



Trusts & Equity (10th edn)

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p. 310 **9. Flexibility of benefit**

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<https://doi.org/10.1093/he/9780192869630.003.0009>

Published in print: 01 April 2023

Published online: August 2023

Abstract

According to the so-called ‘rule in *Saunders v. Vautier*’, the beneficiaries of an expressly created private trust may terminate the trust if they are in unanimous agreement and are all competent adults, and are, between them, absolutely entitled to the trust property. This chapter examines the issue of ‘flexibility of benefit’, the extent to which beneficiaries may be able to take benefits under a trust despite limitations on their beneficial ownership, as well as the extent to which limitations on their beneficial ownership may be varied or entirely removed. It shows that under the Trustee Act 1925, trustees have a discretionary power—known as ‘the power of maintenance’—to apply income for the benefit of infant beneficiaries and a similar discretionary power, termed ‘the power of advancement’, to apply capital for the benefit of a beneficiary (infant or adult) out of his/her anticipated entitlement to the trust fund.

Keywords: private trust, *Saunders v. Vautier*, flexibility of benefit, beneficial ownership, Trustee Act 1925, power of maintenance, power of advancement, income, capital, benefits

Context

Suppose that a trust confers a benefit at the age of 25 upon on a school pupil who is now 15 years old. They need trust income to support their education at school now, and when they are 18 they will need a lump sum of capital to pay university fees. Or suppose that a trust is set up to give your mother a life interest under a trust and you the remainder interest when your mother dies, but for tax planning and other reasons you and your mother would rather share the fund equally now. Is the distribution of benefits under a trust set in stone or can it respond flexibly to situations such as these? This chapter will answer that question.

p. 311 **9.1 Introduction**

The beneficiaries of an expressly created private trust may bring the trust to an end if they are in unanimous agreement and are all competent adults, and are, between them, absolutely entitled to the trust property. This is the so-called ‘rule in *Saunders v. Vautier*'.¹ Having terminated the trust, each beneficiary will be entitled to take her share of the fund as an absolute owner. When beneficial ownership returns to absolute ownership, it is then at its most flexible, because an absolute owner has virtually unrestricted rights to use and dispose of her property as she wishes.² In the meantime, before the trust is brought to an end, the nature and extent of a beneficiary's beneficial ownership are limited by the terms of the trust. The trust may provide that the beneficiary's interest will vest in possession at the moment the trust is created; alternatively, her interest may be deferred until some future date (for example, ‘the year 2010' or ‘the date p. 312 of her father's death'), or it may be expressly contingent upon the happening of some future event that may or may not occur (for example, ‘when she qualifies as a barrister' or ‘when she reaches the age of 25'). The central question to be addressed in this chapter is to what extent beneficiaries may be able to take benefits under a trust despite limitations on their beneficial ownership, and to what extent limitations on their beneficial ownership may be varied or entirely removed.

We will identify, for example, what may be done if a trust confers a benefit on X at the age of 25 and it is thought that X would benefit during her infancy from the payment of trust income towards school fees, or that she would benefit at the age of 21 from a lump sum of capital to pay for the legal practice course. We will see that, subject to contrary provision in the trust instrument, the Trustee Act 1925 grants trustees a discretionary power—called ‘the power of maintenance’—to apply income for the benefit of infant beneficiaries and a similar discretionary power—called ‘the power of advancement’—to apply capital for the benefit of a beneficiary (infant or adult) out of her anticipated entitlement to the trust fund. In fact, if the trust instrument so provides, it is even possible for trustees to exercise the ‘power of advancement’ so as to allow a beneficiary to take her entire presumptive share under the trust even though her interest has not yet vested, and might never vest, in possession. The availability, operation, and extent of the powers of maintenance and advancement are the first major topic in this chapter.

Occasionally, more fundamental flexibility may be called for. Events might occur for which the settlor had made no express provision, such as the divorce of a beneficiary or a change in the tax laws. Another possibility is that one beneficiary may wish to reduce the size of her share in favour of another beneficiary. Faced with a need for fundamental flexibility of this kind, the beneficiaries could agree to bring the trust to an end under the rule in *Saunders v. Vautier*, thereby taking their shares absolutely or resettling them on new trusts, but this will not be possible if, for example, an adult beneficiary wishes to reduce the size of her share in favour of an infant beneficiary. It was in response to problems of this sort that Parliament enacted the Variation of Trusts Act 1958. The Act confers a right on any interested party to seek the court's approval for proposals to vary or revoke expressly created trusts. A variation under the Act operates, like the rule in *Saunders v. Vautier*, on the basis of the unanimous consent of the beneficiaries. So if the court approves a proposal to vary beneficial interests under a trust, or to bring the trust to an end, it gives its consent on behalf of any beneficiary who, as a matter of fact or law, is incapable of giving her own consent to the proposal. All other beneficiaries must give their own consent before the proposal can be approved.

The second major topic in this chapter is the variation of beneficial interest under private trusts. The Variation of Trusts Act 1958 forms the major part of that topic, but other modes of varying beneficial interests under private trusts are also considered.

In this chapter, we are mainly concerned with flexibility that is available as a matter of general law, but it should always be borne in mind that the trust instrument can, subject to limitations of public policy,³ override the general law. Thus, it is common practice for a modern trust deed to grant the trustees an overriding power of appointment by which they may terminate the interest of the principal beneficiary and appoint the benefit in favour of members of a defined class of alternative beneficiaries.

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The chapter concludes with a brief reference to the variation of trust administration, which is included in order to contrast administrative flexibility with flexibility of benefit.

9.2 Maintenance of infant beneficiaries

Consider the traditional settlement trust ‘to A for life, to B in remainder’. The settlor has expressed an intention as regards the extent of the beneficial entitlements under the trust: the two beneficiaries are to have vested interests. A will have an interest vested ‘in possession’ now and B’s entitlement will be vested ‘in interest’ until A’s death, when it will vest in possession. Do the settlor’s intentions end there? Suppose that A is currently in urgent need of financial assistance, but, being an infant, is not yet absolutely entitled to the income from the trust. It is natural to presume that the settlor’s general intention to confer a benefit on A extends to providing for A in these circumstances, so the Trustee Act 1925 implies a power to maintain an infant beneficiary out of trust income, provided that the gift to that beneficiary includes income arising between the creation of the trust and the date the beneficiary’s interest vests in possession.⁴ This ‘power of maintenance’ is fiduciary, which means that the trustees must consider whether or not to exercise it, bearing in mind the purposes of the trust and the interests of all of the beneficiaries, and, if the trustees decide to exercise the power, they must exercise it for the benefit of the beneficiaries and for their benefit alone.⁵ The statutory power of maintenance can be extended, modified, or excluded by the express terms of the trust instrument.⁶

9.2.1 The statutory power

Section 31 of the Trustee Act 1925 provides that trustees may ‘*at their sole discretion*’ apply the whole or any part of the income from trust assets for ‘*the maintenance, education or benefit*’ of an infant beneficiary. An ‘infant’ is any person under the age of 18.⁷

9.2.1.1 Limitations on the exercise of the statutory power

Even though the statutory power under section 31 of the Trustee Act 1925 provides that the exercise of the power of maintenance is at the trustees’ ‘sole discretion’, s. 31(1) lays down a number of limitations as to its exercise:

- 1.

The power cannot be exercised in conflict with the rights of persons with prior interests. So if the trust is for A for life and for B in remainder, A is absolutely entitled to all of the income from the fund and no income can be applied to maintain B unless A consents.

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2. When income is applied to maintain an infant, it should not be paid directly to the infant: it should be paid to the infant's parent or guardian, or directly to address the particular financial need. If, for example, the payment of income is intended to meet the infant's school fees, the trustees should make the payment to the child's guardian or to the school direct. Trustees cannot safely pay income to an infant beneficiary, even if her interest in income has vested in possession, because an infant beneficiary cannot (unless she is married)⁸ give a valid receipt for income,⁹ with the result that she could demand the money *again* upon attaining majority.
3. In relation to trust interests created or arising before 1 October 2014, the maintenance payment must be reasonable in all of the circumstances. In determining what is reasonable, the trustees must have regard to the '*age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes*'.¹⁰ In trusts coming into effect on or after the 1 October 2014, the power of maintenance can be exercised 'as the trustees may think fit'.¹¹
4. In relation to trust interests created or arising before 1 October 2014, if the trustees have notice that more than one fund is available to meet the infant's particular financial need contribution from the trust income should be made pro rata to contributions from other sources where practicable.¹² In trusts coming into effect on or after the 1 October 2014, trustees can exercise their power as they 'think fit'.¹³

9.2.1.2 Gifts carrying intermediate income

As stated earlier, the statutory power of maintenance can only be exercised in favour of a beneficiary under a trust if the gift to that beneficiary includes income arising between the creation of the trust and the date the beneficiary's interest vests in possession. In legal language, it is said that the gift must '*carry the intermediate income of the property*'.¹⁴ To determine whether or not a gift carries the intermediate income is a very technical question, the answer to which is hidden in a mixture of statutory provisions and judicial decisions. Before an attempt is made to summarize these technical rules in as straightforward a way as possible, it is necessary to reacquaint ourselves with the meaning of certain terms.

Future and contingent gifts

A 'future' or 'deferred' gift is a gift that is expressed to vest in possession at some future date. An example would be a gift to X in 2015, or a gift to Y when her Uncle Jack dies. Typically, a future gift is one that will not vest in possession until some time after the trust comes into effect. However, testamentary trusts do not come into effect until the death of the testator, so there is every possibility that, by then, the future date to which the beneficiary's interest was deferred will already have passed, as would be the case if Uncle Jack were to predecease the testator in the example given earlier. The crucial point, however, is that a future gift is one that will certainly vest in possession. Short of divine intervention, the year 2015 will be reached and Uncle Jack will certainly die. This is the feature that distinguishes future gifts from contingent

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gifts. A contingent gift is a gift subject to a condition that may or may not be fulfilled. An example would be a gift to Z when Z qualifies as a solicitor. To confuse matters somewhat, it is possible to have a future contingent gift. An example would be a gift to Q in 2015 if Q has qualified as a solicitor by that date.

Devise, bequest, and legacy

'Devise', 'bequest', and 'legacy' are all types of testamentary gift. Such gifts come into effect on the death of the testator or testatrix and must comply with the formalities of the Wills Act 1837. A devise is simply a testamentary gift of 'real' property, which, for testamentary purposes, means all interests in land apart from leases (for historical reasons, leases are said to fall within the testator's personal estate and not his real estate). A bequest is simply a testamentary gift of personal property or 'personalty', which is property other than real property, and a legacy is a testamentary gift of cash. 'Legacy' is sometimes used more casually to refer to a testamentary gift of property of any type, so the term 'pecuniary legacy' is sometimes used to remove any doubt that the legacy is of cash. Finally, we must be aware of the distinction between 'specific' testamentary gifts and 'residuary' testamentary gifts. If T makes a gift to S of the freehold title to 'Linacre Farm' and leaves the rest of his real estate to R, S is said to be the beneficiary of a specific devise and R is said to be the beneficiary of a residuary devise. If T leaves his Rolls-Royce Corniche Convertible to S, and the rest of his personalty to R, S is said to be the beneficiary of a specific bequest and R is said to be the beneficiary of a residuary bequest.

Express and implied exclusion by the trust instrument

The express terms of the trust instrument or deed of gift are conclusive on the issue of whether or not a gift carries the intermediate income, so if the trust instrument says that a gift to beneficiary A does not carry the intermediate income, it does not carry it.¹⁵ Conversely, if the trust instrument says that a gift to beneficiary A does carry the intermediate income, then so it does. Let us assume, however, that the trust instrument is silent on the point. In such a case, it is important to distinguish between gifts of income and gifts of capital. If a trust is established for A for life and B in remainder, the gift to A is a gift of all income arising from the trust property so long as she lives and the gift to B is a gift of the capital remaining when A has died. There is no point debating whether or not the gift to B carries the income between the creation of the gift and A's death, because the gift to B does not carry income in any circumstances at all. This does not mean that it is impossible to maintain B, but that, to do so, the court will have to exercise its special inherent jurisdiction to maintain an infant out of capital. The court is unlikely to do so apart from where the legacy is small and the infant has no other means of being maintained.¹⁶ Where the fund is small, so that the cost of an application to court would be disproportionate to the size of the fund, a trustee will probably be justified in maintaining a beneficiary out of capital without the express authority of the court order.¹⁷ However, by applying capital by way of maintenance, it may be regarded as taxable income, so it generally makes more sense to pay capital by way of advancement. Another possibility is to sell the property to which the infant is entitled and use the capital proceeds for her benefit.¹⁸

Testamentary gifts: the general position

An important distinction is between a gift conferred by an *inter vivos* trust and a gift conferred by a testamentary trust: the former will generally carry the intermediate income, whereas the latter is subject to more complex rules. If a testamentary gift is absolute, it vests in possession immediately; there is no intermediate period between the creation of the trust and the beneficiary's interest vesting in possession, so the question of entitlement to intermediate income simply does not arise. The position is more complex, however, when a testamentary gift is deferred to the future, or expressed to be contingent upon the happening of an event which may or may not occur. Here, the general position can be summarized by saying that future testamentary gifts *do not* carry the intermediate income unless the gift is a specific devise¹⁹ or specific bequest,²⁰ whereas contingent testamentary gifts *do* carry the intermediate income²¹ unless the gift is a pure pecuniary legacy.²² A contingent pecuniary legacy will only carry the intermediate income in special circumstances:²³

1. where the legacy was conferred by the parent of the legatee or a person standing *in loco parentis*;²⁴
2. if the testator has elsewhere demonstrated an intention to maintain the beneficiary;²⁵
3. the legacy is held on trusts distinct from the trusts to which the testator's other property is subject.²⁶

If a residuary bequest is both future and contingent, it will not carry the intermediate income²⁷ and, logically, the same will follow in the case of a future-contingent residuary devise.

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↳ Residuary gifts are a special case, because trust income that is not otherwise disposed of automatically falls into residue. A beneficiary of a *contingent* residuary bequest can be maintained from intermediate income acquired indirectly in this way²⁸ and the same is presumably true of the beneficiary of a *contingent* residuary devise, but the beneficiary of a *future* residuary devise cannot,²⁹ and the same is true of the beneficiary of a *future* residuary bequest.³⁰

9.2.2 Accumulation of income during infancy

Trustees do not have a *duty* to maintain an infant beneficiary when the gift to the beneficiary carries the intermediate income: they merely have a *power* to do so. Accordingly, it may be that the intermediate income arising in any given year will not be applied by way of maintenance. If this is the case, the unapplied income must be accumulated '*in the way of compound interest*',³¹ which means that last year's unapplied income is treated as if it were capital and added to the main capital of the trust, so the beneficiary can be maintained this year out of income arising on last year's accumulated income in addition to the usual income arising on the main trust capital. Thus, even though the accumulated income is treated for most purposes as if it were capital,³² it can still be used to maintain the infant beneficiary in future years as if it were income arising in those years, provided that the infant is still entitled to be maintained out of income arising in those future years. If a beneficiary dies during infancy, the accumulations on that beneficiary's share are added to the capital of the trust as a whole, and not only to that beneficiary's share of the capital, so the deceased beneficiary's accumulations will not devolve as part of his estate. This is so even though the infant had a vested interest in the income during its life.³³

9.2.3 Allocation of income after infancy

When the infant beneficiary attains majority (reaches the age of 18), or marries under that age, the trustees must add accumulated income to the main trust capital from which that beneficiary's accumulated income arose. There are, however, two exceptions to this rule.³⁴ When either of those exceptions applies, the trustees will not add the accumulations to the main capital, but will hold them on trust for the beneficiary absolutely, so that the accumulations may be paid to the beneficiary and the beneficiary's receipt will discharge the trustee. The first covers cases where the beneficiary already had a vested interest in the income *before* she attained majority (or earlier marriage). The second exception is when the beneficiary's contingent interest in the income vests absolutely *at the date* that she attains majority (or earlier marriage); this exception will apply when the gift is in the form 'to X when she reaches 18' or 'to Y when she marries'.

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↳ If neither exception applies—as would be the case if the gift was, for example, £1,000 'to Y when she reaches the age of 21'—the income accumulated on the £1,000 during Y's infancy will be added to the main capital (the £1,000) when she reaches the age of 18. Thereafter, she can no longer be maintained and she cannot take the accumulated income, but she is absolutely entitled to all income arising thereafter on the combined fund of capital and accumulations until she becomes absolutely entitled at the age of 21.³⁵ This concession ensures that income is not accumulated long enough to infringe the rule against excessive accumulation.³⁶

9.2.4 Class gifts

If there is a gift to a class, contingent upon its members attaining the age of 21 or some other age, the class will be closed on a provisional basis, for the purpose of maintenance, when the first member attains that age. The provisional class will include all members living at the date on which the class is closed. The trustees may then maintain that beneficiary out of the income attributable to her notional share. If a new beneficiary is born later, the class is enlarged to include the new beneficiary, reclosed again on a provisional basis, and a fresh allocation of notional shares is made. This reallocation occurs every time a member of the class attains the contingent age or a new member is born. In relation to trusts created on or after 1 October 2014, if a beneficiary dies before reaching the contingent age, income accumulated on their share is added to the trust capital of the whole benefiting class.³⁷

9.2.5 Inherent jurisdiction to maintain

Even when a trust requires all income on a gift to be accumulated, which would normally be clear evidence that the settlor intended to exclude the statutory power of maintenance, the court has an inherent jurisdiction to maintain an infant if there are no other funds available for its maintenance.³⁸ The assumption is that the settlor, having demonstrated an intention eventually to confer a benefit on the infant, would not have intended it to go without basic necessities in the meantime.

9.3 Advancement

Advancement is the power to pay trust capital for the advantage of an adult or infant beneficiary. Usually, the capital is applied by means of a formal deed of advancement, but such a deed is not strictly necessarily. The exercise of the power usually confers benefits on the beneficiary ‘in advance’ of the beneficiary’s interest vesting in possession, but, in this context, ‘advancement’ actually means ‘to confer an advantage’.

p. 319 There are ↵ suggestions, particularly in some of the earlier cases, that ‘advancement’ necessitates a contribution to the ‘early period’ of the beneficiary’s life—part of the process of ‘getting them started’—but it is now established that the power can be exercised at any stage to further *‘the establishment in life of the beneficiary’*.³⁹ Examples include payment of capital to support an apprenticeship, to purchase a commission in the army,⁴⁰ to purchase an interest in a business,⁴¹ to provide a dowry on the marriage of a girl,⁴² to pay off the beneficiary’s inheritance tax,⁴³ and to establish the beneficiary’s spouse in business.⁴⁴

9.3.1 The fiduciary aspect

The power to make an advancement is a fiduciary power. Therefore, the trustees must weigh the interests of other beneficiaries against the advantage to the beneficiary who is the object of the advancement.⁴⁵ They must also ensure that the capital monies paid to the object beneficiary are used by her for the purpose intended by the trustees. In *Re Pauling’s Settlement Trusts*, the trustee bank had been advised by counsel that it could pay capital monies directly to the adult beneficiary by way of advancement and what the beneficiary did with them thereafter was his own concern. The Court of Appeal came to a different view. Wilmer LJ held that trustees are not permitted to prescribe a particular purpose, and then raise and pay the money over to the advancee leaving him or her entirely free, legally and morally, to apply it for that purpose or to spend it in any way he or she chooses, without any responsibility on the trustees even to inquire as to its application.⁴⁶

If monies paid by way of advancement are not used for the prescribed purpose and the trustees receive notice of that fact, they are under a duty to make no further advances without first being satisfied that the monies will be properly applied.

9.3.2 Incidental beneficiaries

We have already observed that it is a valid exercise of the statutory power of advancement to pay off a beneficiary’s debts and, in another case, to set the beneficiary’s spouse up in business. In these cases, it is clear that the beneficiary’s creditors and spouse are incidental beneficiaries of the exercise of the trustees’ power. This, however, does not make the exercise of the power invalid. As Viscount Radcliffe stated in *Pilkington v. IRC*:⁴⁷ ‘It is no objection to the exercise of the power that other persons benefit incidentally from the exercise of the power.’⁴⁸ In that case, Miss Pilkington was the principal object of the power of advancement. The trustees had proposed to exercise their power of advancement by resettling capital monies on new trusts for ↵ her benefit. The proposal was approved despite the fact that the children of the principal beneficiary, who would have received nothing under the original trusts, would take as ‘incidental beneficiaries’ of the new trusts if she were to die under the age of 30 and they were to survive her.

Although incidental beneficiaries are usually permitted, it will be a breach of their fiduciary duty for trustees to exercise the power of advancement knowing that one or more of the trustees will take some incidental benefit in the trust capital paid in exercise of the power.⁴⁹

9.3.3 The statutory power

Section 32 of the Trustee Act 1925, as amended by section 9 of the Inheritance and Trustees' Powers Act 2014, provides that trustees may 'pay or apply any capital money subject to a trust, or transfer or apply any other property forming part of the capital of the trust property, for the advancement or benefit' of a beneficiary, regardless of whether the beneficiary is an infant or an adult. The reference to 'benefit' in the statutory power widens the ambit of the power beyond mere 'advancement' in its traditional sense, so the power of advancement is now truly a power of applying capital so as to confer an 'advantage' of any kind. This means, for example, that the statutory power can be applied to paying off a beneficiary's debts,⁵⁰ whereas a mere power of 'advancement' cannot.⁵¹ We will see shortly that the word 'benefit' has a very wide meaning indeed. The statutory power has no application to Settled Land Act settlements; in relation to other trusts, the statutory power is subject to express contrary provision in the trust instrument.⁵²

9.3.3.1 Capital money

The reference to 'capital money' in s. 32 is misleading. There is no requirement to sell trust assets so as to realize capital money for the purpose of advancement; it is possible to apply capital assets directly for the advancement of the beneficiary. This occurred in *Re Collard's Will Trusts*.⁵³ The capital asset in that case was a farm to which the beneficiary was entitled under a will. Buckley J observed that the trustees had the power to advance £20,000 in capital monies to the beneficiary and then to sell the farm to the beneficiary at that price, so he concluded that the farm could be given to the beneficiary directly. R. E. Megarry described this as the '*healthy realism*' of equity.⁵⁴ It is worth digressing to note, briefly, that this '*healthy realism*' is exhibited in other contexts. There is even a maxim which states that 'equity will not act in vain'. This maxim must be carefully applied according to the particular context of each case, but it can apply, for example, as a basis for refusing an injunction where it is incapable of practical enforcement.⁵⁵

p. 321 **9.3.3.2 The meaning of benefit**

The example of the farm in *Re Collard's Will Trusts* demonstrates that advancement need not involve the conferral of financial benefits. The beneficiary in that case received far more than money—he received a livelihood and a place to live. Even though the immediate benefits of advancement take the form of money or valuable assets, the trustees must be satisfied that the payment of the money or valuable assets will achieve some ulterior benefit for the beneficiaries.⁵⁶ There is no defined limit to the range of benefits that will justify the exercise of the power of advancement. 'Benefit' is '*the widest possible word one could have*'.⁵⁷ Contribution to the costs of a wedding confers the social benefit of marriage, contribution to professional training confers the social benefit of a professional qualification, and so on. *Re Clore's Settlement Trusts*⁵⁸ illustrates the potential breadth of the concept. The beneficiary's father had established a charitable foundation to which the beneficiary felt morally obliged to contribute. It was more tax-efficient for a

donation to be made by the trustees out of the trust capital than to be made by the beneficiary out of his private funds, so the trustees made the contribution by exercising their power of advancement in favour of the beneficiary. At one level, the benefit to the beneficiary was nothing more remarkable than the benefit of a tax saving, but, at another level, the benefit was assistance in fulfilling a moral obligation.

Re Clore's Settlement Trusts was applied in *X v. A.*⁵⁹ In that case, trustees of a marriage settlement had exercised their power of advancement to give the life tenant (the wife of the settlor) £350,000 in 1996 and £500,000 in 2000, which sums she had given to charity in accordance with her Christian beliefs. The trustees now applied for directions as to whether it was open to them to give her a very substantial part of the remaining trust capital for the purpose of enabling her to devote it to charitable causes. The judge did not criticize the earlier payments, but refused to authorize further advancement on the ground that the sums proposed to be released were too large a proportion of the whole. The implication that trustees can apply funds to discharge a moral burden on the beneficiary's conscience, but only to a limited extent, betrays the law's inherent bias towards maintaining material wealth at the expense of moral considerations.⁶⁰

It might even be beneficial for the trustees to exercise the power of advancement temporarily to prevent a beneficiary from receiving wealth that would otherwise be due to her. Suppose a beneficiary's interest under a trust was contingent upon her attaining the age of 25, but evidence suggested that the beneficiary was immature, reckless, or a spendthrift. It might be to the benefit of the beneficiary for the trustees to exercise the power of advancement by resettling her capital on new trusts under which her interest will not vest until she reached the age of 30 (see the section headed 'Advancement by resettlement'). Incidentally, the notion of beneficial postponement has also been applied to justify the variation of a trust under the Variation of Trusts Act 1958.⁶¹

p. 322 9.3.3.3 Provisos to the statutory power of advancement

Section 32 of the Trustee Act 1925, as well as providing the statutory power of advancement, lays down the following limitations on its exercise.

Advancement limited to the beneficiary's presumptive share

In a gift on trust 'of £10,000 to A at the age of 25' if A is currently 15 years old his interest has not yet vested in possession. But it has 'vested in interest', which means that he has a 'presumptive' share. Accordingly, the trustees have the power to distribute the trust capital (£5,000) to A now and even if A fails to satisfy the contingency, he will be under no obligation to repay the £5,000. In trusts coming into effect prior to the Inheritance and Trustees' Powers Act 2014, the statutory power is limited to payment of one-half of the beneficiary's presumptive share.

The 'hotchpot' rule

Section 32(1)(b) of the Trustee Act 1925 provides that, if a beneficiary becomes absolutely and indefeasibly entitled to a share of trust property, the money she has already received by way of advancement must be brought into account as part of her share. The process is called 'hotchpot'.

The statutory power cannot be exercised prejudicially to prior entitlements

Section 32(1)(c) of the Trustee Act 1925 provides that trustees are not permitted to make a payment by way of advancement if to do so would prejudice any person with a prior interest in the fund, unless the person with the prior interest gives consent in writing to the advancement. The written consent of a person with a prior interest will still be required, despite a clause in the trust instrument dispensing with the requirement⁶² (a rare instance of the settlor being unable to oust the provisions of the general law by the express terms of the trust instrument). So, if a trust provides for A for life and for B in remainder, the trustees will not be permitted to apply any capital money for the advancement or benefit of B unless A has first given her consent in writing. This is because A has a vested interest in income arising on the capital of the trust and the payment of capital to B will reduce A's income. However, if A is merely a potential object of a discretionary trust, her consent will not be required.⁶³

9.3.4 Advancement by resettlement

The power of advancement may be exercised by resettling the trust capital on new trusts, but Upjohn J stated, in *Re Wills WT*, that:

[t]rustees cannot under the guise of making an advancement create new trusts merely because they think they can devise better trusts than those which the Settlor has chosen ↗ to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power.⁶⁴

In addition to the requirement that the resettlement is beneficial to the beneficiary, the resettlement must not infringe the rule against inalienability of capital and must not involve the unauthorized delegation of a basic discretion. As to the last requirement, Upjohn J stated that '*a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretion, at any rate in relation to beneficial interests*',⁶⁵ but his Lordship made it clear that such delegation may be expressly authorized by the trust instrument. When considering the advancement by resettlement in *Pilkington v. IRC*,⁶⁶ Viscount Radcliffe confirmed that '*the law is not that a trustee may not delegate; it is that trustees may not delegate unless they have authority to do so*'.⁶⁷ The resettlement in *Pilkington v. IRC* was successfully carried out for the avoidance of death duties (the precursor to inheritance tax), but, nowadays, a resettlement of trust capital on distinct trusts may give rise to a chargeable gain.⁶⁸ Today, there may also be adverse inheritance tax implications to such an arrangement.⁶⁹

9.4 Exclusion of the statutory powers of maintenance and advancement

The powers conferred on trustees by the Trustee Act 1925, including the powers of maintenance and advancement, are in addition to the powers conferred by the trust instrument, if any, but, according to s. 69(2) of the Act, they apply only so far as a contrary intention is not expressed in the instrument.⁷⁰ In *IRC v. Bernstein*,⁷¹ the settlor had directed that the income on his trusts should be accumulated during his lifetime, and this was held to be evidence of an intention to exclude the statutory powers of maintenance and advancement. In *Re Ransome*,⁷² a similar direction to accumulate income was held to be evidence of an

intention to exclude the trustees' usual duty to pay income on accumulations under the Trustee Act 1925, s. 31(1)(ii).⁷³ The beneficiary in that case got the worst of both worlds, because the direction to accumulate was held to be good evidence of an intention that the beneficiary should not be able to take income by way of maintenance, but the direction to accumulate was otherwise void for perpetuity, so the beneficiary was also disabled from taking income by way of accumulation. Accordingly, the settlor's fundamental intention to benefit the beneficiary was thwarted by the unintended, and unforeseen, combined effect of s. 69(2) of the Trustee Act 1925 and the rule against excessive accumulation.⁷⁴

p. 324 **9.5 The Variation of Trusts Act 1958**

If a dispute arises as to the proper construction to be given to the words of a trust instrument, it goes without saying that the courts are its most expert arbiters. However, a practice grew up whereby parties interested in varying the terms of a trust for the benefit of the beneficiaries would produce a sham dispute and, having agreed a 'compromise' in terms favourable to the beneficiaries, would seek a court order approving the parties' agreed interpretation of the trust. This practice continued until it was brought to an end by the House of Lords in the case of *Chapman v. Chapman*.⁷⁵ The House of Lords insisted that courts should no longer approve the compromise of sham disputes, but the consequence was to deprive the courts of a flexible and useful jurisdiction to vary trusts. It was in response to *Chapman v. Chapman* that the Law Reform Committee proposed that Parliament should grant the courts an '*unlimited jurisdiction to sanction*' variation of trusts⁷⁶ and it was in response to that proposal that the Variation of Trusts Act 1958 was swiftly passed into law.

The essence of the 1958 Act is that it confers a jurisdiction on the Chancery Division of the High Court to approve an arrangement varying or revoking all, or any part, of any expressly created private trust. This jurisdiction cannot be excluded by the express terms of the trust.⁷⁷ The Act lists four categories of beneficiary on whose behalf the court can give substituted consent, but all other beneficiaries have the right freely to decide on their own behalf whether or not to approve a proposed variation.

The most common reason for seeking a variation of beneficial interests under trusts is to reduce the beneficiaries' tax liabilities, with the result that the 1958 Act has become something of a tax-avoidance facility. It is perfectly acceptable for an individual to arrange his property and affairs so as to reduce his tax burden, but it is surely doubtful that the courts should take so active a role in reducing the public revenue. The contrast with the law of charitable trusts, where public benefit is a precondition to the judicial grant of fiscal immunity, could hardly be more stark. Nevertheless, the courts have turned a blind eye to the moral problem of judicially assisted tax avoidance, being content to make it their 'moral' imperative to advance the best interests of the beneficiaries. The Revenue is more concerned with public fiscal responsibilities than private financial rights, and is reported to have discontinued its practice of giving advance opinions on proposed arrangements to vary trusts under the 1958 Act.⁷⁸ Of course, not every variation is made to achieve tax advantages. Thus in one unreported case the 1958 Act was used to vary a settlement made following a divorce. The original trust had settled cash on the ex-husband for the purpose of buying a house in which to see his children. The house was never bought, so the court approved the ex-wife's application to vary ↪ the trust so as to partition the cash between the ex-husband and their children

and any children (presumably step-children) yet to be born.⁷⁹ Sometimes there is undoubtedly a public interest in varying a trust. An example would be any trust containing a condition tending to racial prejudice. We shall consider some cases in this category later.

9.5.1 The theoretical basis for variations under the 1958 Act

In theory, a variation under the 1958 Act is based on the consent of the beneficiaries; it is a statutory extension of the rule in *Saunders v. Vautier*. In *Re Holmden's Settlement Trusts*,⁸⁰ Lord Reid stated that:

[t]he beneficiaries are not bound by variations because the court has made the variation. Each beneficiary is bound because he has consented to the variation. If he was not of full age when the arrangement was made he is bound because the court was authorised by the Act [1958] to approve of it on his behalf and did so by making an order. If he was of full age and did not in fact consent he is not affected by the order of the court and he is not bound.⁸¹

However, the power of the beneficiaries must not be overstated. The court is never obliged to vary a trust under the Act, even if the beneficiaries are all adults and all consent to the variation. The Act merely authorizes the court to approve the arrangement. Section 1 states that the court may '*if it thinks fit*' 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.

9.5.2 The machinery of the Act

9.5.2.1 Who should apply?

Section 1 of the Act provides that the court has authority to approve an arrangement '*by whomsoever proposed*', but, in keeping with the principle of consent on which the jurisdiction is based, it is accepted that adult beneficiaries should normally be the ones to apply to vary or revoke their trust. Trustees should not make the application themselves unless they believe, first, that the variation would be for the benefit of the beneficiaries and, second, that there is no adult beneficiary willing to make the application for a variation.⁸² Trustees should, though, be joined as defendants to the application, because it is they who have the fiduciary duty to protect the interests of all of the beneficiaries under the trust and they who should raise objections if the proposed variation appears to benefit some, but not all, of the beneficiaries. Indeed, ECHR Art. 6 requires that the trustees should be joined as parties to an application to vary a trust, without which no order would be binding on them.⁸³ If the beneficiaries are not unanimous in making the application, the non-applicant beneficiaries should be joined as additional defendants. In keeping

p. 326 ↵ with the notion that the settlor's intentions are a 'serious' consideration, the settlor should be joined as a defendant if variation of an *inter vivos* trust is proposed and the settlor is still alive.⁸⁴ The form of the application to vary a trust under the Act is an originating summons exhibiting a draft scheme of arrangement. Hearings are normally in public. In a case where the parties are concerned that a public

hearing will prejudice the parties (for example by publicizing the wealth of a private company or revealing the identities of wealthy infant beneficiaries) reporting restrictions may be imposed and the judgment may be anonymized.⁸⁵ Restriction on publication should be the minimum encroachment necessary, and where the only beneficiaries needing protection are minors an order under section 39 of the Children and Young Persons Act 1933 is preferable to an anonymity order.⁸⁶

9.5.2.2 How does the variation occur?

According to Megarry J in *Re Holt's Settlement*,⁸⁷ any beneficiary who gives her own consent to a variation disposes of her original equitable interest the moment the application to vary is approved by the court, but his Lordship reluctantly yielded to counsel's submission that this disposition should be an exception to the usual requirement⁸⁸ that dispositions of equitable interests must be made in writing. This means that consent can be given informally, with the result that there will be no document liable to *ad valorem* stamp duty.⁸⁹ A reversal of this concession would go some way to countering the tax benefits that usually accompany a variation of trust. There is, however, little prospect of such a reversal, because, as Megarry J observed, the practice of informal consents has been accepted by HM Revenue and Customs, and by the courts for many years '*in some thousands of cases*'.⁹⁰

9.5.3 Consents given by the court

The Act lists four categories of beneficiary on whose behalf the court may give substituted consent, but all other beneficiaries have the right freely to decide on their own behalf whether or not to approve a proposed variation. The four categories of beneficiary on whose behalf the court may grant consent are set out in paras (a), (b), (c), and (d) of s. 1(1) of the Act. The para. (b) category is the most difficult and will therefore be considered last.

9.5.3.1 Persons under a disability: s. 1(1)(a)

This class includes minors (infants) and any other beneficiaries, including those of unsound mind and those suffering from a relevant physical disability, who are incapable of giving their own consent to the proposed arrangement to vary the trusts. If it seems surprising that the consent of an adolescent should be treated in like manner to the consent of a person of unsound mind, it should be borne in mind that, in practice, the court will take into account the expressed wishes of persons approaching majority even though their lack of consent cannot be a conclusive consideration. The power of the court to substitute its own consent for that of minors is a recognition that infants (even those aged 17) may still be under parental influence, with the very real possibility that their parents might try to influence the exercise of their child's consent for their own ends. In a case concerning a minor who was severely autistic and not expected to have mental capacity to consent to a variation, even as an adult, the question arose whether variation should be a matter for the Court of Protection. It was held, to the contrary, that approval of a proposed variation of a trust for his benefit will always be a matter for the High Court.⁹¹

A long-established Chancery practice of requiring counsel's opinion when proceedings are compromised in which an infant is interested has been extended to all cases '*where any infants or unborn beneficiaries will be affected by an arrangement*' under the 1958 Act:⁹²

[S]uch a written opinion is helpful, and in complicated cases it is usually essential to the understanding of the *guardian ad litem* and the trustees, and to the consideration by the court of the merits and the fiscal consequences of the arrangement.⁹³

9.5.3.2 The unborn: s. 1(1)(c)

The court may consent to an arrangement on behalf of any person unborn. This class is not restricted to persons in the womb. It would include 'the children of X', even if X were an avowed celibate. Even if X were a female octogenarian, the court would take the precaution of consenting on behalf of her unborn issue.

9.5.3.3 Discretionary beneficiaries under protective trusts: s. 1(1)(d)

A protective trust is a trust under which the principal beneficiary has a determinable life interest that, if it determines due to the bankruptcy or such like of the principal beneficiary, is replaced by a discretionary trust for a secondary class of potential beneficiaries.⁹⁴ According to s. 1(1)(d), the court may provide the consent of any beneficiary of the discretionary trust so arising.

9.5.3.4 Persons with mere expectations: s. 1(1)(b)

According to s. 1(1)(b), the court may, if it thinks fit, approve a variation on behalf of:

[a]ny person (whether ascertained or not) who may become 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

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↳ but with the following proviso:

[T]his 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 key to understanding s. 1(1)(b) is to identify those persons on whose behalf the court can give consent and to contrast them with the persons described in the proviso. The court has no authority to consent on behalf of the persons described in the proviso.

Persons on whose behalf the court can give consent under s. 1(1)(b) have no certain entitlement to the trust property, but merely an expectation of attaining an interest under the trust. Their interests in the trust have not vested in interest, let alone vested in possession. It is for this reason that they are not required to

give their own consent and that the court is authorized to consent on their behalf. The essential words of s. 1(1)(b) identify the person with a mere expectation as someone who '*may become entitled ... at a future date or on the happening of a future event*' if he then falls within a '*specified description*' or a '*specified class of persons*'. The most straightforward example of a person falling within s. 1(1)(b) is a person, E, who may be entitled to an interest under a trust when X dies, as being, at that time, X's next of kin. E satisfies all of the key ingredients of s. 1(1)(b). He '*may become entitled*' (but may not) '*on the happening of a future event*' (the death of X), as being at that date within a '*specified description or specified class*' (X's next of kin). The reason why we say that E has a mere expectation is because, even if X is unmarried today and E is X's only child, there is still the possibility that E may not be X's next of kin by the time that X dies. If E predeceases X, or if X marries and is survived by his spouse, E will not be X's next of kin. In short, one can never say for certain until a person dies who will be their next of kin. An old maxim puts it this way: *nemo est heres viventis* ('the living have no heirs').

Consider the facts of *Re Moncrieff's Settlement Trust*.⁹⁵ The primary beneficiary, Mrs Parkin, applied to court for an order approving an arrangement to vary the trusts under which she was entitled. Mrs Parkin had an adopted son, Alan. In the event of Alan predeceasing Mrs Parkin, her next of kin would be the four infant grandchildren of her maternal aunt. The judge was able to consent on behalf of Alan, because Alan was still an infant and therefore fell within s. 1(1)(a) of the Act. However, s. 1(1)(a) only applies to persons '*having*' an interest under the trust, so the four infant grandchildren, having mere expectations of an interest under the trust, did not fall within s. 1(1)(a). The crucial question was whether they fell within s. 1(1)(b) as being persons who '*may become entitled ... on the happening of a future event*', as falling within a specified description or class. The question was answered in the affirmative. At the date of the court hearing, it could be said that the cousins '*may*' fall in the specified class of '*next of kin*' on the future event of Mrs Parkin's death. However, the court then took into account the proviso important to s. 1(1)(b), which states that s. 1(1)(b) does not include any person who *would be* a member of the specified class if the said future event had happened *at the date of the application to the court*. So the court asked itself whether the ← four infant grandchildren *would have been* '*next of kin*' if Mrs Parkin had died on the date of the application to the court. The court answered this question in the negative. If Mrs Parkin had died at the date of the application to the court, Alan, not the four infant grandchildren, would have been her next of kin. Hence the court was able to consent on behalf of the four infant grandchildren to the arrangement proposed by Mrs Parkin. Buckley J observed that the four infant grandchildren '*may never fall within the class of beneficiaries because they may predecease the settlor or the first respondent [Alan] may survive the settlor*'.⁹⁶ His Lordship took the view that the interests of the four infant grandchildren could be adequately looked after by the trustees.

The facts of *Re Suffert's Settlement*⁹⁷ were broadly similar to those of *Re Moncrieff's Settlement Trust*. Under the terms of the original settlement, Miss Suffert had a life interest under a protective trust with a power to appoint her successor. If she were to die without issue, having failed to exercise her power of appointment, the fund would pass in trust to her statutory next of kin. Miss Suffert applied to court for an order approving a variation of the protective trusts. She was a 61-year-old spinster, who had no children and her only ascertainable relations were three adult first cousins. One of the cousins had joined Miss Suffert in making the application to the court, but that still left two adult cousins who had not given their consent to the proposed variation. The question arose whether the court could consent on their behalf. The court held

that it could not consent on behalf of the cousins, because they fell within the proviso to s. 1(1)(b). If the future event (Miss Suffert's death) had happened '*at the date of the application to the court*'—that is, the date of the court hearing—the three cousins *would be* entitled immediately as next of kin to an interest under the trust.

A vested interest, albeit remote and contingent, is more than a mere expectation

In *Knocker v. Youle*,⁹⁸ Mrs Youle, the settlor's daughter and primary beneficiary, had a life interest in income under the trust. The remainder of the fund would pass to persons appointed by the primary beneficiary in her will. If she made no appointment, the remainder interest would pass to the following persons or classes of person in the following strict order: the settlor's son, Mr Knocker; if he were dead, to the settlor's sisters; if they were dead, to the sisters' issue at the age of 21. The settlor's daughter and son applied to court for an order approving a variation of the trusts. The settlor's sisters had all died. The question arose whether the sisters' issue had to give their consent to the arrangement, or whether the court was able to consent on their behalf under s. 1(1)(b). The court concluded that the sisters' issue were not persons who 'may' be entitled upon the happening of a future event, etc., but were persons who 'would' be entitled upon the happening of a future event—that is, Mrs Youle's omission to appoint beneficiaries by her will. As Warner J stated:

Each of them is ... entitled now to an interest under the trusts, albeit a contingent one (in the case of those under 21, a doubly contingent one) and albeit also that it is an interest that is defeasible on the exercise of the general testamentary powers of appointment vested in Mrs Youle and Mr Knocker.⁹⁹

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↳ Warner's J's reading of the word 'may' works very well in the case of any of the sisters' issue aged over 21, but is less convincing in relation to any under the age of 21. The interest of any of the sisters' issue under the age of 21 depends upon two contingencies being met: Mrs Youle's omission to appoint beneficiaries by her will *and* their attaining the age of 21. Those beneficiaries cannot say that they 'would' be entitled upon the happening of a (singular) future event; the most that can be said is that they 'may' be entitled upon the happening of a future event. However that may be, Warner J was making the point that, in contrast with the 'next of kin' referred to in *Re Suffert's* and *Re Moncrieff's*, persons with remote and doubly contingent interests have more than a mere specious hope of attaining a vested interest, and should therefore have the opportunity to give or refuse consent. In any event, Warner J went on to state that, even if the applicants had been able to argue a way around the importance that he had attached to the word 'may', the variation would still have depended upon the sisters' issue giving their own consent, because, like the cousins in *Re Suffert's Settlement*, the sisters fell within the proviso to s. 1(1)(b).

9.5.4 A return to procedural trickery?

Earlier we noted that the 1958 statutory jurisdiction to vary trusts replaced an earlier judicial device under which trusts were varied through the pretended compromise of fake disputes. It seems that judges are nowadays willing to remove practical obstacles to variation under the 1958 Act by approving similarly dubious procedural tricks. In *A v. B*,¹⁰⁰ the trustees had a power of appointment that might potentially benefit a very wide class of potential beneficiaries. To remove the need to seek their consent to the proposed arrangement varying the trusts, the trustees proposed to execute deeds by which their power of appointment would be released immediately prior to seeking the court's approval for the variation and reinstated immediately after the variation had been approved. The court held that such an exercise of the trustees' fiduciary powers was in the interests not only of the core beneficiaries but also of the class of remoter beneficiaries, and held, less convincingly in this author's view, that the artificial process of release and reinstatement did not amount to a fraud on the fiduciary power of appointment. However well-intentioned, a procedural abuse is a procedural abuse and arguably sets a dangerous precedent.

9.5.5 The benefit requirement

The main statutory prerequisite to the grant of the court's approval to a proposal to vary or revoke trusts is that the proposal must be beneficial to beneficiaries falling within s. 1(1)(a), (b), and (c). In exercising its discretion, '*the function of the court is to protect those who cannot protect themselves*'.¹⁰¹ Even if the proposal is beneficial to beneficiaries within the three relevant categories, it does not follow that the court is obliged to approve the variation. The court still has discretion to withhold its approval. Persons falling within

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↳ s. 1(1)(d) are expressly excluded from the benefit requirement, so their consent may be given even if the arrangement will not be, or may not be, for their benefit.¹⁰²

The Act does not define what may constitute a 'benefit', or how benefit and detriment are to be weighed, but the cases indicate that benefit has a wide meaning:

The court's concern involves, *inter alia*, a practical and business-like consideration of the arrangement, including the total amounts of the advantages which the various parties obtain, and their bargaining strength.¹⁰³

This 'business-like' test was applied by the court in *Swan v. Gibbs*¹⁰⁴ when approving an arrangement extending the perpetuity period applicable to the trusts. The fact that one beneficiary would have an absolute contingent interest removed was dismissed as a consideration because the principal beneficiaries were consenting to the removal of theirs.

9.5.5.1 Financial benefits

In the great majority of cases, the benefit provided by the Act is a tax-planning advantage and so, ultimately, a financial one. The jurisdiction can therefore appear to serve the more financially privileged members of society 'at the expense' of the ordinary taxpayer. Of course, should the very wealthy benefit from a variation under the Act, they would no doubt argue that they are extraordinary taxpayers

attempting merely to retain their private wealth and that ordinary taxpayers would be well advised to do the same wherever possible. Less controversial, one assumes, would be a variation designed to avoid, for example, the payment of tax on a damages award held in trust to maintain a person who had been seriously injured in a road-traffic accident.¹⁰⁵

9.5.5.2 Social and moral benefits

In *Re Holt's Settlement*,¹⁰⁶ Megarry J held that benefit is '*not confined to financial benefit, but may extend to social or moral benefit*'.¹⁰⁷ The reader might recall the case of *Re Weston's Settlements*,¹⁰⁸ in which the Court of Appeal led by Lord Denning refused to approve of an arrangement that would have provided a tax-planning advantage, and thus a financial benefit, to the beneficiaries. The transaction proposed the export of a trust to Jersey and entailed a temporary change of the residence of infant beneficiaries from England to Jersey. Lord Denning observed that:

the court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things in life more worthwhile than money.¹⁰⁹

p. 332 **9.5.5.3 Benefit by deferral**

In *Re Towler's Settlement Trusts*,¹¹⁰ it was accepted that it might be beneficial to defer the vesting of a gift until the beneficiary was more mature and responsible, thereby protecting her from creditors, exploitation, and her own folly.¹¹¹ In *Re Holt's Settlement*,¹¹² it was seen to be a benefit to the beneficiaries to defer the vesting of the gift until they were reasonably advanced in a career and settled in life. This involved a deferral of the contingent age from 21 to 30. Megarry J stated that he did not require evidence of special immaturity or irresponsibility. Of course it cannot be presumed beneficial to defer the coming into possession of a valuable interest under a trust. In *Wright v. Gater*¹¹³ an application to postpone from age 18 to age 30 was rejected on the ground that no benefit had been shown, and because the variation would come close to being a resettlement. In *Allfrey v. Allfrey*,¹¹⁴ the court approved a variation under the Variation of Trusts Act 1958 extending the perpetuity period of a trust to 125 years, and HMRC agreed that this did not amount to a resettlement of the trust for capital gains tax purposes. Likewise in *RS v. JC*,¹¹⁵ the period during which income from discretionary trusts was to be accumulated, which had originally been for 21 years, was extended by the full statutory perpetuity period of 125 years i.e. until the year 2141.

9.5.5.4 The benefit of familial harmony

In some cases, applicants for a variation have sought to set the benefit of familial harmony against the reduced financial benefits that would flow from the new arrangement. They have not always been successful. In *Re Tinker's Settlement*,¹¹⁶ a fund was held on trust for the settlor's son and daughter in equal shares. The daughter's share was contingent upon her attaining the age of 30, failing which, it would pass to her issue, or to her brother if she were to die without issue. The brother's share was given upon a similar contingency, but with no gift over to his issue should he fail to attain the age of 30; instead, his share

would pass to his sister. This crucial difference between the two gifts was quite reasonably presumed to have resulted from an inadvertent omission in the drafting of the settlement. By applying to court for an order approving an arrangement varying the trusts, it was hoped to rectify the error so as to allow the brother's children to take if he were to die before the age of 30. The application failed and approval was refused. The court had to be satisfied that the new arrangement would be for the benefit of unborn beneficiaries within s. 1(1)(c) of the Variation of Trusts Act 1958. The daughter's unborn children could not possibly benefit financially from the arrangement, as they had a financial advantage over the brother's unborn children according to the terms of the original settlement. Russell J was not persuaded that the advantage of familial harmony outweighed the financial loss that the daughter's unborn children would incur if the proposal were approved. His Lordship did not regard family harmony '*as a benefit in itself*',¹¹⁷

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In *Re Remnant's Settlement Trust*,¹¹⁸ the testator left a fund upon trust, ultimately, to the issue of his two daughters. However, he provided that any child who, on the death of its mother, was 'practising Roman Catholicism' (which included being married to a Roman Catholic) should forfeit any interest. The forfeited share was directed to be passed to the issue of the other sister. One of the daughters had become a Roman Catholic and it was likely that her children would forfeit their interests under the terms of the will. Both daughters disliked the forfeiture clause and they applied, within less than two years of their father's death, for a variation of the trusts to excise the forfeiture clauses. The new arrangement also proposed to accelerate the interests of the sisters' children in £10,000 of the fund, which would be set aside for that purpose.

Pennycuik J took into account the fact that the forfeiture clause might '*operate as a deterrent to each of the ... children in the selection of a husband when the time comes*' and '*might well cause very serious dissension between the families of the two sisters*'.¹¹⁹ These considerations, together with the fact that each of the sisters' issue had an accelerated financial entitlement, persuaded the judge to approve the arrangement. As he said:

I have not found this an easy point, but I think that I am entitled to take a broad view of what is meant by 'benefit', and so taking it, I think this arrangement can fairly be said to be for their benefit.¹²⁰

In *Re Tinker's Settlement*, it was proposed to give a beneficial interest to a beneficiary who would have had nothing under the original settlement, whereas in *Re Remnant's ST*, the proposal did not give any beneficiary anything that they did not already have, but simply removed a forfeiture provision that could have stripped them of their entitlement and accelerated certain other benefits. The judge in *Re Remnant's ST* acknowledged that the new arrangement '*defeats this testator's intention*', but stated that this had to be set against the fact that '*forfeiture provisions are undesirable in themselves*'.¹²¹

In *Ridgwell v. Ridgwell*¹²² the court held that children having benefits under a trust set up by their father might benefit if the trust were varied to postpone their interests whilst granting the settlor's spouse a life interest on the settlor's death. In terms of financial benefits, it is hard to see how the children benefitted from this tax-avoidance arrangement except very indirectly. It might have been more convincing to

acknowledge that this is an area in which financial benefits might be relevant where they are conferred on a close family unit (rather than upon each individual member of the family), or to acknowledge that financial benefits should sometimes give way to the broader benefit of familial harmony.

p. 334 **9.5.5.5 Risks of detriment**

What if the proposed variation would, in the normal course of events, be for the benefit of all of the beneficiaries, but carries a risk that certain potential beneficiaries might suffer a detriment rather than a benefit? How much weight should be attached to that possibility? The question is of particular relevance when the court comes to consider whether the arrangement would be for the benefit of unborn beneficiaries under s. 1(1)(c).

In *Re Cohen's Will Trusts*,¹²³ Danckwerts J held that, in exercising its discretion to consent to a variation under the Act, the court must take the sort of risk, on behalf of persons for whom it was providing consent, that an adult beneficiary might be prepared to take on her own behalf. In a different case, of similar name,¹²⁴ approval for an arrangement was refused, because the prospects for one unborn person under the arrangement would have been hopeless whatever events might happen to pass. In *Re Holt's Settlement*, there was a risk that one of the unborn beneficiaries would receive no interest under the trust if their mother were to die during, or shortly after, childbirth. However, this risk had to be balanced against the possibility that the mother might survive for a reasonable, or indeed substantial, period after the birth, whereupon the infant would undoubtedly receive a benefit under the new arrangement. In *Re Holt's Settlement*, Megarry J concluded that the risk was one that an adult would be prepared to take in order to secure the benefit. Accordingly, he gave approval for the new arrangement.

If the proposed arrangement involves a risk of detriment (including the risk that anticipated benefits might not materialize), the court may require the trustees to take out insurance against that risk, even at the expense of that beneficiary's income,¹²⁵ unless the insurance premiums would involve an excessive drain on trust income.

The hypothesis that an adult would have taken the sort of risk that the court took on behalf of the unborn beneficiary in *Re Holt's Settlement* involves the court in mental gymnastics. The court in *Re CL*¹²⁶ carried out a similar exercise when it provided the consent of a mentally unsound beneficiary,¹²⁷ on the basis that the beneficiary would have given their own consent had they been in a position to do so. This was despite the fact that the new arrangement removed the beneficiary's interest under the trust and conferred benefits on other persons instead. Cotterell has observed in relation to this case that '*it is hard to avoid the conclusion that benefit and the measure of it is simply what the court says it is*'.¹²⁸

9.5.6 The relevance of the settlor's intentions

Judges demonstrate a basic fidelity to the settlor's intentions—the court will not rewrite a trust¹²⁹—but when deciding whether or not to approve applications under the Act, the court must weigh in the balance the equitable property rights of the persons beneficially entitled under the trust against the wishes of the person who set up the trust in the first place. It follows that, even though consideration of the

settlor's intentions may, in some cases, be 'relevant and weighty'¹³⁰ or 'serious',¹³¹ it is 'by no means conclusive'.¹³² It has even been said that '[f]idelity to the settlor's intention ends where equitable property begins'.¹³³ This view is confirmed by cases such as *Re Remnant's ST* and *Re CL*, considered earlier, and by the Court of Appeal in *Goulding v. James*.¹³⁴

In *Goulding v. James*, the testatrix provided by her will that her residuary estate should be divided equally between her daughter, June, and her daughter's husband, Kenneth, but the testatrix later revoked that will and replaced it with a new will which provided for the creation of a trust under which June would have a life interest in possession of the residue, with June's son, Marcus, taking the residue after June's death, but not before he attained the age of 40. If Marcus were to predecease the daughter, or die before attaining the age of 40, the trust provided that his children living at the date of his death would take absolutely by substitution. When the testatrix died, June and Marcus applied to the court for a variation of the will trusts. They proposed that the will trust should be varied to provide that the testatrix's residuary estate be held 45 per cent for June absolutely, 45 per cent for Marcus absolutely, and 10 per cent on trust for Marcus's children. The applicants wished the variation to operate retrospectively—in other words, they sought a declaration from the court that the residuary estate should be deemed to have devolved according to the new terms since the date of the testatrix's death.

The judge at first instance dismissed the application, on the ground that the testatrix clearly intended to postpone her grandson's interest in capital until he reached the age of 40 and, as the revocation of her first will showed, clearly did not intend that her daughter should get any interest in capital at all. Nevertheless, the applicants appealed successfully to the Court of Appeal. Their Lordships held that the judge had erred by allowing extrinsic evidence of the testatrix's subjective wishes to outweigh considerations of objective and substantial benefit to unborn great-grandchildren falling with s. 1(1)(c) of the Act. The Court of Appeal held that, in deciding whether or not to grant approval under that section, the court's only concern should be to ensure that the arrangement was 'beneficial' to those on whose behalf the court had been asked to consent. The purpose of s. 1 of the Act was merely to enable a *Saunders v. Vautier* type of arrangement to take place where it would otherwise be precluded because there were beneficiaries who could not give their own consent.

9.5.7 Resettlement or variation?

Related to the problem of fidelity to the settlor's intentions is the problem of where to draw the line between a genuine variation of trust and the creation of a wholly new trust. In *Re T's Settlement*,¹³⁵ a mother wished to prevent her immature and irresponsible daughter becoming entitled to trust capital at the age of 21, so she applied for an order approving an arrangement under which her daughter's share would be transferred to a new trust under which the fund would be held on a protective trust for the daughter's life, with remainder to her issue. Wilberforce J refused to approve the proposal on the ground, *inter alia*, that the mother was not proposing a variation but rather an entirely new settlement. In *Re Ball's Settlement*,¹³⁶ Megarry J proposed the following test for distinguishing variation from resettlement:

[I]f an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard the arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.¹³⁷

This so-called ‘substratum test’ sounds simple enough, but it is by no means straightforward to apply in practice. Where is the line to be drawn between a mere change in the form of a trust and an alteration to the substratum of the trust? In *Re Ball’s Settlement* itself, the settlor’s life interest was removed, but this was held to be a mere formal change, because the varied trusts were ‘*still in essence trusts of half of the fund for each of the two named sons and their families*’.¹³⁸ Perhaps the substratum of the trust and the original purpose of the trust are one and the same thing. Perhaps they are simply shorthand for the settlor’s basic intention to confer beneficial entitlement. If the issue were purely academic, it would make sense to abandon any attempt to draw a distinction between variation and resettlement, but where there is a resettlement there are potential (capital gains) tax consequences, so to recognize when a variation involves a resettlement is a practical necessity. In *Roome v. Edwards*,¹³⁹ Lord Wilberforce suggested that a new settlement (one that does not leave the old substratum intact) might be indicated by such factors as ‘separate and defined property; separate trusts; and separate trustees’ and, perhaps, ‘a separate disposition bringing the separate settlement into existence’.¹⁴⁰ An advancement by way of resettlement is more likely to be permitted where it varies the trusts applicable to *part only* of the beneficial interests in the trust property.¹⁴¹

9.6 Other modes of varying private trusts

9.6.1 Variation of ‘strict settlements’

Since the coming into force of the Trusts of Lands and Appointment of Trustees Act, on 1 January 1997, it has not been possible to create a new ‘strict settlement’ under the Settled Land Act 1925, but existing settlements remain subject to the Act.¹⁴² The Act provides that the court may sanction any transaction that is beneficial to the settled land or the beneficiaries of the settlement.¹⁴³ A ‘transaction’ includes ‘any compromise or other dealing, or arrangement’,¹⁴⁴ including the conveyance of the settled land to trustees to hold on protective trusts.¹⁴⁵

9.6.2 Matrimonial jurisdiction

The Matrimonial Causes Act 1973¹⁴⁶ grants to the courts a wide power to vary beneficial interests under trusts in order to achieve a fair distribution of property upon the pronouncement of a decree of divorce or nullity of marriage.¹⁴⁷ In this context, tax avoidance will not be a factor in determining the exercise of the court’s discretion.¹⁴⁸

9.6.3 Mental Capacity Act jurisdiction

The Mental Capacity Act 2005 grants the court the jurisdiction to create a trust of property of a person lacking mental capacity.¹⁴⁹ Supplementary provisions in Sch. 2 of the Act provide that these trusts can be varied later if there is a significant change of circumstances: for example, if the patient ceases to be of unsound mind.

9.6.4 Revocation

It is possible for a settlor to revoke a trust if the trust instrument so authorizes. If the settlor exercises this power, the trust will be brought to an end even though it had been entirely valid. In the absence of such a power of revocation, the settlor can only bring the trust to an end if he can satisfy the court that the trust was created as a result of fraud, undue influence, or mistake.¹⁵⁰ It may be that the settlor of an *inter vivos* trust is under a fiduciary duty to the beneficiary with regard to the exercise of any vestigial power or status, such as his power to revoke the trust.¹⁵¹

9.6.5 Rectification of wills

If a court is satisfied that, as a result of a clerical error or a failure to understand the testator's instructions, a will is so expressed that it fails to carry out his intentions, it may order that the will be rectified.¹⁵² The meaning of 'clerical error' was considered in *Re Segelman (deceased)*.¹⁵³ The error in that case was a solicitor's failure to remove a drafting inconsistency between a will and a schedule to it. The test applied by the court was whether or not the solicitor had applied his mind to the significance and effect of the words used. Chadwick J held that the solicitor in the instant case had not, so he had committed an error through mere inadvertence, with the result that the will should be rectified. A will can also be rectified on grounds of fraud.¹⁵⁴

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9.7 Administrative variations

So far, we have been considering the variation of beneficial interests under trusts. In the following sections, we will examine the modes of varying the administration of trusts.

9.7.1 Trustee Act 1925, s. 57

The Variation of Trusts Act 1958 has sometimes been used to achieve what appear to be purely administrative changes to trusts (for example, a change to the nature of the persons authorized to appoint new trustees)¹⁵⁵ but in theory the 1958 Act only permits changes to the administration of a trust that are *incidental* to the remoulding of beneficial interests under the trust. Where the only variation that is required is an administrative variation, an order should be sought under the Trustee Act 1925, s. 57. Section 57 permits variations in the way that the trust is managed;¹⁵⁶ it does not authorize the remoulding of the beneficial interests under the trust, but does permit administrative changes that cause merely 'incidental' variation of beneficial interests.¹⁵⁷ What if the benefit is not a change in the nature of the beneficial

interests, but a significant increase in their value? Such a case is a good candidate for the variation of the trustees powers under s. 57. In *Gelber v. Sunderland Foundation*,¹⁵⁸ the trustees of an off-shore trust created by the Duke of Marlborough wished to sell trust owned agricultural land for extremely profitable non-agricultural development, but the planning permission made it a condition that 70 per cent of profits should be paid by the trustees to maintain Blenheim Palace (which as well as being the Duke's ancestral home, is a World Heritage Site and as a tourist attraction hugely significant to the local economy). The trustees were keen to make the payment because even 30 per cent of the development profit would be significantly greater than the usual agricultural yield, but the terms of the trust gave them no power to do. Applying s. 57, the court granted the trustees the necessary power and directed them to exercise it in making the payment, and also, incidentally, authorized the trust to be administered by a single offshore corporate vehicle even though the settlement did not permit the trustees to retire in favour of a sole trustee.

p. 339 ↵ Section 57 operates by inserting an 'overriding power' in the trust instrument so as to permit the trustees to act in accordance with the variation ordered by the court.¹⁵⁹ In the words of the section, it allows the court to authorize the trustees to carry out any transaction '*in the management or administration*' of the trust property where such transaction is '*expedient*'. It was suggested, in *Re Downshire SE*,¹⁶⁰ that the section would permit '*specific dealings*' with the trust property, which the court might not otherwise be authorized to permit under its inherent jurisdiction. For example, variation of investment powers should normally be sought under this section.¹⁶¹ Another example arises in the context of trusts of land. The court has a broad power to make any order that it thinks fit in relation to the exercise by trustees of land of any of their '*functions*'.¹⁶² However, this jurisdiction probably does not extend to authorizing the sale of trust property where the settlor has expressly removed the trustees' power of sale.¹⁶³ In such cases, an order for sale must be sought under the general jurisdiction conferred by s. 57 of the Trustee Act 1925.¹⁶⁴

9.7.2 Trustee Act 1925, s. 53

Under this section, the trust may be varied for the maintenance, education, or benefit of an infant beneficiary. The variation is effected by making a conveyance on sale of the beneficiary's interest. The capital proceeds of the sale, and income made thereon, are then '*applied*' for the maintenance of the infant. This power is most useful where the beneficiary has an interest only in capital under the trust and in other situations in which the trustees will not have the usual power to maintain the beneficiary.¹⁶⁵

9.7.3 Variation under the court's inherent jurisdiction

The court has always had an inherent jurisdiction to vary the manner in which a trust is administered in cases of '*salvage*' and '*emergency*', although the courts now prefer that such variations be sought under s. 57 wherever appropriate. '*Salvage*' cases almost exclusively involve infants. In such cases, the administration of the trust may be varied in the interests of the infant beneficiary, but only in situations of absolute necessity. An example might be where one part of the property is mortgaged to raise monies to prevent another part of the property from becoming valueless—as where Greenacre is mortgaged to prevent Green Mansion from falling down. Trusts may be varied in ↵ situations of '*emergency*' without

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there being any need to show that the variation is absolutely necessary. ‘Emergency’ refers to situations which the settlor had not foreseen. A variation under this heading can therefore be made entirely in keeping with the settlor’s presumed intention for the trust.

In *Re New*,¹⁶⁶ the trustees wished to approve a proposal to reorganize a limited company in which the trust owned shares, but neither they, nor the beneficiaries, had power to give such approval (the beneficiaries were not all *sui juris* and so the rule in *Saunders v. Vautier* could not assist). Romer LJ stated that the court will not be justified in sanctioning every act desired by the trustees and beneficiaries ‘merely because it may appear beneficial to the estate’,¹⁶⁷ but there were suggestions in the judgment that the court might vary the administration of the trust under its inherent jurisdiction in cases where the variation would be desirable, even if it was not, in fact, essential.

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9.8 Further reading

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HARRIS, J. W., *Variation of Trusts* (London: Sweet & Maxwell, 1975).

KER, B. S., ‘Trustees’ powers of maintenance’ (1953) 17 Conv 273.

MORRIS, R. and CLARK-JONES J., ‘I’ve got the power: *Saunders v Vautier* in the context of massively discretionary trusts’ (2022) 28(1) Trusts & Trustees 19–28.

POLLARD, D., ‘*Saunders v. Vautier* and pension trusts’ (2013) 27(3) Tru LI 131–40.

REES, D., ‘Trustees’ powers: the amendments to sections 31–32’ (2015) 1 PCB 20–4.

RIDDALL, J. G., ‘Does it or doesn’t it? Contingent interests and the Variation of Trusts Act 1958’ (1987) 51 Conv 144.

SMITH, J., ‘Rethinking the role of settlor intent in the variation of trusts: was the 1958 Act an unfinished revolution?’ *Tru LI* 2022, 35(4), 246–264.

STIBBARD, P., ‘Jersey court upholds variation of trust to avoid capital gains tax liability of the settlor’ (2001) 1 PCB 35.

WATKINS, D., ‘The (literal) death of the author and the silencing of the testator’s voice’ (2012) 24(1) *Law & Literature* 59.

Notes

¹ (1841) 4 Beav 115. Contrast the USA, where the rule is that no trust may be terminated or modified by the beneficiaries if it would defeat a ‘material purpose’ of the settlor or testator (*Claflin v. Claflin* (1889) 20 NE 454; American Law Institute, *Restatement of the Law of Trusts (3rd edn)*, s. 65(1), and Uniform Trust Code (2000), s. 411(b)).

² See Chapter 1.

³ See further Chapter 6.

⁴ Trustee Act 1925, s. 31.

⁵ Subject to permissible incidental benefits to non-beneficiaries.

⁶ Trustee Act 1925, s. 69(2).

⁷ Family Law Reform Act 1969, s. 1.

⁸ Law of Property Act 1925, s. 21.

⁹ Trustee Act 1925, s. 31(1), (2).

¹⁰ Ibid. s. 31(1).

¹¹ Inheritance and Trustees’ Powers Act 2014, s. 8.

¹² Trustee Act 1925, s. 31(1).

¹³ Inheritance and Trustees’ Powers Act 2014, s. 8.

¹⁴ Trustee Act 1925, s. 31(3).

¹⁵ Law of Property Act 1925, s. 69(2).

¹⁶ *Re Mary England* (1830) 1 Russ & M 499.

¹⁷ *Lee v. Brown* (1798) 4 Ves 362.

¹⁸ Trustee Act 1925, s. 53; *Re Meux* [1958] Ch 154.

¹⁹ Law of Property Act 1925, s. 175. This section applies to wills coming into effect after 1925.

²⁰ Ibid.

²¹ Ibid.

²² *Re Raine* [1929] 1 Ch 716.

²³ See, generally, B. S. Ker, ‘Trustees’ powers of maintenance’ (1953) 17 Conv 273.

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²⁴ Trustee Act 1925, s. 31(3). Unless the person *in loco parentis* has provided another fund for the purpose of maintaining the infant, or the legacy was contingent upon the legatee attaining an age greater than 18 (*Re Abrahams* [1911] 1 Ch 108).

²⁵ *Re Churchill* [1909] 2 Ch 431.

²⁶ *Re Medlock* (1886) 54 LT 828.

²⁷ *Re Geering* [1964] 3 All ER 1043, *per* Cross J.

²⁸ *Re Adams* [1893] 1 Ch 329, *per* North J.

²⁹ *Re McGeorge* [1963] Ch 544, *per* Cross J.

³⁰ *Re Oliver* [1947] 2 All ER 162, *per* Jenkins J.

³¹ Trustee Act 1925, s. 31(2).

³² See Chapter 6 ('The rule against excessive accumulation of income').

³³ *Re Delamere's ST* [1984] 1 WLR 813.

³⁴ Trustee Act 1925, s. 31(2).

³⁵ *Ibid.* s. 31(1)(ii).

³⁶ See Chapter 6.

³⁷ Trusts (Capital and Income) Act 2013, s. 1(1).

³⁸ *Re Walker* [1901] 1 Ch 879.

³⁹ *Pilkington v. IRC* [1964] AC 612, *per* Viscount Radcliffe at 634.

⁴⁰ *Cope v. Wilmet* (1772) Amb 704.

⁴¹ *Re Mead* (1919) LT 724, CA.

⁴² *Lloyd v. Cocker* (1860) 27 Beav 645.

⁴³ *Klug v. Klug* [1918] 2 Ch 67.

⁴⁴ *Re Kershaw's Trusts* (1868) LR 6 Eq 322.

⁴⁵ *Re Pauling's ST* [1964] Ch 303. In this case, the power should have benefited children but instead it placed money in the hands of their parents who wasted it on their own living expenses.

⁴⁶ [1964] Ch 303 at 334.

⁴⁷ [1964] AC 612, HL.

⁴⁸ *Ibid.* at 636.

⁴⁹ *Molyneux v. Fletcher* [1898] 1 QBD 648.

⁵⁰ *Lowther v. Bentick* (1874) LR 19 Eq 166.

⁵¹ *Talbot v. Marshfield* (1868) LR 3 Ch App 661.

⁵² Trustee Act 1925, s. 69(2).

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⁵³ [1961] 1 All ER 821.

⁵⁴ (1961) 77 LQR 161 at 163 (a note on *Re Collard's WT*).

⁵⁵ *Derby & Co Ltd v. Weldon* [1990] Ch 65.

⁵⁶ *Moxon's Will Trusts* [1958] 1 WLR 165.

⁵⁷ *Ibid.* per Danckwerts J at 168.

⁵⁸ [1966] 1 WLR 955.

⁵⁹ [2006] 1 WLR 741.

⁶⁰ Compare the law's attitude towards ethical investment in Chapter 12.

⁶¹ *Re T's Settlement Trusts* [1964] Ch 158.

⁶² *Henley v. Wardell*, *The Times*, 29 January 1988. The report carries the witty caption, 'Will power doesn't override consent'.

⁶³ *Re Beckett's Settlement* [1940] Ch 279.

⁶⁴ *Re Wills' WT* [1959] Ch 1, per Upjohn J at 14.

⁶⁵ *Ibid.* at 12, 13.

⁶⁶ [1964] AC 612.

⁶⁷ *Ibid.* at 639.

⁶⁸ Inland Revenue Statement of Practice SP7/84; *Swires v. Renton* [1991] STC 490.

⁶⁹ See N. Hassall, 'Powers of advancement: how far can *Pilkington* be stretched' [2007] 4 PCB 282.

⁷⁰ Trustee Act 1925, s. 69(2).

⁷¹ [1961] 1 Ch 399.

⁷² [1960] Ch 444.

⁷³ See earlier.

⁷⁴ See J. G. Riddall's imaginative article, 'Re Ransome revisited or "first the good news"?' (1979) 43 Conv 423.

⁷⁵ [1954] AC 429.

⁷⁶ Law Reform Committee 6th Report, *Court's Power to Sanction Variation of Trusts* (1957) Cmnd. 310, para. 13.

⁷⁷ '[E]ven the most determined settlor or testator cannot exclude the jurisdiction of the court under the 1958 Act' (per Mummery LJ in *Goulding v. James* [1997] 2 All ER 239 at 251d-e).

⁷⁸ *Wyndham v. Egremont* [2009] EWHC 2076 (Ch).

⁷⁹ *Re King*, Ch D, 15 December 2010.

⁸⁰ [1968] AC 685, HL.

⁸¹ *Ibid.* at 701. Followed in *Goulding v. James* [1997] 2 All ER 239.

⁸² *Re Druce's ST* [1962] 1 WLR 363.

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⁸³ *M v. H* [2016] EWHC 572 (Fam); [2016] 4 WLR 78.

⁸⁴ RSC Ord. 93, r. 6(2).

⁸⁵ *V v. T* [2014] EWHC 3432 (Ch); [2014] All ER (D) 293 (Oct).

⁸⁶ *MN v. OP* [2019] EWCA Civ 679 (paras [75]–[83]).

⁸⁷ [1969] 1 Ch 100.

⁸⁸ Law of Property Act 1925, s. 53(1) and (1)(c). See Chapter 6.

⁸⁹ Stamp Act 1891, s. 54.

⁹⁰ [1969] 1 Ch 100 at 115.

⁹¹ *ET v. JP* [2018] Ch 565.

⁹² *Vice Chancellor's Practice Direction of 27 July 1976* [1976] 1 WLR 884.

⁹³ Ibid.

⁹⁴ See Chapter 6.

⁹⁵ [1962] 1 WLR 1344.

⁹⁶ Ibid. at 1346.

⁹⁷ [1961] Ch 1.

⁹⁸ [1986] 1 WLR 934.

⁹⁹ Ibid. at 937B–C.

¹⁰⁰ [2016] EWHC 340 (Ch).

¹⁰¹ *Re Weston's Settlements* [1969] 1 Ch 223, per Lord Denning MR at 245.

¹⁰² *Re Turner's WT* [1960] 1 Ch 122.

¹⁰³ *Re Van Gruisen's Will Trusts* [1964] 1 All ER 843, per Ungoed-Thomas J at 844.

¹⁰⁴ [2020] EWHC 1226 (Ch).

¹⁰⁵ In practice, such a variation would usually be unnecessary, because damages for personal injury automatically enjoy exemption from income tax (Income and Corporation Taxes Act 1988, s. 329) and capital gains tax (Taxation and Chargeable Gains Act 1992, s. 51(2)). See, generally, J. Lomas, ‘The use of trusts in personal injury cases’ [2002] JPIL 307–9. The courts have noted a ‘growing popularity for personal injury trusts where the Court of Protection was not involved’ (*H v Craven* [2016] EWHC 3146 (QB); [2017] 4 WLR 25, at para. [25]).

¹⁰⁶ [1969] 1 Ch 100.

¹⁰⁷ Ibid. at 121D.

¹⁰⁸ [1969] 1 Ch 223.

¹⁰⁹ Ibid. at 245.

¹¹⁰ [1964] Ch 158, *sub nom. Re T's Settlement Trusts*.

¹¹¹ The variation in this case was refused on other grounds.

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¹¹² [1969] 1 Ch 100. Postponement in the interest of saving tax and life insurance justified the variation in *Re RGST* [2007] EWHC 2666 (Ch).

¹¹³ [2011] EWHC 2881.

¹¹⁴ [2015] EWHC 1717 (Ch).

¹¹⁵ Chancery Division, 16 November 2016, unreported.

¹¹⁶ [1960] 1 WLR 1011.

¹¹⁷ *Ibid.* at 1014.

¹¹⁸ [1970] 1 Ch 560.

¹¹⁹ *Ibid.* at 566D–E.

¹²⁰ *Ibid.* at 566F.

¹²¹ [1970] 1 Ch 560 at 561C.

¹²² [2007] EWHC 2666 (Ch).

¹²³ [1959] 1 WLR 865.

¹²⁴ *Re Cohen's Settlement Trusts* [1965] 1 WLR 1229.

¹²⁵ *Re Robinson's Settlement Trusts* [1976] 1 WLR 806.

¹²⁶ [1969] 1 Ch 587.

¹²⁷ Under s. 1(1)(a).

¹²⁸ R. Cotterell, 'The requirement of "benefit" under the Variation of Trusts Act' (1971) 34 MLR 96 at 98.

¹²⁹ *Re Downshire Settled Estates* [1953] Ch 218 at 248, *per* Lord Evershed MR.

¹³⁰ Mummery LJ in *Goulding v. James* [1997] 2 All ER 239 cited *Re Steed's Will Trusts* [1960] 1 Ch 407 as such a case.

¹³¹ *Re Remnant's Settlement Trusts* [1970] 1 Ch 560.

¹³² *Ibid.* at 567.

¹³³ J. W. Harris, *Variation of Trusts* (London: Sweet & Maxwell, 1975) at 2.

¹³⁴ [1997] 2 All ER 239.

¹³⁵ [1964] Ch 158.

¹³⁶ [1968] 1 WLR 899.

¹³⁷ *Ibid.* at 905C.

¹³⁸ *Ibid.* at 905F.

¹³⁹ [1982] AC 279.

¹⁴⁰ *Ibid.* at 292–3. Followed in *Wyndham v. Egremont* [2009] EWHC 2076 (Ch).

¹⁴¹ *Southgate v. Sutton* [2011] EWCA Civ 637; [2012] 1 WLR 326, CA, following *Pilkington v. IRC* [1964] AC 612.

¹⁴² *Trusts of Land and Appointment of Trustees Act 1996*, s. 2(1).

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¹⁴³ Section 64.

¹⁴⁴ Section 64(2).

¹⁴⁵ *Hambro v. Duke of Marlborough* [1994] Ch 158.

¹⁴⁶ Section 24 as substituted by the Family Law Act 1996, s. 15, Sch. 2, para. 6.

¹⁴⁷ The breadth of the judge's discretion was confirmed in *P v. P* [2015] EWCA Civ 447.

¹⁴⁸ *Thomson v. Thomson and Whitmee* [1956] P 384.

¹⁴⁹ Sections 16, 18(1)(h).

¹⁵⁰ *Wright v. Carter* [1903] 1 Ch 27.

¹⁵¹ W. F. Fratcher, *Scott on Trusts*, 3rd edn (Boston: Little Brown & Co, 1967) vol. III, para. 331 ff.

¹⁵² Administration of Justice Act 1982, s. 20(1).

¹⁵³ [1996] 2 WLR 173.

¹⁵⁴ *Collins v. Elstone* [1893] P 1.

¹⁵⁵ In *Bathurst v. Bathurst* [2016] EWHC 3033, the High Court authorized a variation under the 1958 Act which gave the power of trustee appointment to the principal beneficiary instead of the settlor on the basis that the arrangement would not be departing radically from the structure the settlor first created.

¹⁵⁶ The section applies to 'the management or administration of any property vested in trustees'.

¹⁵⁷ *Southgate v. Sutton* [2011] EWCA Civ 637; [2012] 1 WLR 326, CA. In this case, an order was granted under s. 57 to create a sub-trust for the benefit of US-resident beneficiaries with a view to avoiding the 28 per cent rate of capital gains tax charged against UK trustees. *Southgate* was followed in *Re English & American Insurance Co Ltd* [2013] EWHC 3360 (Ch); [2014] WTLR 57.

¹⁵⁸ [2018] All ER (D) 31 (Ch).

¹⁵⁹ *Re Mair* [1935] Ch 562.

¹⁶⁰ [1952] 2 All ER 603.

¹⁶¹ *Anker-Petersen v. Anker-Petersen* (1991) 16 LS Gaz 32.

¹⁶² Trusts of Land and Appointment of Trustees Act 1996, ss. 14–5.

¹⁶³ In accordance with the power conferred on settlors by the Trusts of Land and Appointment of Trustees Act 1996, s. 8(1).

¹⁶⁴ G. Watt, 'Escaping section 8(1) provisions in "new style" trusts of land' (1997) 61 Conv 263. *Alexander v. Alexander* [2011] EWHC 2721 is a case in which the court used s. 57 to reinstate the trustees' power of sale which the settlor had removed.

¹⁶⁵ On the power of maintenance see the start of this chapter.

¹⁶⁶ [1901] 2 Ch 534.

¹⁶⁷ *Ibid.* at 545.

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