

# #10

## Variation of trusts

### *Key facts*

- A trust may be varied in a number of ways: by a power within the trust itself, the collective consent of the beneficiaries, by the court, through its inherent jurisdiction, or by statute.
- The power of the courts to intervene will depend on whether the variation relates to administrative or managerial matters or a reorganization of the beneficial interests.
- The [Variation of Trusts Act 1958](#) gives the courts a wide jurisdiction to vary a trust for the benefit of those beneficiaries unable to consent.
- A benefit under the [VTA 1958](#) will typically be financial but the court can also take into account non-financial benefits.

### Introduction

As a trust can operate for many years, there may be occasions where it is useful or necessary to vary the terms of the trust. The most common reason for varying the terms of a trust is to minimize beneficiaries' liability to pay tax. The key issue in variation of trusts is consent – either by the beneficiaries or, where necessary, by the courts. Where this consent does not exist, trustees who do not follow the terms of the trust will be liable for breach of trust. However, it will often be impossible for all the beneficiaries to consent to a variation of a trust. Therefore, the majority of this chapter will focus on the circumstances in which the courts may approve a variation on their behalf.

### Methods of varying the terms of the trust

A trust can be varied by:

- the terms of the trust instrument;
- the consent of beneficiaries;
- the court's inherent jurisdiction; or
- statutory provisions.

### The trust instrument

The provisions of the trust may expressly provide trustees with the power to vary the terms of the trust. This allows trustees to modify the terms of the trust to adjust to changing circumstances without having to receive the consent of the beneficiaries or use trust assets in gaining court approval for such variations. While this might appear to give trustees free rein to remould the trust as they see fit, a measure of protection is provided by *Society of Lloyd's v Robinson* [1999]. Lord Steyn stated that a power to vary the terms of a trust must be exercised for the purpose for which it was granted and not beyond the reasonable contemplation of the parties. Therefore, the extent to which the trustees are free to vary the terms of the trust will depend on the terms on which the power was granted.

#### Example

Richard establishes a trust for Jackie for life, remainder to Eleanor. The trust includes a power to the trustees to vary the terms of the trust 'where necessary for the efficient administration of the trust'. Suppose that after 20 years' dedicated service the trustees propose to include a new term in the trust to provide them with an annual salary: would they succeed?

Arguably, they would not. The power to vary refers to changes improving the efficient administration of the trust. The trustees are already bound by their fiduciary obligations to carry out their responsibilities – if it is argued that money would 'improve' their efficiency, legitimate questions might be asked about how well they have so far carried out their

## Methods of varying the terms of the trust

\*\*\*\*\*

responsibilities! The trustees, of course, remain free to pursue remuneration through other methods – eg s 29 **Trustee Act 2000** or court-approved payments (see chapter 11).

## Beneficiary consent: the rule in *Saunders v Vautier*

Collectively, the beneficiaries can use the rule in *Saunders v Vautier* (1841) to end the trust, at which point they may choose to take the property absolutely or resettlement on more favourable terms. The rule in *Saunders v Vautier* can only be applied where:

- all the beneficiaries are together absolutely entitled to the trust property;
- all beneficiaries agree to ending the trust; and
- all beneficiaries are *sui juris* – ie adults (over 18) with the legal capacity to give consent.

There are two important limitations on the rule in *Saunders v Vautier*:

1. Beneficiaries cannot use the threat of ending the trust as a bargaining chip to force trustees to invest the trust funds in accordance with their instructions (*Stephenson (Inspector of Taxes) v Barclays Bank Trust Co Ltd* [1975]). If this were permitted, trustees would effectively be prevented from discharging their fiduciary obligations to the beneficiaries by personally considering and deciding how their best interests are served.
2. All beneficiaries must give their consent. If the beneficiaries include children, beneficiaries who cannot legally consent, or others who do not yet exist, the rule in *Saunders v Vautier* will not apply.

As any change to the terms of the trust requires the collective consent of all beneficiaries, variation will not always be possible. However, in certain circumstances the court will be able to provide approval for those beneficiaries who cannot.

## The courts' inherent jurisdiction

The courts have always had an inherent jurisdiction to vary the terms of a trust where the consent of all the beneficiaries cannot be obtained. As Romer LJ stated in *Re New* [1901], this is a jurisdiction which is to be exercised 'with great caution, and the court will take care not to strain its powers'. The central concern of the courts is to act only when it is required and, otherwise, to avoid interfering with the intentions of the settlor.

### Revision tip

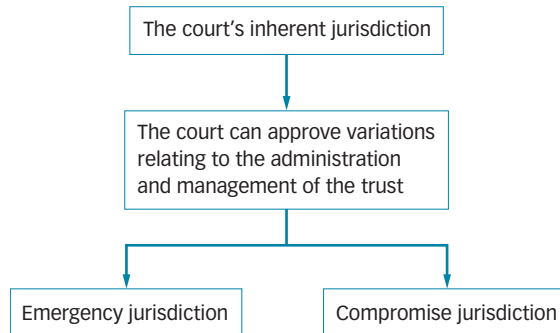
Reading some of the key cases in this area can really improve your understanding of the area. However, the facts of these cases and the proposals for variation can often be technical and complex. Concentrate on the headnote and the leading judgment. The judgments tend to focus on the central issues and will help you get to the heart of the legal questions.

## Methods of varying the terms of the trust

\*\*\*\*\*

### *What sort of variations could be approved?*

The court will only approve variations relating to the administration and management of the trust. It will not generally intervene in situations relating to the reorganisation of the beneficial interests of the beneficiaries. (Note: there is one exception to this rule, in relation to **maintenance** provisions, which is discussed below under the emergency jurisdiction of the courts.)



**Figure 10.1** The court's inherent jurisdiction

### *In what circumstances will the court approve a variation?*

Following the decision of the House of Lords in *Chapman v Chapman* [1954], the courts' jurisdiction is restricted to two situations, 'Emergency' and 'Compromise'.

#### **'Emergency'**

'Emergency' can be understood in its literal context, as in *Re Jackson* [1882], where the trustees needed permission to use some of the trust's money to make repairs to one of the trust's buildings which was about to collapse. However, a more accurate understanding of an 'emergency' is something not anticipated by the settlor (*Chapman v Chapman* [1954]). This means that the court will intervene if, *by not taking action*, it would frustrate or interfere with the settlor's intention.

For example, in *Re Tollemache* [1903], the court refused to approve a variation merely because it was of financial benefit to the beneficiaries. However, it is interesting to contrast this decision with the reasoning of the Court of Appeal in *Re New* [1901]:

.....  
*Re New* [1901] 2 Ch 534

It was proposed that a company, in which the trust already had shares, be reorganized to allow for further growth. It was undisputed that this would be of benefit to the beneficiaries. However, the trustees did not have the power to invest in these new shares and applied for a variation to the terms of the trust from the court.

## Methods of varying the terms of the trust

\*\*\*\*\*

While the Court of Appeal approved the variation, Romer LJ emphasized that it was not within the court's inherent jurisdiction to interfere merely because a change would be of benefit to the beneficiaries. Instead, *as the proposed variation would not alter the trust's property but only its nature* (ie the *type* of holding), the court was satisfied that its intervention actually *supported* the settlor's intention of leaving shares in this company on trust.

---

Maintenance provisions - The court will in general only approve variations to the administration or management of the trust. However, the underlying idea that the court will intervene only in matters unanticipated by the settlor has been used to justify one limited exception. Where a settlor has established a trust and directs that the income should be accumulated for a period of time, the court will approve the insertion of a term providing for the maintenance of a beneficiary.

The rationale for this exception can be found in *Havelock v Havelock (1881)*, where it was reasoned that a settlor would not establish a trust to benefit a beneficiary in the future but in the meantime allow the beneficiary to go short. Therefore, the court is only approving a change of which the settlor would be sure to approve.

### 'Compromise'

The second aspect of the court's inherent jurisdiction is in approving compromises where there is a conflict regarding the rights of the beneficiaries. Originally, 'compromise' was defined widely to allow the court to approve variations to the rights of the beneficiaries (*Re Downshire Settled Estates [1953]*). This allowed the court to approve of tax-saving and financially advantageous bargains between different classes of beneficiaries.

However, such a power was difficult to reconcile with the narrower 'emergency' jurisdiction of the courts and in *Chapman v Chapman [1954]*, the House of Lords adopted a more restrictive approach. Lord Morton argued that the court only had the jurisdiction to intervene in '*genuine disputes*' over the beneficial interests. He stressed that in such circumstances, the court could not be said to be interfering with the beneficial interests because the existence of a dispute meant that they were not already clear. Therefore, all the court was doing was *clarifying* the settlor's intentions.

### *Why is the court's inherent jurisdiction so narrowly defined?*

You may be wondering why the House of Lords adopted such a cautious approach to their inherent jurisdiction, especially given that an application to vary the trust is usually accepted to be in the best financial interests of the beneficiaries. In *Chapman v Chapman*, Lord Simonds argued that if the courts were to exercise a wider jurisdiction, this should be authorized by the legislature and not claimed by the courts for themselves. This restrictive approach was criticized by the Law Reform Committee in their 1957 Report, 'The Court's Power to Sanction Variation of Trusts' (Cmd 310) which provided the impetus for the **Variation of Trusts Act 1958**. This Act, together with the various other statutory provisions, has now largely replaced the court's inherent jurisdiction with a wider authority to approve changes to the terms of a trust.

### Revision tip

As you can see, there are different ways in which the terms of a trust can be varied. Remember that just because approval is not granted under one method does not mean that it cannot be granted under another – see, for example, *Mason v Farbrother* [1983].

## Statutory provisions

The courts have also been given statutory authority to vary the terms of a trust in a number of circumstances:

**Section 53 Trustee Act 1925:** allows the court to vary the terms of a trust ‘for the maintenance, education, or benefit of the infant’. It both mirrors the court’s inherent jurisdiction to provide maintenance from a trust and extends it to authorise changes which support the education or benefit of a child.

**Section 57(1) Trustee Act 1925:** allows the court to approve changes to the administration and management of trusts where it is ‘expedient’ to do so. As this section does not require an emergency, it largely renders the court’s inherent emergency jurisdiction redundant. However, this section does not allow the courts to interfere in the *beneficial interests* under a trust (*Re Downshire Settled Estates* [1953]).

## The Variation of Trusts Act 1958

The **Variation of Trusts Act 1958** allows the court to provide consent for certain types of beneficiary where they cannot do so for themselves. Thus, any variation still requires the consent of all other existing *sui juris* beneficiaries. What was striking about the Act was its scope: in *Re Steed’s Will Trusts* [1960], Evershed MR described the Act as conferring ‘a very wide and indeed revolutionary discretion’ to the courts to vary the terms of a trust.

In order to answer a question on the application of the **VTA 1958**, you will need to consider the following questions:

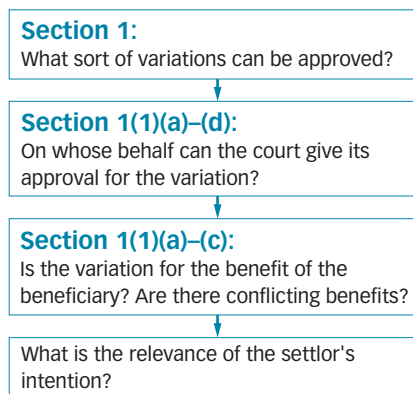


Figure 10.2 The Variation of Trusts Act 1958

## Methods of varying the terms of the trust

\*\*\*\*\*

### *What sort of variations can be approved?*

**Section 1 VTA 1958** gives the courts the power to approve ‘any arrangement...varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts’. Therefore, unlike other methods of variation discussed, the **VTA 1958** allows the court to deal with matters relating to both:

- administrative and managerial aspects of the trust; and
- all other terms, including those relating to the beneficial interests under the trust.

However, there are limits to what the court will approve. The court will *not* give its approval for variations which represent, in effect, a complete ‘**resettlement**’ of the property on new trusts. In *Re Ball’s ST [1968]*, Megarry J explained that ‘If an arrangement changes the whole substratum of the trust, then it may well be said that it cannot be regarded merely as varying that trust’:

---

#### *Re T’s ST [1963] 3 WLR 987*

A mother held a life interest in half the trust’s property, the remainder going to her two children. The other half of the trust’s property was to be split between her two children when they reached 21. The mother believed that one of her daughters was irresponsible and immature and applied for a variation to the trust which would transfer her daughter’s quarter share to a new protective trust under which she would hold a life interest. Wilberforce J rejected this proposal as it fundamentally altered the daughter’s position under the trust from an absolute interest to a mere life interest.

---

### *Looking for extra marks?*

The courts’ powers under the **VTA 1958** are essentially supportive ones. When discussing the **VTA 1958** in an essay, it is useful to be able to discuss this policy and not just recite the relevant decisions. If you read the judgment in *Re Ball’s ST [1968]* and particularly *Re T’s ST [1963]*, you will see that the court does more than simply approve or reject proposed variations. In both cases, the court contributes advice on how a successful application can be made. For example, in *Re T’s ST [1963]*, while Wilberforce J was unwilling to approve the proposed application, he was sympathetic to the applicant’s concerns and granted a revised order which *postponed* the vesting of the daughter’s absolute interest and created an interim **protective trust** which could be extended should the daughter’s behaviour warrant it.

### *On whose behalf can the court give its approval for the variation?*

The **VTA 1958** does not change the fact that all *sui juris* beneficiaries must consent to any proposed change to the terms of the trust. In general, the parties to an application under the **VTA 1958** should include the settlor (if still alive) and all beneficiaries. The courts can only give consent on behalf of *four* types of beneficiaries identified in **s 1(1) VTA 1958**:

## Methods of varying the terms of the trust

\*\*\*\*\*

### Section 1(1)(a): infants and those incapable of giving consent

This group will include minors and those persons unable to consent, eg beneficiaries of unsound mind.

### Section 1(1)(b): unascertained persons

Under this subsection, the court can give approval for:

Any person (whether ascertained or not) who may be entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court.

While the wording of this subsection is difficult to follow, its meaning can be broken down into two parts:

1. It covers those who *may be entitled* at a future date or on the happening of a future event:

.....

#### *Knocker v Youle* [1986] 1 WLR 934

Property was held on trust for a woman's children. Under the trust, there was a remote chance that the children's Australian cousins could become entitled. The children sought to vary the trust and approval was sought from the court on behalf of the cousins, as it was impractical to obtain the consent of all of them.

The court refused to give its consent on their behalf. In interpreting the phrase 'may be entitled' in s 1(1)(b), Warner J argued that regardless of how unlikely it was that they would become entitled, they still had an interest and their consent was needed to any change.

.....

**Section 1(1)(b)** does not include those beneficiaries who only have a remote chance of benefiting – they must still consent. Instead, **s 1(1)(b)** covers those beneficiaries whose future *status* may entitle them to an interest. Therefore, a trust which benefits a future spouse would be included (*Re Clitheroe's ST* [1959]) as the beneficiary may never marry. Likewise, a trust which benefits the **next-of-kin** of a beneficiary would be included (*Re Suffert* [1961]) as it remains uncertain who the next-of-kin will be until the beneficiary dies.

These situations can be distinguished from the unborn beneficiaries dealt with by **s 1(1)(c)** where the question revolves around their existence rather than a particular status.

2. The proviso to **s 1(1)(b)**:

The second half of **s 1(1)(b)** – beginning 'so however' – contains a proviso which provides that at the time the application is made, it will be assumed that the future



## Methods of varying the terms of the trust

\*\*\*\*\*

date or event has occurred. If, on that basis, there are persons who satisfy the contingency, those persons will have to consent personally and the court will not do so on their behalf.

---

### *Re Suffert* [1961] Ch 1

A woman held a life interest under a trust, with the remainder to be passed either to those appointed in her will or, in the absence of a will, to her next-of-kin under the rules of intestacy. When she sought to vary the terms of the trust, she had three adult cousins who were her next-of-kin. The court applied the proviso and considered who would have an interest if, at that point, the woman was assumed to have died. On that basis, it held that it would not provide consent for the cousins.

---

### Example

Michael establishes a trust for his wife, Catherine, with the remainder to be divided equally between those members of his family who are members of the armed forces. In default of appointment, the capital is to be divided amongst his nieces and nephews.

Should Catherine wish to vary the terms of the trust, all of Michael's adult nieces and nephews would have to give their consent. Under **s 1(1)(a)**, the court would have the jurisdiction to provide consent for any infant nieces and nephews. Under **s 1(1)(b)**, consent could be given on behalf of those unknown beneficiaries who may at some future time become members of the armed forces. In addition, the court will assume that at the time of the application Catherine has died. Therefore, if, at that time, one of Michael's brothers is an Army Lieutenant, the court will apply the proviso in **s 1(1)(b)** and require that the brother also consents to any change.

### Section 1(1)(c): unborn beneficiaries

Many trusts seek to provide benefits for future generations of a family. This section allows the court to consent to changes on behalf of those not yet born.

### Section 1(1)(d): discretionary beneficiaries under a protective trust

Protective trusts are defined by **s 33 Trustee Act 1925**. If the principal beneficiary's interest is forfeited due to certain events, eg their bankruptcy, the property will instead be held on discretionary trust for others, such as the beneficiary and his family. As long as the principal beneficiary has not yet forfeited their interest, this section allows the court to provide consent on behalf of those who would be entitled under the discretionary trust.

### *Is the variation for the benefit of the beneficiary?*

**Section 1 VTA 1958** states that for those beneficiaries under **s 1(1)(a)–(c)**, any variation must be for their benefit.

Note: the benefit requirement does not apply to variations affecting those beneficiaries under **s 1(1)(d)**.



## Methods of varying the terms of the trust

\*\*\*\*\*

'Benefit' has been broadly defined by the courts to include not only financial advantages (eg the reduction of inheritance tax as in *Re Druce's ST* [1962]) but also non-financial advantages:

Figure 10.3

Case	Non-financial benefit accepted by the court
<i>Re T's ST</i> [1963]	Delay to entitlement approved to protect an 'immature and irresponsible' beneficiary from squandering benefits.
<i>Re Holt's ST</i> [1968]	Delay in entitlement approved to ensure children were advanced in maturity and careers before becoming independently wealthy.
<i>Re Weston's ST</i> [1969]	Proposal to move trust (and beneficiaries) to Jersey for financial advantage rejected in favour of allowing the children to grow up in England.
<i>Re Remnant's ST</i> [1970]	Proposal to remove a forfeit clause for those children who married a Roman Catholic approved as preventing family conflict.

The courts' discretion to assess the 'benefit' of a variation is extremely wide and potentially very subjective. This problem is accentuated when the court has to weigh financial benefits against non-financial ones. While this discretion allows the court to consider all the circumstances of a case, it is an unfortunate feature of variation cases that many are heard in private and not reported. Therefore, it is difficult to establish any clear principles determining how that discretion should be exercised.

### What is the relevance of the settlor's intention?

In the case of *Re Steed's WT* [1960], the settlor's intention to protect her housekeeper from her 'sponging brother' was used to refuse an application by the beneficiary to vary the trust.

However, this case was later distinguished in *Goulding v James* [1997]:

.....  
*Goulding v James* [1997] 2 All ER 239

The testatrix left her daughter, June, a life interest, with the remainder to go to June's son Marcus, should he reach the age of 40. Marcus's children (of which he had none at the time) would take the remainder should Marcus predecease June. June and Marcus applied to the court under s 1(1)(c) VTA 1958 for approval on behalf of Marcus's unborn children to vary the trust. Under their proposal, Marcus and June would take 45% of the estate absolutely with the remaining 10% held on trust for Marcus's children. While this would benefit the children, evidence was presented that the testatrix had set up the trust specifically to protect June's interest from her husband, Kenneth, whom she mistrusted. She had also delayed Marcus's benefit as she thought him a 'free

## Key cases

\*\*\*\*\*

spirit' who needed first to settle down (Marcus was living in an artistic community in Nantucket at the time).

In approving this arrangement, the Court of Appeal held that the settlor's intention could only be taken into account insofar as it related to the interests of the beneficiary on whose behalf the court was asked to give consent. As the testatrix's concerns related to June and Marcus, her intentions were irrelevant to the question of whether consent should be given on behalf of Marcus's unborn children.

---

### ✓ Looking for extra marks?

*Goulding v James* renders the settlor's intention largely irrelevant. However, it remains unclear what weight the court would give to that intention should it relate to the interest of the beneficiary the court is being asked to consider. You could gain valuable credit in an exam by being able to analyse the conflicting reasoning. In 'Variation of trusts: settlors' intentions and the consent principle in *Saunders v Vautier*' [1997] Modern Law Review, pp 719–26, Luxton argues that if the effect of varying a trust under the VTA 1958 is akin to the operation of the rule in *Saunders v Vautier*, the court is providing proxy consent for the beneficiary and so, logically, it should only consider questions of relevance to that beneficiary. This would exclude the question of the settlor's intention entirely. However, neither *Re Steed's WT* nor *Goulding v James* goes quite that far. Instead, we are left with a compromise, wherein the settlor's intentions may sometimes be relevant but rarely conclusively.

## \* Key cases

Case	Facts	Principle
<i>Chapman v Chapman</i> [1954] 2 WLR 723	Raised the question of the court's inherent jurisdiction to vary a trust to the financial advantage of the beneficiaries.	Defined and narrowed the courts' inherent jurisdiction to vary a trust to cases of emergency and the resolution of 'genuine disputes' over beneficial interests. Led directly to the enactment of the VTA 1958.
<i>Goulding v James</i> [1997] 2 All ER 239	The court approved the variation of a trust under the VTA 1958 on behalf of as yet unborn children, despite extrinsic evidence that the settlor's intentions regarding the <i>sui juris</i> beneficiaries ran contrary to the changes.	The settlor's intention is only of relevance insofar as it relates to the beneficial interest of the beneficiary on whose behalf the court is asked to consent. However, it will not necessarily outweigh financial benefits.
<i>Re Ball's ST</i> [1968] 1 WLR 899	The court approved a variation dispensing of the settlor's life interest in favour of life interests for his two sons.	The court cannot approve variations which amount to a 'resettlement' of the trust on entirely different terms.

Case	Facts	Principle
<i>Re Weston's ST</i> [1969] 1 Ch 223	Proposal to move trust (and beneficiaries) to Jersey for financial advantage rejected in favour of allowing the children to grow up in England.	'Benefit' under the VTA 1958 can include non-financial as well as financial benefits.

## » Key debates

Topic	How consistent has the courts' approach to variation of trusts been?
<b>Academic/ Author</b>	Harris
<b>Viewpoint</b>	Harris provides an excellent overview of the entire area. There has been relatively little written on this area – some extra reading on your part could really improve your marks.
<b>Source</b>	<i>Variation of Trusts</i> (1975).

Topic	What is the relevance of the settlor's intention under the VTA 1958?
<b>Academic/ Author</b>	Luxton
<b>Viewpoint</b>	<i>Goulding v James</i> distinguished <i>Re Steed's WT</i> to allow a more restrictive approach to be taken to the settlor's intention. However, this still imposes unsatisfactory constraints upon the court's discretion to vary a trust for the benefit of the beneficiaries.
<b>Source</b>	[1997] 60 MLR 719.

## ? Exam questions

### Problem question

Scott and his wife, Laura, have life interests in the Summers Trust. The remainder is shared equally between their four children, Ben, Connor, Deborah, and Eve, on the condition that they are married at the time their interest vests. The trust states that if any of the children do not marry, their share will pass to their siblings.

Scott and Laura are tired of the wet weather in the UK and are seriously considering emigrating to Australia. They would like the trustees to be able to invest in residential property in Australia so that they might spend some time there to decide whether they wish to move permanently.

## Exam questions

\*\*\*\*\*

They also wish to help all their children by removing the marriage condition in the trust and inserting a condition that the children will not become entitled until they are 25 years old.

Ben is 23 and married.

Connor is 20 and gay.

Deborah is 16 and a devout Christian. She has broken off all contact with her gay brother and opposes the change on religious grounds.

Eve is 14 and severely autistic. As she finds it extremely difficult to form close personal relationships, her parents are concerned that she will never marry.

Advise Scott and Laura whether the court will give permission for these variations.

[An outline answer is included at the end of the book.](#)

## Essay question

Discuss the extent to which the courts should take the settlor's intention into account when deciding whether to approve variations under the [VTA 1958](#).

[An outline answer is available online at www.oxfordtextbooks.co.uk/orc/concentrate/](http://www.oxfordtextbooks.co.uk/orc/concentrate/)