THE INCOME TAX ASSESSMENT ACT, SECTION 102(1) (B): TRUSTS FOR UNMARRIED INFANT CHILDREN

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Most of the sections of Division 6 of the *Income Tax Assessment Act*, 1936 (Cth), dealing with the taxation of trust income, conform to a basic pattern. The pattern involves assessing beneficiary, trustee, or both, at the rate of tax appropriate to them, or, in cases where s.99A applies, at a fixed flat rate (at present 50%). S.102 is notable in standing outside this pattern. With a view to minimising tax avoidance by the use of certain types of trust, the Legislature has in that section provided for assessment of the trustee to tax at the *settlor's* marginal rate of tax. At first glance one might form the impression that s.102 works effectively against those kinds of tax avoidance at which it is directed. The object of this article is to analyse the section in its application to trusts for the settlor's unmarried infant children. It will become apparent that the section is defective in major respects, and will not perform effectively the task presumably intended for it by the Legislature until it is significantly recast.

Elements of Section 102

S.102 (1) provides (so far as it is relevant):

> Where a person has created a trust in respect of any income or property (including money) and —. . . (b) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of twenty-one years and unmarried, the Commissioner may assess the trustee to pay income tax, under this section, and the trustee shall be liable to pay the tax so assessed.

Sub-s. (2) provides in effect that the amount of tax payable under s.102 is the amount by which the tax of the creator of the trust is less than the tax which would have been payable by him had the trust income been included in his assessment.

Sub-s. (3) is designed to ensure that whenever s.102 is applied to trust income, that income will not be the subject of any other assessment, either in the hands of the trustee or any beneficiary.

For s.102 to operate, the following conditions must be satisfied:

(a) there must be a 'trust in respect of any income or property

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(including money)';
(b) the parent must have created the trust;
(c) income must be, under that trust,
(i) payable to,
or (ii) accumulated for,
or (iii) applicable for the benefit of an unmarried child (or children) under the age of twenty-one years;
(d) the Commissioner must exercise his discretion to apply the section.

Each condition calls for comment.

(1) A Trust in Respect of Income or Property

(a) Trust

S.102 provides one of the few occasions in Division 6 in which the word 'trust' is divorced from the word 'estate'. Whatever be the precise import of 'trust estate', the notion is clearly different from that described by the word 'trust'. 'Trust' describes the legal relationship under and by virtue of which a trust estate exists. Authorities on the interpretation of 'trust estate' must therefore be treated with caution in dealing with s.102.

While the Act nowhere defines 'trust', s.6 contains a definition of 'trustee', which adopts and extends the general law notion. In its extended, statutory sense 'trustee' includes, unless the contrary intention appears, an executor or administrator, guardian, committee, receiver, liquidator, and 'every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under legal or other disability'. Does this provision widen by inference the trust notion?

The significance of this question, in the context of s.102(1)(b), is tempered by that section's insistence on *creation* of a trust. It will be submitted later that a trust which arises by will or on intestacy is not 'created' in the sense contemplated by s.102. Accordingly, the section will not apply to the administration of the assets of a deceased person, even if that phenomenon can be described as a 'trust' by inference from the statutory extension of 'trustee' to include executor and administrator. Similarly, even if a receiver or liquidator is deemed to be a trustee, it is improbable that any person (and 'person' cannot include company in s.102, for the reason mentioned below) can be said to have *created* the receivership or liquidation.

However, a person having or taking upon himself the administration or control of income affected by a trust (in the general law sense of 'trust') is a trustee under s.6. Might not the parent in *Truesdale* v. *Federal Commissioner of Taxation*[1], who was held not to have created a trust by transferring property to the trustees of an existing trust, nevertheless have created a statutory 'trust' had he taken upon himself the

1 (1970) 120 C.L.R. 353.

de facto administration of the trust income? Does the parent who acquires 'possession... or management' of income of which his child is the beneficial or even the legal owner, thereby become a 'person [who] has created a trust [under which]... income is... payable to... a child or children of that person....'?

It is submitted that each of these questions must be answered in the negative. First, s.6 itself in defining 'trustee' uses the word 'trust' in its general law sense ('... income affected by any express or implied trust....'). Secondly, the fact that some parts of the definition of 'trustee' (*e.g.* receivers, liquidators) are entirely inappropriate to s.102 suggests that the definition was not intended to have any relevance in a s.102 situation. Thirdly, and most importantly, s.102 was enacted to prevent a taxpayer from gaining a fiscal advantage by alienating income on trust for his children. It would be absurd if a provision so designed were interpreted so as to penalise a parent who offers his experience and advice in the management and administration of property acquired by his child *aliunde*. For these reasons the word 'trust' in s.102 should be taken as referring only to the general law concept of express, implied or constructive trust. Of course, there is a problem (discussed below) as to whether any person can be said to have *created* a constructive trust.

(b) Multiple Trusts

The exposition of the general law notion of the trust and the distinction between the trust and analogous legal institutions are matters outside the scope of this article. However, one aspect warrants special attention in the tax context. Granted that given facts satisfy the requirements for the existence of a *trust situation*, a problem which sometimes remains is: *how many* trusts are there? What are the criteria upon which a trust situation may properly be divided into more than one trust?

The significance of the question in respect of s.102 is twofold. First, where S conveys property to the trustees of a trust created by X, to be held by the trustees on the terms of X's trust, has S 'created a trust'? Setting aside for the time being difficulties about the meaning of 'created', has 'a trust' been brought into existence by S's action? S.102 will apply only if in the events which have happened there are two trusts and not one. Secondly, the adverse effect on the taxpayer of s.102 can be alleviated by splitting trust income, if he can create more than one trust.

This second point can be illustrated in the following way. Suppose S creates two trusts by conveying separate parcels of income-producing property to T_1 and T_2 respectively, in trust for S's son B. In the year ended 30th June 1972 Trust No. 1 produces $20,000 net income, and Trust No. 2 produces $10,000 net income. Had S derived an additional $10,000 taxable income, tax on the additional amount would have been

(say) $5,000. A second $10,000 would have involved tax of $6,000 and a third $10,000 would have involved tax of $6,500.

S.102 nowhere expressly requires the aggregation of the income of multiple trusts for the purpose of calculation of tax. In fact, sub-ss. (1) and (2) refer to 'a trust', 'the trust' and 'the trust estate', suggesting that the section must be applied separately to each trust. S.102 does not deem the trust income to be the parent's income for tax purposes. It provides that the *trustees* may be assessed to pay as tax the amount by which the parent's tax is less than what it would have been 'if he had received... so much of the net income of the trust estate as...' benefits the child.

The effect of these provisions seems clearly to be that two assessments must be issued by the Commissioner, should he decide to invoke s.102 on the facts set out above. T_1 will be assessed to tax on the $20,000 net income produced by Trust No. 1, the tax being $5,000 on the first $10,000 and $6,000 on the second $10,000. T_2 will be assessed to tax on the $10,000 net income of Trust No. 2, *the tax being $5,000.* Had the Commissioner been able to treat the two trusts as a single trust, the last $10,000 of net income would have produced tax of $6,500 rather than $5,000. And, of course, the greater the number of trusts to share the $30,000 of total trust income, the greater the tax advantage. It will therefore be crucial to determine how many trusts exist in order to apply s.102.

Lord Eldon,[2] among others, has said, in order for a trust to be valid, 'first, that the words must be imperative...; secondly, that the subject must be certain...; and thirdly, that the object must be as certain as the subject'. The first element raises 'a question in every case of construction of the words used to ascertain whether they (together with any admissible extrinsic evidence) establish an intention to set up a trust'.[3] Intention to create a trust (such intention being gleaned principally from construction of the settlor's words) is thus a paramount element in trust formation.

One would expect that likewise the issue of the number of trusts created depends (assuming the elements of a trust situation are present) upon (a) how many were intended to be created (except as regards constructive trusts, which are set aside for present purposes) and (b) whether that intention was carried into effect by what was done. Duplication of trust funds, trust instruments and the like should largely be disregarded except insofar as it provides evidence of intention. After all, 'equity looks to the intent rather than to the form'.[4] The primacy of intention is forgotten only when one succumbs to the linguistic trap

2 In *Wright* v. *Atkyns* (1823), Turn. & R. 143, 157; see also Lord Langdale's judgment in *Knight* v. *Knight* (1840), 3 Beav. 148.

3 P. H. Pettit, *Equity and the Law of Trusts*, 2nd ed. (1970), 32.

4 R. E. Megarry and P. V. Baker (eds.), *Snell's Principles of Equity*, 26th ed. (1966), 43.

of referring to a trust as if it were an entity like a pen. The number of pens in a given situation has nothing to do with anyone's intention — they are there, and one only has to count them. But linguistic similarity should not obscure the fundamental difference which arises because a trust is not an object but a legal relationship;[5] and the existence of legal relationships often (as in this case) depends upon intention.

Analysis supports this expectation. In a trust situation there can be more than one settlor, set of trustees, trust fund, set of beneficiaries and trust instrument. But mere multiplicity of any of these cannot be conclusive. The one settlor can of course create many trusts; and a person can settle property upon an existing trust created by someone else, without thereby establishing another trust.[6] One trustee or set of trustees can act in many trusts; and a settlor may appoint two or more sets of trustees in respect of a single trust, with some appropriate division of responsibility (*e.g.* the assignment of property in another jurisdiction to a set of trustees resident in that jurisdiction)[7]. One trust fund can be the subject of more than one trust;[8] and two or more trust funds can be made the subject of the same trust.[9] One set of beneficiaries can be entitled under more than one trust; and a single trust can involve more than one set of beneficiaries (as where entitlement is contingent). One trust instrument can contain more than one trust;[10] and a trust may be set out in more than one instrument (*e.g.* will and codicil). However, while mere multiplicity cannot be conclusive, the fact that a settlor uses separate sets of trustees, conveys separate parcels of trust property to trustees, appoints separate sets of beneficiaries or uses separate instruments will, taken with the surrounding circumstances, be factors indicating an intention to create two or more separate trusts. There are few tax cases in this area. The Australian authority is consistent with the present contention, but some earlier New Zealand cases are not.

In *Baldwin* v. *Commissioner of Inland Revenue*[11] B executed a deed of trust under which he made a number of gifts of £500 each to himself

5 See G. W. Keeton, *The Law of Trusts*, 4th ed., 3; R.P. Meagher & W. Gummow (eds.), *Jacobs' Law of Trusts in N.S.W.*, 3rd ed. (1971), 108.

6 *Truesdale's* case, *supra* n. 1.

7 *Trustee Act*, 1898 (Tas.), s.13 (2) (b).

8 As in *Thomson* v. *Commissioner of Stamp Duties* [1929] A.C. 450. There a settlement of a fund upon trust to pay the income to the settlor's wife during their joint lives with remainder after death of either of them to their five daughters in equal shares, was held to create (at least) two trusts. There was a trust if the wife should die first, and another trust if the husband should die first, even though the beneficiaries were the same five daughters in each case. In the High Court Higgins J. (with whom Powers J. agreed on this point) clearly expressed this holding ((1927) 40 C.L.R. 394 at 426). *Semble,* nothing in the Privy Council's advice is inconsistent with Higgins J.'s judgment. Gibbs J. analysed the position in *Keighley* v. *Commissioner of Stamp Duties (N.S.W.)* (1971) 45 A.L.J.R. 620 at 624-5. See also D. G. Hill, 'Trusts to Take Effect after Death', (1971) Vol. 1 *Australian Tax Review*, 10.

9 As in *Truesdale's* case, *supra* n. (1), but see *Baldwin's* case and *Tucker's* case, *infra*, n. 11 and n. 20.

10 As in *Thomson's* case, *supra* n. 8.

11 [1965] N.Z.L.R. 1.

and his wife as trustees (the 'Surrey trustees') upon trust to form a finance company and to carry on the business of the company upon trust for his children. Later B's father-in-law executed a deed of trust under which he settled £5 upon B and his wife as trustees (the 'Ritz trustees'), the trustees to hold that sum, and any other property subsequently made over to them, upon trust for B's children. Then by a later deed of assignment the Surrey trustees made over to the Ritz trustees all the trust property held by them, the latter covenanting to hold the property as trustees for the Ritz Trust. In his income tax return B claimed a deduction by way of special exemption under s.83A of the *Land and Income Tax Act*, 1954 (N.Z.). The Commissioner disallowed the claim, relying on s.84A, which provided that no child of a taxpayer shall be deemed to be dependent upon him if the Commissioner was satisfied that the child in respect of the year in question had received certain defined benefits from a trust created by the taxpayer or his wife or both of them.[12] Macarthur J. found for the Commissioner, on the basis that the Surrey trustees (the taxpayer and his wife) had created a trust by the deed of assignment, and accordingly s.84A applied.

After interpreting the word 'create' as meaning 'bring into legal existence', his Honour said without reference to any authority:

> No particular method of creation of a trust is indicated by the section. I think therefore that if it is shown that trust obligations have been imposed or constituted in respect of certain property by one or more of the specified persons then a trust has been created by that person or those persons within the meaning of the section.[13]

The words 'imposed or constituted' are ambiguous. It has been suggested that they imply the requirement of intention.[14] No doubt the passage requires that the specified person intend that the subject property be held on trust rather than under an agency, for example. But the passage does not state that it is relevant to ask whether a fresh (as opposed to an existing) trust is intended, and his Honour did not do so. Rather in its context the passage appears to suggest that whenever trust property is settled in more than one parcel, so that 'trust obligations have been imposed or constituted in respect of' each separate parcel, a separate trust exists for each parcel, even though the settlor, trustees, beneficiaries and trust instrument are the same in each case. In other words, formal separation of the trust property into parcels, rather than the intention of the settlor, is crucial for the creation of multiple trusts. Such a view would produce some startling consequences. For example,

12 The material provision was sub-s. (1) (b):

(1) This section shall apply in any case where . . .

(b) Either before or after the commencement of this section a trust (other than a trust created by will) has been created by the taxpayer or by a person who is or has been the wife or husband of the taxpayer or by both the taxpayer and that person.

13 At 6. His Honour said 'the meaning of the words "a trust has been created" has not been judicially considered'. But see the cases on analogous statutory formulae, *infra*.

14 *Tucker's* case, *infra* n. 20, at 66.

a person who executes a settlement containing a covenant to settle after-acquired property 'upon the trusts and subject to the powers and provisions (thereinbefore) declared'[15] would create a new trust when he settles such property, notwithstanding his contrary expression of intention. That new trust would presumably involve the creation of new beneficial interests, to which the modern rule against perpetuities would apply as at the time of settlement of the after-acquired property, when such interests would be created.[16] The settlement might as a whole be invalid because of the rule, and yet a covenant to settle after-acquired property performed some time later might create a valid trust. This would be odd, to say the least. Further, if S covenants with trustees to settle $10,000 on trust, and happens to transfer the trust fund to the trustees by two cheques on different days, there would be two trusts, since 'trust obligations have been imposed or constituted in respect of' each of the two sums, notwithstanding that such a result would be produced by a fortuitous circumstance and contrary to S's intention. Likewise, businessmen dealing with trustees who carry on a business would be regarded as creating a trust upon each sale of property to the trustees.

It is far from self-evident that if 'trust obligations have been imposed or constituted in respect of' certain property by a person, then 'a trust' has been brought into legal existence. This assumes the real question at issue. It was reasonably clear in the case before his Honour that, by virtue of the deed of assignment between the Surrey trustees and the Ritz trustees, the obligations of the Ritz trust were imposed in respect of the trust property.[17] But it did not follow automatically that a trust had been brought into legal existence. Later, after analysing the facts, his Honour said:

> The result is that the trust property hitherto held by the Surrey trustees is now held by the appellant and his wife upon the trusts set out in the Ritz trust deed. I think it is clear that the appellant and his wife have thus imposed or constituted fresh trust obligations in respect of the property under consideration.[18]

Again, with respect, this begs the question. Granted that the obligation of the Ritz trust were 'fresh' in respect of the property under considera-

15 The form in *Re Pryce* [1917] 1 Ch. 234; *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609; *Pullan* v. *Koe* [1913] 1 Ch. 9.

16 J. H. C. Morris and W. Barton Leach, *The Rule Against Perpetuities*, 2nd ed. (1962), 57. In *Cooke* v. *Cooke* (1887) 38 Ch. D. 202, North J. said that, where property was conveyed to trustees in 1836 pursuant to a covenant made in 1834, the perpetuity period commenced in 1834. However, the case is not inconsistent with the extension of Macarthur J.'s view in the text, because the covenant was supported by marriage consideration, so that equitable rights in respect of the property were vested in the trustees on execution of the covenant.

17 However, since the assignment was in breach of trust, the beneficiaries could set it aside. But they were beneficiaries under both trusts, and the assignment was apparently not to their disadvantage, so it was not likely that they would set it aside.

18 At 6.

tion, has a *fresh trust* been brought into existence? The judgment answers this question in the affirmative, but it is submitted that no good reasons are provided for the answer.

According to the present analysis the Court should have had regard to the intention of the Surrey trustees at the time of the deed of assignment, as expressed in that deed. That intention, according to the wording of the deed itself, was that the Ritz trustees 'will hold the said trust property as trustees for the Ritz Investments Trust', not as trustees for a new trust identical with the Ritz trust.[19]

In *Tucker* v. *Commissioner of Inland Revenue*[20] Woodhouse J. dealt with similar facts. T's father-in-law executed as settlor a deed of trust which made provision for T's wife and children as beneficiaries. The amount settled was £10 and the deed provided that the trustees would hold after-acquired property 'upon the trusts contained in the deed'.[21] On the same day T transferred property to the trustees for consideration, took a lease of it from the trustees, and made a gift to the trustees of the value of planting on the property. Ten days later he transferred life policies and shares to the trustees under a deed of covenant pursuant to which he was entitled to receive payment upon demand.

Macarthur J.'s test in *Baldwin's* case would produce the result that T had created not only 'a trust', but at least two (of the shares and policies, and the property and plantings), because trust obligations had been imposed or constituted in respect of at least two parcels of property. S.84A of the New Zealand Act would accordingly apply.

Woodhouse J., however, found that T had created 'a trust'. The basis of this holding is, with respect, unclear. He purported to follow the *Baldwin* case, which he regarded as laying down two necessary elements for the creation of a trust: the element of intention ('a deliberate act of will on the part of the person' dealing with the property[22]), and the element of achieving or carrying into effect that intention. Yet it seems that the element of intention was invoked only to rebut the suggestion that the various transactions were solely commercial in their concept;[23] it was a test to identify a trust situation, and was not relied upon to determine whether a fresh trust was created or an existing trust was used. His Honour said:

> In my opinion, his intention and purpose was effected and a trust created in respect of the property when he made use of the existing trust deed in order that its terms should become applicable to his own dispositions.[24]

T's intention was to make use of the existing trust deed in order that

19 See also the terms of the Ritz Trust Deed set out on p. 4 of the report.
20 [1965] N.Z.L.R. 1027.
21 At 1028.
22 At 1030.
23 At 1029.
24 At 1030-1031.

its terms should become applicable to his own dispositions; that is, he intended to create no new trust, but to subject new property to the terms of an existing trust. The assertion that this intention was 'effected' and a trust created is baffling. It is submitted that his Honour can only have had in mind that a new trust arose irrespective of T's intention in the matter, because new property was conveyed upon trust.[25] This is Macarthur J.'s position in *Baldwin's* case, and should be rejected for the same reasons.

The High Court of Australia considered the matter in *Truesdale* v. *Federal Commissioner of Taxation.*[26] K wanted to transfer shares to be issued by K Holdings Pty. Ltd. to trusts in favour of his three children. Three deeds of trust identical in form but each benefiting a different child were executed by E as settlor, and on the same day E paid to T as trustee three cheques for £10 each. Shortly prior to the execution of the deeds, a meeting of K Holdings Pty. Ltd. had passed a resolution for the issue of three parcels of 50 shares to T as trustee of the trusts to be constituted, at a price of £11 per share. On the day of the meeting K had handed three cheques for £555 to T. After the trust deeds had been executed T paid the cheques into three trust accounts, and drew on those accounts in payment of the allotted shares. In the year of income the trustee received a dividend of £2,000 in respect of each parcel of shares, and he paid the whole amount to the beneficiaries. The Commissioner sought to apply s.102. T argued that K did not create any of the trusts, and that, if he did, the income of each trust, although paid by T to the beneficiary, was not in the year of income 'payable to' the beneficiary within the meaning of s.102. Consideration of the latter point will be deferred for the time being.

The scheme might have failed from the outset because, for reasons which are not clear, K handed to T the cheques for £555 *before* E's trust deeds were executed. If T held the cheques as trustee immediately upon receipt of them, then K would have created trusts. On this point, however, Menzies J. found it to be K's intention that, when T became trustee under the trust deeds to be executed by E, T should pay the cheques into trust accounts and then hold the moneys standing to the credit of those accounts as trustee.[27] In the meantime T held the cheques upon a mandate to pay them into the trust accounts when the deeds were executed.

On the substantive issue as to whether K created a trust, his Honour said:

> The words 'created a trust' in s.102 are not, I think, apt to describe the payment of money to a trustee to hold under a trust already constituted. There is an obvious difference between creating a trust in respect of property, on the one hand, and, on the other,

25 It is odd, however, that Woodhouse J. found 'a trust' and not two trusts.
26 (1970) 120 C.L.R. 353.
27 At 361.

> transferring property to a trustee to hold upon the terms of an established trust. To read the section as if it applied to such a transfer would be, in the absence of a context, to expand it. Such a reading would be tantamount to saying that the transfer to the trustee of property to be held as part of the assets of an already constituted trust would be to create a second trust, whereas, from the point of view of both the trustee and of the beneficiary, there would be but one trust and the property transferred would be nothing more than an addition to the property subject to the trust.[28]

The reference to the point of view of the trustee and beneficiary mars an otherwise lucid exposition. The fact that the trustee for convenience or simplicity or for any other reason regards himself as administering one trust should not be a test of the number of trusts in existence; nor should the beneficiary's point of view provide a test.

His Honour was troubled about the situation where a father sets up a trust, and the mother conveys property to the trustees of that trust. S.102 (2) seems to require that the income from both parcels of property be regarded as the father's additional income, if he and not the mother has created the trust. This is certainly an odd result, but two points should be made by way of mitigation. First, the difficulty will not arise where the mother has created a separate trust, and on the present analysis this depends on her intention at the time of the transfer. If the mother does not wish to increase the father's tax burden and is properly advised, she will make it clear that she intends a separate trust. Secondly, the father can avoid the possibility of additional tax by specifically limiting the trust property to what he then and there settles, by appropriate provision in the trust instrument (and by avoiding words such as those in the Truesdale trust, which added after the description of the settled fund, 'together with any other property or moneys which come into the hands of the Trustee on Account').

Menzies J.'s judgment cannot be relied upon as express authority for the present submissions. He does not stipulate (but nor does he deny) that the creation of a second trust depends upon the transferor having an intention to do so. Nevertheless his judgment is consistent with that view, and certainly inconsistent with the view of Macarthur J. criticised earlier. By holding that K had not created a trust, Menzies J. was giving effect to K's clear intention.[29]

In 10 C.T.B.R. (N.S.) Case 26 the Taxation Board of Review No. 1 (J. L. Burke, R. C. Smith and R. E. O'Neill) considered a rather different issue. Mr. and Mrs. K had substantial assets. K was advised by his solicitor and accountant to make an outright gift of money to his unmarried infant children with a view to decreasing his dutiable estate in the event of his death. K decided to make a gift of £5,000 each to two

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28 At 362.

29 The submission by D. M. Dawson for the taxpayer (at 358) accords with the present writer's view.

of his children. He drew a cheque for £10,000 in favour of his solicitor's firm and handed it to his solicitor. His solicitor had told him that when the cheque was cleared by the bank, through the firm's trust account, the sum of £5,000 would be credited to each child in the firm's trust ledger and that K would have no further control over the money given. The solicitor and a partner of K's accountant later opened a joint bank trust account and paid the £10,000 (and another sum) into it, and subsequently invested the fund in some unsecured convertible notes which produced income. The Commissioner sought to apply s.102 to all of this income but the only reference before the Board related to the income of the £5,000 the subject of the gift to P, one of the two children. The trustees (solicitor and accountant) argued that s.102 was inapplicable because K had not created any trust, but rather had made gifts to the children. When the money came into the solicitor's hands and he and the accountant dealt with it, a trust arose because of the unauthorised dealing.[30] Until the unauthorised dealing, the solicitor held the money as agent for the children and was their debtor. Messrs. Burke and Smith said:

> In our opinion the proper inference to be drawn from all the facts surrounding the transaction was that K's intention at the time of handing over his cheque for £10,000 was that the £5,000 given for P was to constitute a separate fund to be held for P and invested for his benefit. In the light of this finding and of the . . . authorities, such disposition constituted, in our our opinion, the creation of a trust by the disponor K.[31]

It is significant for the present purpose that these members of the Board looked to the settlor's intention in transferring the money, not only to determine whether a trust situation rather than an agency situation had been created, but also to determine that a separate trust existed for the benefit of P.[32]

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30 Relying on *Soar* v. *Ashwell* [1893] 2 Q.B. 390.

31 At 157.

32 In the same case, Mr. O'Neill found that K had intended a gift and not a trust. He had transferred the money to the solicitor as his agent to make the gift. But then the solicitor/agent had, at K's request, agreed to hold the money to the use of P. It was a case of a gift completed by means of a trust. This reasoning sheds no light on the multiple trust problem, but para. 17 of his reasons deals with the meaning of 'a trust' in s.102. In Mr. O'Neill's view, where a trustee under an express trust created by X converts the trust property into another form without power or authority to do so, income produced by the converted property does not arise under the trust created by X, but rather under a new trust which arises by operation of law. The income falls within s.102 only because of sub-s. (2A). With respect, it is submitted that (i) an unauthorised investment by a trustee does not give rise to a new trust, and (ii) if it did, s.102 (2A) would not apply, since that subsection, which speaks of 'a trust' and 'the trust', requires that the same trust exist after as before conversion. Where a trustee makes an unauthorised investment, the property thereby acquired is held by him on the terms of the original trust. He is not a constructive trustee, but rather an express trustee of it. If he makes an unauthorised profit he is probably a constructive rather than an express trustee of the profit (Pettit, *op. cit. supra* n. 3, at 41, though he notes that there is some dispute about this). But a breach of trust will not *per se* create a constructive trust (*Ibid.*, at 341).

There appear to be no other relevant income tax cases on the 'multiple trusts' problem. Cases dealing with the interpretation of the words 'a trust' or the like in other legislation would provide useful analogies, but such legislation is rare, and when it does exist, the case law is often uninformative. For example, s.37 (1) (b) of the *Trustee Act,* 1925 (U.K.) provides for the appointment of a separate set of trustees 'for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property.' *Re Hetherington's Trusts*[33] is regarded as authority for the proposition that s.37 (1) (b) authorises appointment of separate trustees where trusts are separate for a time but may ultimately unite in favour of one individual. One might have hoped for an exposition of the notion of 'distinct trust' in that case, but instead one finds a judgment of a few lines in which no reasons whatever are advanced.

However, some assistance is provided in cases on the interpretation of death duty provisions such as s.5 (2) (a) of the *Deceased Persons' Estates Duties Act,* 1931 (Tas.) or s.102 (2) (a) of the *Stamp Duties Act,* 1920 (N.S.W.). By the latter provision the dutiable estate of a deceased person includes all property which he has disposed of by a settlement 'containing any trust in respect of that property to take effect after his death. . . .' The High Court of Australia carefully considered this provision in *Keighley* v. *Commissioner of Stamp Duties (N.S.W.),*[34] and the judgment of Gibbs J. (with whom McTiernan, Windeyer and Owen J.J. agreed) is particularly helpful.[35] There an employer settled property on trust to pay the income to certain employees as long as, in each case, the employee should remain employed by the settlor or his wife. Clause 3 of the trust deed provided that 'On any of the said employees ceasing to be employed by the Settlor or the Settlor's said wife except by dismissal or by quitting service without his employer's consent or on the death of any of the said employees whilst in the employment of the Settlor or the Settlor's said wife' the trustee should transfer to the employee or his personal representative a proportion of the trust fund. Upon and by reason of the death of the settlor two employees ceased to be employed by the settlor, and became entitled under Clause 3 to a proportion of the trust fund. Did Clause 3 contain any trust to take effect after the settlor's death? The High Court unanimously answered this question in the negative. In the course of his judgment Gibbs J. said:

> No doubt, the settlement does contain more than one trust but the

33 (1886) 34 Ch. D. 211. The judgments in *Re Wood; Wodehouse* v. *Wood* [1913] 2 Ch. 574 are equally unhelpful. However, observations by Counsel (Upjohn, K.C.) support the writer's argument. He said at 579-580: 'In *In re Perkins* (1892) 67 L.T. 743, North J. found an intention on the part of the testator to treat the three funds as one fund; and that differentiates that case from this . . . In *In re Perkins* separate sets of trustees could not have been appointed, but here they could . . . .'

34 (1971) 45 A.L.J.R. 620.

35 The other major judgment, by Menzies J., does not expressly raise the multiple trusts issue.

> trust with which we are concerned is that expressed in the words 'on any of the said employees ceasing to be employed by the settlor or the settlor's said wife except by dismissal or by quitting service without his employer's consent' and it seems to me essential to the Commissioner's argument that these words should be regarded as declaring not one but several trusts, namely, inter alia, a trust arising on the death of the settlor and a separate trust arising on the employee leaving the settlor's employment during the settlor's lifetime and with his consent. With all respect, I am unable to accept this view of the matter. The words with which we are concerned, in my opinion, create one trust only .... The relevant words of the deed create only one condition precedent to the taking effect of the trust as to an employee's proportion of the investments, namely, that the employee ceased to be employed. That condition might be fulfilled before or at the death of the settlor but the deed does not contain separate trusts taking effect before and at his death. Upon the proper construction of the deed these words create in favour of each employee one trust taking effect on one specified event.[36]

How did Gibbs J. decide that one rather than many trusts had been created? Clearly 'upon the proper construction of the deed', the written expression of the settlor's intention. Although the problem before the Court and its statutory context are obviously different from the problem with which this article is concerned, it is submitted that Gibbs J.'s approach of solving the multiple trust problem by construction of the relevant instruments (as expressing the settlor's intention) is correct in the income tax context as well.

Finally on the 'multiple trusts' issue, a number of points should be made about intention:—

(1) the fact that the taxpayer's motive for the creation of multiple trusts is to minimise his tax burden will not prevent a court from giving effect to his clear intention, unless s.260 applies or the transaction is a sham;

(2) intention is to be determined primarily from the instruments (if any) by virtue of which the property is conveyed to the trustees, but presumably regard will be had to surrounding circumstances (including the motive of tax minimisation) as well;

(3) some provisions will necessarily involve an intention to create more than one trust; for example, (a) a trust for A with a gift over upon trust for B on the happening of an uncertain event; (b) a disposition upon trust for A on X contingency and for B on Y contingency (hence if Y contingency is the settlor's death, one cannot avoid a provision such as s.102(2)(a) of the *Stamp Duties Act* (N.S.W.) by asserting in the instrument that only one trust is intended); (c) a disposition of property to a trustee of an existing trust of other property, to be held on terms materially different from those of the existing trust.

An obvious result of the above submissions is that the income tax advantages provided by multiple trusts and transfer upon an existing

36 At 624.

trust are available to any relevant taxpayer careful enough to express his intention as to the number of trusts which he wishes to create. The law of express and implied trusts is designed to give legal effect to the settlor's intentions. Legislative use of trust words without definition invites an interpretation which pursues equity's design.

(c) 'Income or Property (Including Money)'

S.102 stipulates that the trust must be 'in respect of any income or property (including money)'. These words do no more than to emphasise, *ex abundanti cautela*, the general law according to which any property, real or personal, legal or equitable,[37] is capable of forming the subject-matter of a trust provided that neither the policy of the law nor any statute prevents alienation on trust.[38] Before 1947 the words were 'in respect of any income or income-producing assets'. These words confined the section to a limited class of trusts, and were held not to apply where trust property was not income-producing at the time of creation of the trust but became so later.[39]

Sub-s. (2A) provides that where property the subject of a trust has been converted into other property, the section applies in the same way as if the trust had originally been created in respect of that other property. This provision was inserted following a Taxation Board of Review decision[40] that s.102 applied only to the original trust property ('in respect of which the trust was created'). It is clear from the wording of the subsection that it catches not only the conversion of the original trust property into other property, but also a later conversion of that other property. The subsection appears to apply whether or not the conversion of trust property is authorised.[41]

(2) 'A Person has Created'

S.6 of the Act provides that 'person' includes a company, unless the contrary intention appears. It is submitted that the contrary intention appears in s.102, since sub-s. (1) (b) refers to 'a child or children of that person'.

In *Baldwin*'s case Macarthur J. quoted the *Shorter Oxford Dictionary's* definition of 'create', which was 'to make, form, constitute or bring into legal existence'. These words all envisage some activity on the part of the person to whom the section refers, such activity being the cause of the coming into existence of the creation. A settlor in the case of an express or implied trust will have created the trust, but has a person against whom a constructive trust is imposed created that trust by his unconscionable conduct? Certainly there would be no trust without some conduct on the part of the constructive trustee. However, the trust

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37 For an example of the application of s.102 in the case of a trust of an equitable interest, see 2 C.T.B.R. (N.S.) Case 65.

38 W. J. Mowbray (ed.), *Lewin on Trusts*, 16th ed., 19.

39 11 C.T.B.R. Case 84.

40 *Ibid.*

41 10 C.T.B.R. (N.S.) Case 26, 167-8 *per* R. E. O'Neill.

is imposed by operation of law irrespective of, and usually contrary to, the intentions of the constructive trustee. It is not a usual use of language to say that a trespasser upon my land has *created* my right to sue for damages. Nor would it accord with usual usage to say that a fiduciary who makes a secret profit out of his office has created the rights arising in the person to whom he owes his fiduciary duty which rights are described by reference to a constructive trust. Accordingly it is submitted that s.102 does not apply where the trust is a constructive trust.

Has a deceased person created the trusts which arise on his death under his will or on intestacy? In the case of intestacy, there is clearly no creative activity, but where there is a will the situation is more doubtful. One could argue forcefully that a person who makes a will has created a trust upon his death, just as a person who sets up a contingent *inter vivos* trust has created a trust upon the happening of the contingency; and surely the testator is regarded as the author of the trusts of his will. S.84A of the *Land and Income Tax Act*, 1954 (N.Z.) referred to and exempted from its operation 'a trust *created* by will'. There are, however, three effective arguments against this view. All rely less on the dictionary definition of 'create' than on its context in s.102. First, s.102 applies to revocable trusts (sub-s. (1) (a)) as well as trusts for unmarried infant children. The word 'created' is meant to be applicable to both. As applied to revocable trusts, it could not have been intended to cover creation by testamentary disposition. This suggests (though not conclusively) that testamentary trusts were not intended to be within the scope of the word 'created' at all. Secondly, s.102 (2) requires that regard be had to 'the tax actually payable on his own taxable income by the person who created the trust'. The wording is too explicit to permit application to a deceased's estate. Thirdly, as has been noted previously, s.102 was designed to prevent a parent from gaining a tax advantage by alienating income upon trust for his children. This policy is inapplicable in the case of testamentary dispositions.

The notion of 'creation' is one of substance rather than form, and the courts will look beyond the formal creator of the trust where appropriate. In *Truesdale's* case Menzies J. rejected on the facts an argument that E was 'no more than a lay figure in the *dramatis personae*; a figure to be manipulated....'[42] The implication seems to be that his decision would have been different had the argument been substantiated in fact. In 7 C.T.B.R. (N.S.) Case 42, funds were formally settled by an aunt on her nieces. In fact, however, the funds were provided to the aunt by the father of the children for that purpose. The Board held that the father was the real settlor.

A creation in the sense of bringing into legal existence can, it seems, take place even though the creator is acting under compulsion. Some

42 (1970) 120 C.L.R. 353, at 363.

support for this view may be found in *Yates* v. *Starkey*,[43] although that case involved the United Kingdom tax legislation.

Certain trusts created for consideration pose a special problem. Suppose that A and B each want to settle similar funds in trust for their respective children. Rather than each settling a fund in trust for his own children, A settles his fund in trust for B's children, and in consideration therefor, B settles his fund in trust for A's children.[44] It seems that s.102 is inapplicable in this situation, since neither parent has created a trust for 'a child or children of that person'. This conclusion could be avoided only if the transaction were to be regarded as a sham or s.260 could be invoked.

> (3) Income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of an unmarried infant child.

The use together of the words 'payable', 'accumulated' and 'applicable' gives rise to a good deal of obscurity. 'Payable' is inherently ambiguous. According to the *Concise Oxford Dictionary*, it may mean 'that must be paid, due' or 'that may be paid'. The same may be said of 'applicable'. Neither word seems to require, or be satisfied by mere payment or application in fact. The word 'accumulated', on the other hand, seems to refer to accumulation in fact, whether or not the trustee has a duty or power to accumulate.

The High Court considered these words in *Hobbs* v. *Federal Commissioner of Taxation*.[45] In that case shares were held on trust for infant beneficiaries subject to the relevant beneficiary attaining the age of twenty-five years or marrying under that age. There were gifts over should the beneficiaries die unmarried before attaining the age of twenty-five years. The trustees had discretionary powers to pay or apply income from the part of the fund to which a beneficiary may have a presumptive share for the maintenance, education or benefit of that beneficiary, and to advance or pay or transfer to any beneficiary a part not exceeding half of his presumptive share. There was a direction to accumulate and treat as capital any income not so applied, but with recourse to it for the same purposes and to the same extent as if it were capital. In the year of income the trustees accumulated the whole of the trust income. The High Court held that s.102 could not be applied, there being no income payable to or accumulated for or applicable for the benefit of the beneficiaries, because they were only contingently entitled. The essence of the Court's judgment is in this passage:

> We think that the whole clause [paragraph (b) of Section 102(1)] requires that the disposal of the income in the year in question

43 [1951] 1 Ch. 465.

44 The problem is suggested by R. W. Parsons and G. Kenneally, *Principles of Income Tax Law in Australia* (University of Sydney, Faculty of Law, (1969), Vol. I. Ch. XI, p. 19.

45 (1957) 98 C.L.R. 151.

> must be by payment to, accumulation for or application for the benefit of the child. If you have a case of payment to the child authorized by the trust deed, that of course satisfies the provision. If you have the case of an accumulation for a child, that in turn satisfies the provision; if you have neither of these things and a case where the money must be applied for that child, that in turn satisfies the provision. But they are alternatives together covering the ground which the legislature has selected as the test of the special liability.[46]

In its context this passage is clearly intended to be a precise, exhaustive interpretation of the relevant words in s.102 (1) (b). The section will apply if and only if

(a) a payment of income authorised by the trust deed is made to the child in the year of income;

or (b) income is accumulated for the child (not for a class of contingent beneficiaries) in the year of income;

or (c) there being neither payment nor accumulation as above, the income *must be* applied for the child (not for a class of contingent beneficiaries).

The wording of the section does not entail the above construction, and the judgment is, in truth, a piece of judicial legislation. Some comments on each paragraph are called for.

Paragraph (a) — Payment

(i) Difficulty as to when trust income will be payable in a mandatory sense to an infant is avoided, since it is not enough that income be merely due to the child. Actual payment is necessary.

(ii) Payment will be 'authorised by the trust deed' if made by virtue of the statutory implied power to pay income for the maintenance, education or benefit of an infant beneficiary,[47] but that provision will not usually authorise payment to the infant direct.[48]

(iii) If payment is not made to the infant direct but is made to his guardian, school, or the like, the income is not 'payable to' the child within s.102 (1) (b). The situation will be caught by the words 'applicable for', however, if the trustee is obliged, in the absence of authorised payment to the child or accumulation, to apply the income for the child's benefit (paragraph (c) above).

(iv) Where payment is made to the child in breach of trust, paragraph (a) above does not apply. S.102 (1) (b) may, however, apply to the income if the income must be applied (*i.e.* the trustee is under a legal obligation to apply the income) in the manner described in paragraph (c).

(v) If income is paid to the child pursuant to authority contained

46 At 161.

47 *E.g. Conveyancing and Law of Property Act*, 1884 (Tas.), s.47; *Trustee Act*, 1925 (N.S.W.), s.43; *Trustee Act*, 1925 (U.K.), s.31.

48 See *Re Vestey's Settlement* [1951] Ch. 209.

in the trust deed, s.102 (1) (b) will apply even though the income was not due to the child. This was held by Menzies J. in *Truesdale's* case to be the literal effect of the High Court judgment in *Hobbs*' case. Taxation Board of Review No. 3 purported to follow the *Hobbs*' and *Truesdale* decisions in 17 C.T.B.R. (N.S.) Case 66, but in that case it appears that the income was applied for the child and not paid to him. S.102 (1) (b) should have been held inapplicable since, the child being only contingently entitled, it was not 'a case where the money must be applied for that child', in the words of the High Court in *Hobbs*' case.[49]

(vi) If an authorised payment is made to a child whose beneficial interest is contingent, s.102 (1) (b) applies, since the condition in paragraph (a) is literally satisfied.[50]

Paragraph (b) — Accumulation

(i) The Act does not define 'accumulated for'. It is submitted that mere retention of income at the end of the year of income will amount to 'accumulation for' the beneficiaries entitled to that income unless their entitlement is contingent. Were the position otherwise, the trustee could avoid s.102 simply by taking no steps in respect of the income until the year of income was over.

(ii) Both the section and the High Court's judgment in *Hobbs*' case seem to contemplate accumulation in fact. A power or duty to accumulate, without actual accumulation, will not satisfy paragraph (b), though paragraphs (a) and (c) will have to be considered.

(iii) The High Court does not insist upon accumulation authorised by the trust deed, though it does impose that requirement in the case of payment to the child. The omission is presumably deliberate, and gives content to the statutory distinction between 'payable' (rather than 'paid') and 'accumulated' (rather than 'liable to be accumulated'). S.102 (1) (b) may therefore apply even if the accumulation is in breach of trust;[51] however an accumulation in breach of trust will not necessarily be 'for' the person for whom the trustees intended it. Where the settlor has directed accumulation for a period in excess of the appropriate statutory period but within the period allowed by the modern rule against perpetuities, the income directed to be accumulated in excess of the statutory period goes to the person who 'would have been entitled

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49 Mr. F. E. Dubout just assumed that there was no difficulty in applying the High Court's observation that 'If you have a case of payment to the child authorised by the trust deed, that of course satisfies the provision' (see paras. 6 and 7 of his reasons). Mr. G. Thompson read into the High Court's judgment words which were not there, when he said (in para. 3 of his reasons): 'Actual payment to *or for* the child beneficiary authorised by the trust deed is sufficient to satisfy the requirements of Section 102 (1) (b) of the Act' (my emphasis). If the High Court's first condition were read in this way, it would overlap with their third condition (paragraph (3) in the text of this article) though the Court itself described the conditions as 'alternatives'.

50 17 C.T.B.R. (N.S.) Case 66.

51 This interpretation does, however, produce an overlap between paragraphs (b) and (c) in the case of accumulation in breach of trust.

thereto if such accumulation had not been directed'[52] (often not the infant for whom the trustees intended the accumulation). This consequence may, however, often be avoided. If the trustees properly apply the income for the maintenance of a person entitled contingently or otherwise, so that accumulation of that income is avoided, they will successfully divert the income from the person otherwise entitled.[53] It should be noted that in the United Kingdom and Tasmania the statutory power to apply income for the maintenance of an infant beneficiary is not available in the case of a contingent interest unless the limitation or trust carries the intermediate income.[54] In New South Wales, on the other hand, the proviso to s.43 (3) of the *Trustee Act*, 1925 makes it clear that the statutory power is available for contingent interests whether or not the trust for the infant would, apart from the subsection, carry the intermediate income, unless the intermediate income is expressly or specifically disposed of to some other person.[55]

(iv) If income is accumulated for a beneficiary whose entitlement is only contingent as in *Hobbs'* case itself, s.102 (1) (b) will not apply.

Paragraph (c) — Applicable

(i) This paragraph contemplates a legal obligation to apply the income, or that part of the income which has not been the subject of actual accumulation or an authorised payment.

(ii) The question to be determined is: are the trustees obliged by the express or implied terms of the trust deed or the general law, to apply the income for the child? Actual application is irrelevant to this question. The High Court's words 'must be' make it clear that a power to apply income, which the trustee may dispose of in another way, will not satisfy the requirement.

(iii) If the child beneficiary is contingently entitled, paragraph (c) will not be satisfied, because the trustees will not be obliged (having regard to the contingency) to apply the income for the child. Practical disadvantage to the child whose interest is only contingent may be minimised by ensuring that the gift to him carries the intermediate income.[56] The trustee will then have the wide statutory power to apply

52 *Conveyancing Act*, 1919 (N.S.W.), s.31; *Law of Property Act*, 1925 (U.K.), s.164. *The Accumulations Act*, 1800, which contained the same provision still applies in Tasmania (*Blair* v. *Curran* (1939) 62 C.L.R. 464).

53 *Fenton* v. *Perpetual Trustee Co. Ltd.* (1940) 64 C.L.R. 52.

54 *Trustee Act*, 1925 (U.K.) s.31 (3). Though there is no express provision in s.47 of the *Conveyancing and Law of Property Act*, 1884 (Tas.) equivalent to s.31 (3) of the U.K. Act, the Tas. provision is identical with s.43 of the *Conveyancing and Law of Property Act*, 1881 (U.K.). That latter section was held inapplicable where the contingent gift did not carry the intermediate income: *Re Dickson* (1884) 28 Ch. D. 291; affd. (1885) 29 Ch. D. 331.

55 *Permanent Trustee Co. of N.S.W. Ltd.* v. *Pym* (1938) 39 S.R. (N.S.W.) 1.

56 In those States which have adopted provisions like s.175 of the U.K. *Law of Property Act*, 1925 (*e.g. Conveyancing Act*, 1919 (N.S.W.), s.36 B) the gift will usually carry the intermediate income unless it is otherwise expressly disposed of. The position in Tasmania is apparently the same as in the United Kingdom before the 1925 Act (see W. J. Mowbray, ed., *Lewin on Trusts*, 16th ed., at 295).

income for the child's maintenance, education or benefit (the latter word encompassing 'any use of the money which will improve the material situation of the beneficiary').[57]

(iv) If income is applied in the year of income for the benefit of an infant contingent beneficiary pursuant to a power to do so, the infant will be deemed to be presently entitled to that income under s.101. This does not mean, however, that the income 'must be' under the trust deed applied for the child. 'Present entitlement' refers to a tax concept, and the deeming effect of s.101 applies only for tax purposes.

The operation of paragraphs (a), (b) and (c) may be illustrated by an example. Suppose that A, an unmarried infant beneficiary, has a vested interest in income-producing property. There being no expression of a contrary intention in the trust instrument, s.47 of the *Conveyancing and Law of Property Act*, 1884 (Tas.) confers on the trustees power to apply the income of the property for A's maintenance, education or benefit. If there is income in the hands of the trustees at the end of the year of income, there is an accumulation within s.102 (1) (b) (see paragraph (b) (i) above). Income which is not in the hands of the trustees at the end of the year of income must have been disposed of by them. If the disposal of income has been by authorised payment to the child, s.102 (1) (b) will apply. Apart from the case of unauthorised payment dealt with in the next paragraph, the only other alternative is for the income to be applied in some way — it 'must be' applied, as a matter of logic. As a matter of law, the application 'must be' for the maintenance, education or benefit of the infant because this is the only application authorised by the trust deed. Accordingly, as to income which was not in fact accumulated or the subject of an authorised payment to the child, we are obliged to say that it 'must be applied for that child', to use the High Court's words. Thus, whatever be the fate of the income, s.102 (1) (b) will apply.

Where the trustee makes an unauthorised payment to the child, or applies the income in breach of trust in such a way that there is no payment 'for' the child, s.102 (1) (b) will nevertheless apply. There being no accumulation or authorised payment, the trustee is legally obliged to apply the income for the child. The fact that he does not is immaterial for the purposes of s.102 (1) (b).

Sometimes a trust deed will authorise the trustee to pay or apply income to the guardian or person for the time being with whom the child is residing, and will exonerate the trustee from liability for the applica-

57 *Pilkington* v. *Inland Revenue Commissioner* [1964] A.C. 612, *per* Viscount Radcliffe at 635.

tion of moneys so paid.[58] It is arguable that such a trust deed is too widely drawn for a payment under the clause to be certainly 'for' the child. Accordingly the section may be avoided in respect of income applied in the year of income under such a clause.

Apart from stipulating that certain conditions must be satisfied 'in the year of income', s.102 (1) (b) does not stipulate the time at which its requirements must be met. In 4 C.T.B.R. (N.S.) Case 26, one of the children attained the age of twenty-one years after the trust income was derived, but before the end of the year of income. The Board held that the material time for consideration of the applicability of s.102 was the date on which the relevant income was derived. Since the income was derived prior to the child's birthday, the Commissioner could invoke s.102. While the date of income derivation may be the crucial date for satisfying the requirement 'child... under the age of twenty-one years and unmarried' (the section itself leaving the point wide open), that date can hardly be crucial in respect of the requirement that income be payable, accumulated or applicable. *Hobbs'* case makes it clear that the first two of these three words refer to payment or accumulation in fact. Since these events must take place after the income is derived, fulfilment of the requirement cannot be determined immediately upon derivation. The High Court required that, for the section to be satisfied, the case must be such that in the year of income the income cannot be dealt with otherwise than under the three alternatives which the section lays down.[59] This suggests that for the whole period from the date of derivation to the end of the year of income, one or other of the three alternatives must be satisfied.

S.102 (1) (b) does not require that the whole of the trust income be payable to, accumulated for or applicable for the benefit of a child. The requirement is that 'income' be so applied. S.102 (2), with its reference to 'so much of the net income of the trust estate' as is payable *etc.*, reinforces this point. Accordingly when only some of the beneficiaries are unmarried children, the Commissioner may invoke the section in respect of their shares of the net income of the trust estate, but not in respect of the shares of the other beneficiaries.[60] S.102 (2) enables the Commissioner to aggregate the income of all the unmarried child beneficiaries which is payable, accumulated or applicable under the same trust.[61]

The reference to 'income' in s.102 (1) (b) appears to be a reference

58 *Cf.* the form in *The Australian Encyclopaedia of Forms and Precedents*, Vol. 16, p. 463: 'My trustees may pay the whole or any part of the said income to the guardian or guardians or parent of any such children without seeing to the application thereof...'. One can envisage wider provisions, such as the power to appoint to 'any person or persons in whose house or apartments or in whose company or under whose care or control or by or with whom G may from time to time be employed or residing' in *Whishaw* v. *Stephens (Re Gulbenkian's Settlements)* [1970] A.C. 508.

59 98 C.L.R., at 161.

60 *Nicholas* v. *Federal Commissioner of Taxation* (1947) 75 C.L.R. 283.

61 *Ibid.* For discussion of multiple trusts see *supra*.

to the trust law concept. Accordingly, if there is no income on trust law principles, s.102 (1) (b) can have no application, even if there is net income of the trust estate. Conversely where there is trust income but no net income of the trust estate, the requirements of s.102 (1) (b) will be satisfied, but no tax will be payable because subsection (2) bases the tax calculation on that part of the net income of the trust estate payable *etc.* to the child.

In some cases trust law income may be less than the net income of the trust estate. For example, where the trustees are entitled under trust law to deduct expenses, including taxation for earlier years, only the balance after such deduction will be income payable, accumulated or applicable under s.102 (1) (b). The net income of the trust estate to which s.102 (2) refers is a tax law concept; tax of previous years would not be an allowable deduction if the trustee were a taxpayer, and is therefore not deductible in the calculation of net income of the trust estate according to its definition in s.95. In 5 C.T.B.R. (N.S.) Case 13 the net income of the trust estate for year One was £82, and for year Two £112. The trustee used the whole of the net income for year One and all but £19 of the net income for year Two in payment of tax for earlier years. Were the amounts to be added to the parent's taxable income under s.102 £82 and £112 respectively, or nil and £19? The Board adopted the latter solution. The result for year One is, with respect, clearly right. Tax for earlier years was an expense properly chargeable to income. In the result, there was no trust law income payable, accumulated or applicable in year One, and s.102 (1) (b) could have no application. In year Two, however, there was £19 of trust income, and so s. 102 (1) (b) was satisfied. To calculate the amount of tax payable, so much of the net income of the trust estate as was payable, accumulated or applicable, had to be quantified. The net income of the trust estate was £112. But since the trustee was entitled to apply all but £19 of that sum in the payment of tax, only £19 was payable to, accumulated for or applicable for the benefit of the infant beneficiaries. Accordingly, though the net income of the trust estate exceeded the trust income, the amount of the parent's additional taxable income under s.102 (2) did not.[62] However, this will not always be the consequence of an excess of net income of the trust estate over trust income. For example, bonus shares are normally treated as capital under trust law,[63] but are income for tax purposes unless s.44 (2) (b) (iii) applies. Suppose that a trustee for an infant beneficiary entitled both to capital and income receives $100 worth of bonus shares and $50 of trust income in the year of income. S.102 (1) (b) applies since there is trust income payable *etc.* for the child. The net income of the trust

62 Compare 11 C.T.B.R. (N.S.) Case 87. In 11 C.T.B.R. (N.S.) Case 111 tax was not deducted in applying s.102 because the trustee had no power to pay tax out of trust income.

63 *Bouch* v. *Sproule* (1887) 12 App. Cas. 385; but see *Hill* v. *Permanent Trustee Co. of N.S.W.* [1930] A.C. 720.

estate is $150, and if the bonus shares are payable to, accumulated for or applicable for the benefit of the child in the manner described in *Hobbs'* case then the whole $150 is added to the parent's taxable income.

Where the trust income exceeds the net income of the trust estate (for example, where the trustee has an investment allowance for tax purposes which is not deductible in calculating trust income), only the net income of the trust estate is added to the parent's taxable income under s.102 (2).

Finally, it should be noted that 'child' is defined in s.6 to include an adopted child, a step-child or an ex-nuptial child. S.102 applies to children under the age of twenty-one years. The *Minors (Property and Contracts) Act*, 1970 (N.S.W.) provides that a person aged eighteen years or upwards is *sui juris* and not under any disability or incapacity of infancy, and that the Supreme Court of N.S.W. may, where a person under the age of eighteen years is beneficially entitled to property, make orders (*inter alia*) authorising a person to make a disposition or receive the income of the property.[64] It amends s.43 of the *Trustee Act*, 1925 (N.S.W.) so that the power to pay or apply income for the maintenance, education or benefit of an infant extends to payment of income to an infant who has reached the age of eighteen years.[65] Accordingly an infant who has a vested interest and has reached the age of eighteen years will be able to put an end to the trust, and if he fails to do so within the year of income, s.102 may be invoked.

(4) The Commissioner's Discretion

If the conditions of s.102 (1) are satisfied, the Commissioner 'may' issue an assessment under that section. In 11 C.T.B.R. Case 4, the Board said of the section:

> Its obvious purpose is to enable the Commissioner to dispense with the ordinary assessments of tax to the beneficiary or trustee or both in favour of the special assessment of tax under Section 102. It is not to be supposed that he was intended to do this to the disadvantage of the revenue.

Where the case falls within s.99A it will not be to the advantage of the Revenue to apply s.102 unless the parent's rate of tax on the additional income would exceed 50%.

The Commissioner is not given a list of matters to consider in determining whether to make a s.102 assessment, and his discretion may therefore be to some extent wider than under s.99A. He will, however, be obliged to disclose reasons to the same extent; the principle in the *Giris*[66] and *Hatch*[67] cases being equally applicable to s.102.

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64 *Minors (Property and Contracts) Act*, 1970 (N.S.W.), ss.9 (1) and 50.

65 *Ibid.*, s.3 (1) and First Schedule.

66 *Giris Pty. Ltd.* v. *Federal Commissioner of Taxation* (1969) 119 C.L.R. 365, esp. at 373, *per* Barwick C.J.

67 *Commissioner of Taxation (Cth.)* v. *Brian Hatch Timber Co. (Sales) Pty. Ltd.* (1972) 46 A.L.J.R. 111, esp. at 115 *per* Menzies J. and 118 *per* Owen J.

Conclusion

The major defects in s.102 (as far as it relates to trusts for unmarried infant children of the settlor) emerging from the foregoing analysis are

(a) that its effect can be minimised by the use of multiple trusts;

(b) that it is confined to cases where a trust has been 'created' by the parent, and does not apply in respect of income-producing property settled upon an already existing trust, or settled by a person who is not the beneficiary's parent;

(c) that it does not apply in respect of contingent beneficiaries unless there has been an authorised payment to the beneficiary.

If s.102 reflects a desirable tax policy, amendments to overcome these defects and to effectuate that policy properly should be implemented.