

Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn)
Iain McDonald and Anne Street

p. 145 **10. Variation of trusts**

Iain McDonald, Senior Lecturer in Law, University of the West of England, and Anne Street, Visiting Lecturer, SOAS, University of London

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter focuses on the circumstances in which the courts may approve the variation of a trust. A trust may be varied: by a power within the trust itself; by 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.

Keywords: trusts, beneficiaries, inherent jurisdiction, statute, Variation of Trusts Act 1958

Key facts

- A trust may be varied by a power within the trust itself, by 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 (VTA) 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.

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. 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, in *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 1

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'. If 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. Therefore money should not influence the exercise of their responsibilities! The trustees, of course, remain free to pursue remuneration through other methods—for example, s 29 Trustee Act 2000 or court-approved payments (see chapter 11).

p. 147 **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 resettle it on more favourable terms. This rule 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 weapon to force trustees to act 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 do so.

The court's inherent jurisdiction

The courts have 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.

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 the reorganization of the beneficial interests of the beneficiaries (see Figure 10.1).

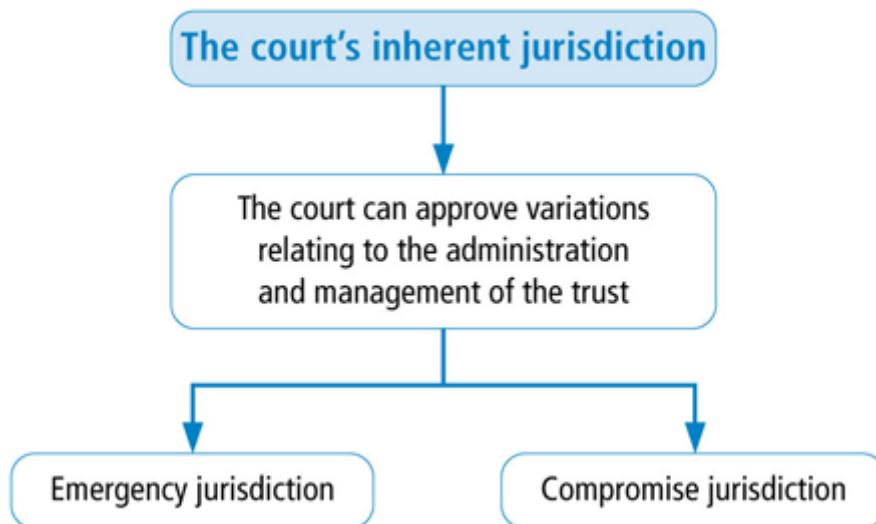


Figure 10.1 The court's inherent jurisdiction

In what circumstances will the court approve a variation?

Following the decision of the House of Lords in *Chapman v Chapman* [1954], the court's jurisdiction is restricted to two situations: 'emergency' and 'compromise'.

p. 148 'Emergency'

'Emergency' can be understood in its literal context, as in *Re Jackson* [1882], where the trustees needed permission to use trust money to make repairs to prevent a trust property from 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.

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—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, on the basis that a settlor would not have established a trust to benefit a beneficiary in the future ensuring their financial position in the meantime: *Havelock v Havelock (1881)*.

p. 149 'Compromise'

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?

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 its 1957 report *The Court's Power to Sanction Variation of Trusts* (Cmnd 310), which provided the impetus for the VTA 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.

Statutory provisions

The courts have also been given statutory authority to vary the terms of a trust in a number of circumstances (see Table 10.1).

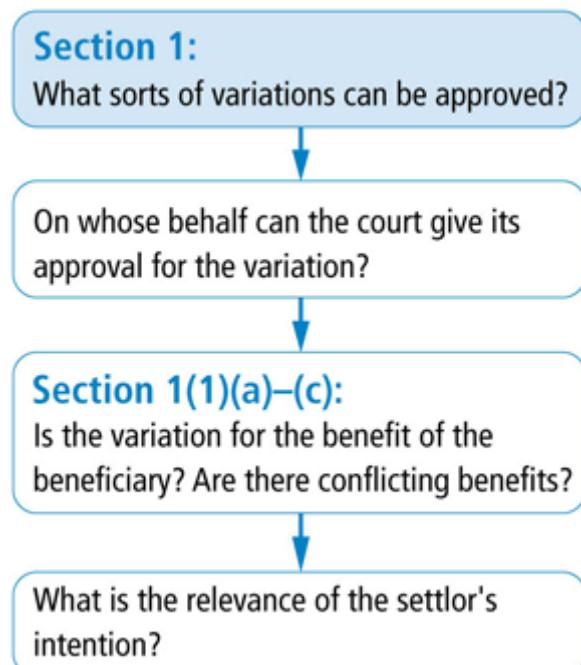
Table 10.1 Statutory powers to vary a trust

STATUTE	COURT'S Power To Vary
Section 53 Trustee Act 1925	To vary the terms of a trust 'for the maintenance, education, or benefit of the infant'.
Section 57(1) Trustee Act 1925	To approve changes to the administration and management of trusts where it is 'expedient' to do so. Note: this section does not allow the courts to interfere in the <i>beneficial interests</i> under a trust: <i>Re Downshire Settled Estates [1953]</i> .
Section 1 Variation of Trusts Act 1958	This wide power allows the court 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'.

p. 150 **The Variation of Trusts Act 1958**

The VTA 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. 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 (see Figure 10.2):

**Figure 10.2** The Variation of Trusts Act 1958

What sorts of variations can be approved?

Section 1 VTA 1958 gives the courts a wide power, so that, unlike other methods of variation, the court can 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, 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'. In *Ridgwell v Ridgwell [2007]*, Behrens J accepted that a variation that created an additional life interest that deferred the entitlement of the **remaindermen** children did not fundamentally alter the basis of the original trust. Compare this decision with the following case:

Re T's ST [1963] 3 WLR 987

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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 judgments in *Re Ball's ST [1968]* and *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 prepared to grant 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 variation. 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.

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

This group will include minors and those persons unable to consent, for example 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.

The meaning of this subsection 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.

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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 as the beneficiary may never marry (*Re Clitheroe's ST [1959]*). Likewise, a trust which benefits the next-of-kin of a beneficiary would be included as it remains uncertain who the next-of-kin will be until the beneficiary dies (*Re Suffert [1961]*).

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 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 2

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 among 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 consent to any change.

p. 153 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, for example his or her bankruptcy, the property will instead be held on discretionary trust for others, such as the beneficiary and his or her family. As long as the principal beneficiary has not yet forfeited his or her 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) (but not those under s 1(1)(d)), any variation must be for their benefit.

'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 (see Table 10.2):

Table 10.2 Examples of non-financial benefits accepted by the courts

CASE	NON-FINANCIAL BENEFIT ACCEPTED BY THE COURT
<i>Re T's ST [1963]</i>	Delay to entitlement approved to protect an 'immature and irresponsible' beneficiary from squandering benefits
<i>Re Holt's ST [1968]</i>	Delay in entitlement approved to ensure children were advanced in maturity and careers before becoming independently wealthy
<i>Re Weston's ST [1969]</i>	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 [1970]</i>	Proposal to remove a forfeit clause for those children who married a Roman Catholic approved as preventing family conflict
<i>Re Y Trust [2019]</i>	Proposal to revise definitions of 'issue' and 'descendant' to allow children born into homosexual relationships, illegitimate children, and children adopted over the age of two to be included approved as supporting a strong and cohesive family support structure

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.

p. 154 **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 if Marcus died before 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 per cent of the estate absolutely, with the remaining 10 per cent held on trust for Marcus's children. While this would benefit the children, it was argued 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 spirit' who needed to settle down (Marcus was living in an artistic community in Nantucket at the time).

The Court of Appeal approved the variation. The settlor's intention could only be considered 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: Settlers' Intentions and the Consent Principle in *Saunders v Vautier*' (1997) 60 MLR 719, 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
Chapman v Chapman [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 court's 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 .
Goulding v James [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.
Re Ball's ST [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.
Re Weston's ST [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.

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Key debates

Topic	How consistent has the courts' approach to variation of trusts been?
Academic/author	Harris
Viewpoint	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.
Source	Harris, <i>Variation of Trusts</i> (1975).
Topic	What is the relevance of the settlor's intention under the VTA 1958?
Academic/author	Luxton

Topic	How consistent has the courts' approach to variation of trusts been?
Viewpoint	<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.
Source	Luxton (1997) 60 MLR 719.

p. 156 **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 United Kingdom 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.

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.

See the Outline answers section in the end matter for help with this question.

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**.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-10-outline-answers-to-essay-questions?options=showName> to the essay question
- Further reading <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-10-further-reading?options=showName>
- Interactive key cases <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-10-interactive-key-cases?options=showName>
- Looking for extra marks quiz <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-10-looking-for-extra-marks?options=showName>
- Multiple choice questions <https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-10-multiple-choice-questions?options=showName>

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