity period. Where it is difficult or not reasonably practicable to ascertain whether the lives have ended, and therefore whether the perpetuity period has ended, under section 12 the trustees have a power to “opt in” to a 100-year perpetuity period. To exercise the opt-in the trustees must execute a deed stating that the trustees believe it is difficult or not reasonably practicable to know if the perpetuity period has ended, and that subsection (2) is to apply (*subsection (1)*). This deed cannot be revoked (*subsection (3)*). The effect of the opt-in is that the trust is deemed to have always had a perpetuity period of 100 years and is subject to sections 6 to 11 of the Act. Sections 1 to 12 of the 1964 Act are treated as if they did not apply (and never applied) in relation to the trust (*subsection (2)*).
66. The power is necessarily a fiduciary power, and so must be exercised in the best interests of the beneficiaries. The power does not enable the trustees to opt in to the provisions in the Act relating to accumulations.

Accumulations

Section 13: Abolition of restrictions

67. Accumulation is the process whereby, under the terms of a trust, the trustees are authorised or required to accumulate income, thereby converting it into capital. Section 13 abolishes the pre-Act rule against excessive accumulations. Because that rule was entirely statutory, the repeal of the four relevant statutory provisions necessarily abrogates it. The repeals apply only to instruments creating powers and duties to accumulate and taking effect on or after the commencement day, other than wills made before that day. Instruments taking effect before commencement of the Act are not affected.
68. The removal of the statutory restrictions on accumulations does not mean that it is possible to accumulate income in perpetuity. This is because the rule against perpetuities, in effect, limits the life of a trust and so provides an upper limit on any accumulation.

Section 14: Restrictions on accumulation for charitable trusts

69. **Section 14** makes specific provision in relation to charitable trusts. The section provides that any power or duty to accumulate is subject to a maximum period of 21 years, unless the trust instrument specifies that the power or duty to accumulate ceases to have effect on the death of the settlor or, where there are multiple settlors, the death of a settlor identified by name or order of death (*subsection (5)*). The 21 year period starts from the first day when the power or duty must or may be exercised (*subsection (4)*).
70. If a trust instrument provides for an accumulation period longer than 21 years, then (except where *subsection (5)* applies) the power or duty to accumulate ceases to have effect after 21 years (*subsection (3)*). *Subsection (6)* provides that the income is then distributed or applied as it would have been had there been no duty or power to accumulate in the terms of the trust. This follows the model of the pre-Act legislation on accumulations: see the Law of Property Act 1925, section 164(1).
71. *Subsection (2)* provides that the 21-year restriction on accumulation does not apply where the provision in the instrument has been made by a court or the Charity Commission for England and Wales.

Application of statutory provisions

Section 15: Application of the Act

72. **Section 15** prescribes the instruments to which the Act applies.
73. The general rule is that the sections of the Act listed in *subsection (1)* apply to instruments which take effect on or after the commencement day for the Act. But they do not apply where the instrument is a will executed before that day, or is made in the exercise of a special power of appointment which was created by an instrument taking effect before that day. For such wills, or for instruments made in the exercise of such a special power, the pre-Act law applies, subject to subsection (2). Wills are deemed to take effect on the death of the testator (section 20(6)). A reference to a will in the Act includes a reference to a codicil (section 20(7)).
74. *Subsection (2)* provides that section 12 (pre-commencement instruments: period difficult to ascertain) applies to instruments which take effect before the commencement day, and to wills executed before that day (whether or not they take effect before that day). By *subsection (3)*, section 12 cannot apply if before the commencement day the terms of the trust were exhausted or the trust property became held on charitable trusts by way of a final disposition of the property.

Section 16: Limitation of 1964 Act to existing instruments

75. This section excludes the application of sections 1 to 14 of the 1964 Act in relation to instruments to which the Act applies.

General

Section 17: The Crown

76. **Section 17** applies the provisions of the Act to the Crown. In the case of the rule against perpetuities, it applies the provisions of the Act to Crown interests subject to the rule, but does not extend the application of the rule.

Section 18: Rule as to duration not affected

77. As a general rule, a trust may not be created for a non-charitable purpose. However, a small category of non-charitable purpose trusts may be regarded as valid, such as trusts for the maintenance of gravestones. These trusts are valid only if their duration is limited. The permitted period is a period equivalent to (but distinct from) the perpetuity period.
78. The Act is concerned with the law relating to the avoidance of future interests for remoteness rather than the duration of trusts. Section 18 ensures that the period permitted for the duration of non-charitable purpose trusts is not affected by the Act. The period is a life or lives in being plus 21 years, or 21 years if there is no relevant life in being.

Section 19: Provision made otherwise than by instrument

79. **Section 19** corresponds to section 15(6) of the 1964 Act. The scope of the application of the rule against perpetuities and excessive accumulations under the Act is defined by reference to instruments. Typically these instruments are a trust deed or a will. However, it is possible to create a trust orally, without the use of writing. For the purposes of the Act, such a trust is treated as if it were made by written instrument.

Section 20: Interpretation

80. **Section 20** provides definitions for a number of terms used in the Act.

Section 21: Repeals

81. **Section 21** introduces the Schedule listing the repeals made by the Act. The repeals apply in relation to instruments taking effect on or after the commencement day for the Act, unless the instrument is a will executed before that day, or an instrument exercising a special power of appointment which was created by an instrument taking effect before that day (see Schedule and section 15).