



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

REPORT
ON
THE VARIATION OF TRUSTS

(LRC 63 - 2000)

IRELAND

The Law Reform Commission

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government in Autumn 2000. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published sixty-two Reports containing proposals for reform of the law; eleven Working Papers; sixteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty one Reports in accordance with Section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Report.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

<i>President</i>	The Honourable Mr Justice Declan Budd, High Court.
<i>Full-time Commissioner</i>	Arthur F Plunkett Barrister-at-Law
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22 January 2001

Dear Taoiseach

Pursuant to the provisions of the *Law Reform Commission Act, 1975*, I have the honour to transmit to you herewith the Commission's *Report on the Variation of Trusts*, (LRC 63 – 2000).

This Report ought to be read in conjunction with the separate but related *Report on the Rule against Perpetuities and Cognate Rules* (LRC 62 – 2000).

Yours Sincerely,

Declan Budd

NOTE

This Report was prepared on the basis of a reference from the Attorney General dated 6 March 1987, under section 4(2)(c) of the Law Reform Commission Act, 1975. At the date of publication of this Report, however, its subject matter is now covered by the Commission's Second Programme for Law Reform, already referred to, which extends the Commission's involvement in this area.

After extensive research and consultation with practitioners in the field, including members of the Land and Conveyancing Law Working Group (described below), the Commission puts forward these proposals for reform.

While these recommendations are being considered by the Department of Justice, Equality and Law Reform, informed comments or suggestions can be made to the Department, by persons or bodies with special knowledge of the subject.

ACKNOWLEDGMENTS

The Commission is most grateful to Margaret O'Driscoll Barrister-at-Law who drafted the Variation of Trusts Bill which forms Appendix A to this Report. Ms O'Driscoll is a former member of the Office of the Parliamentary Counsel to the Government, formerly the Office of the Parliamentary Draftsman.

THE LAND AND CONVEYANCING LAW WORKING GROUP

In 1987, the Commission established an expert working group to assist and advise it in the field of land law and conveyancing law. Broadly speaking, there are two principal aspects to the work of the expert Group. The first is to raise matters giving rise to unreasonable complication and delays in the completion of conveyancing transactions, and to recommend practical reforms in this regard. Secondly, the Working Group has as its aim the reform, or removal where appropriate, of anomalous or redundant land and conveyancing law rules.

Operating under the Commission, the Working Group draws on its expertise to direct the research of the Commission's staff and to appraise the material which they provide. The Group has already been responsible for seven reports in the area of land law and conveyancing law.¹ The current members of the Group, which meets every month or so, are:

Commissioner Arthur F. Plunkett, (Convenor);

George Brady SC;
His Honour Judge John F Buckley;
Patrick Fagan Solicitor;
Ernest Farrell Solicitor;
Brian Gallagher Solicitor;
Mary Geraldine Miller Barrister-at-Law;
Chris Hogan, Land Registry;
Professor David Gwynn Morgan;
Patricia T. Rickard-Clarke Solicitor;
Deborah Wheeler Barrister-at-Law; and
Professor J.C.W. Wylie.

Bairbre O'Neill is Secretary and Legal Researcher to the group.

The Law Reform Commission wishes to record its appreciation of the indispensable contribution which the members of this Working Group, past and present, have made and continue to make, on a voluntary basis, to the Commission's examination of this difficult area of the law. Because of the expertise and involvement of the distinguished members of the Group, we feel justified in following our usual practice in the field of Land Law and publishing our recommendations straightaway as a Report without going through the usual stage of the Consultation Paper.

¹ For more information about these Reports, see *Appendix B, List of Law Reform Commission's Publications*, below.

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INTRODUCTION

1. The parameters delimiting that which a trustee can and cannot do are strictly drawn. A trustee must follow the terms of the trust instrument and is further constrained by the provisions of the *Trustee Act, 1893*. In Chapter 1 we illustrate the typical problems which can arise where trustees' powers turn out to be outdated or inadequate. At present, the courts are precluded from responding to these problems, save in four narrow scenarios. These exceptions to the otherwise strict, 'no variation' rule are set out in Chapter 1. We conclude that there exists a genuine need for legislation allowing for the variation of trust instruments and that this need is, in all but a few exceptional situations, not being met.

2. In Part I of Chapter 2, we address the classic objection to variation of trusts legislation, namely that any variation will, by its very nature, contradict the express intentions of the settlor. In response, we contend that this objection is based on the false presumption that the proposed variation will inevitably fly in the face of the settlor's wishes. Realistically, most variations will merely remove some technical obstacle in the trust document rather than thwarting the settlor's intentions. Even in those rare cases where the variation and the settlor's intentions are entirely at odds, we conclude that there is no insurmountable principled or constitutional objection to the variation of trusts as we propose it.

3. In Part II of Chapter 2, we consider whether the court ought to have any regard to the intentions of the settlor in reaching its decision. In other words, if a proposed variation is contrary to the settlor's wishes, is this relevant and if so, how relevant? Within and between jurisdictions where Variation Of Trusts legislation has already been introduced, several different approaches to this issue have emerged. The settlor's views have been accorded fluctuating levels of importance ranging from the decisive to the irrelevant. Ultimately, we recommend that the court should confine itself to the simple test of whether or not the variation constitutes a *benefit* to the beneficiaries on whose behalf its consent is being sought. The views of the settlor ought not to be a consideration in approving a variation, save insofar as they relate to this core question of benefit. This is, we believe, consistent with the approach already adopted in *Saunders v. Vautier* scenarios. In rare cases where the settlor acts in another capacity, say, as beneficiary or guardian of a beneficiary, we envisage exceptions to this general ban.

4. Having set out the case, in principle, for Variation of Trusts legislation, we then turn our attention to the precise content and design of our proposed legislation. In this context, we have used the English *Variation of Trusts Act, 1958* as our principal working model. In Chapters 3, 4 and 5, we consider respectively: the extent of the court's power; the criteria which the court is to apply in deciding whether or not to exercise its discretion; and, the persons on whose behalf the court

is authorised to consent. Where room for improvement exists, we have recommended alterations to the mechanics of the English legislation.

5. Next, in Chapter 6, we consider the range of trusts to which the proposed legislation ought to apply, and whether that range ought to be restricted in any way. Turning to matters of practice and procedure, in Chapter 7 we recommend that the Circuit Court be given concurrent jurisdiction with the High Court in the sphere of Variation of Trusts applications. We proceed to consider who should be entitled to apply to have a variation approved, and also, who may be represented at these hearings. In both cases, we recommend an inclusive policy and propose that the courts be given a wide discretion.

6. Finally, and most importantly, we should like to emphasise that this report is deliberately published at the same time as, and designed to be read with, our *Report on the Rule against Perpetuities*, which recommends that Rule's abolition. The abolition of the Rule against Perpetuities may have the effect of permitting the establishment of some long trusts; though, for reasons mentioned in that report, we anticipate that in practice this will only occur in a small number of cases. However, it is plain that in, the case of long trusts (which might theoretically last for several decades or centuries), any Variation of Trusts legislation proposed would be of particular value. At the same time, we should note that the legislation will also be of great use in many other situations, as indicated at paras.1.16-18, below.

CHAPTER ONE: THE NEED FOR CHANGE

1.01 The primary duty of any trustee is to administer the trust exactly in accordance with the terms of the trust instrument. The corollary of this fundamental principle is that the trustee "is not entitled to deviate from [the terms of the trust] in any way, although it may seem impractical or even irrational to carry out the settlor's intentions literally".¹ This 'no variation' rule, while desirable in most circumstances, has the potential to give rise to difficulties when rigidly applied. It is these difficulties which our present proposal seeks to address.

1.02 There are two legal sources of a trustee's powers: first, legislation, which means mainly, though not exclusively,² the *Trustee Act, 1893*; secondly, the terms of the trust instrument itself. Both sources have the potential to throw up problems which cannot be easily solved because of the obstacle presented by the strict 'no variation' rule. In the first place, the late Victorian legislation is now somewhat out of date and lacks a number of necessary features. Secondly, the trust instrument may have been badly drawn or drawn up a long time ago, when changes in general circumstances or in family needs could not have been anticipated. These difficulties will be elaborated upon, below.³

1.03 In many cases these deficiencies create a strong need for a variation in the terms of the deed and yet the general rule set out above, precludes such variation. Yet, where exceptions to this general rule exist, they are few, narrowly drawn and, in all but a few cases, are of little use. Specifically, four exceptions are conventionally identified:⁴

A. The rule in *Saunders v Vautier*⁵

1.04 This rule may be invoked where the beneficiaries are of full age and capacity and together entitled to the entire beneficial interest in the trust. Provided all the beneficiaries agree, they may terminate the trust and direct that the trust property be distributed according to their instructions. In this case, in contrast to the remaining three exceptions, no court approval or other involvement is necessary.⁶

¹ Keane, *Equity and the law of Trusts in the Republic of Ireland* (Butterworths, 1988) para 10.31

² Other legislative sources exist (for example the *Charities Act 1961*) with which we are not concerned in this Report.

³ See paras. 1.16-18, below

⁴ As identified by the House of Lords in *Chapman v. Chapman* [1954] AC 429 Cf. *Tickle v. Tickle*, where Young J. thought it "too restrictive a view to confine the inherent jurisdiction into four watertight compartments." (1987) 10 NSWLR 581, 586

⁵ (1841) Cr and Ph 240

⁶ Wylie, *Irish Land Law*, (Butterworths, Third Edition, 1997) para. 10.088

B. 'Salvage' Jurisdiction

1.05 In rare cases, the court does have inherent power to authorise a variation on behalf of persons not *sui juris*, that is, persons not of full age and capacity. This jurisdiction is triggered only in a 'salvage' situation, *viz.*, where there is some crisis unforeseen by the settlor and it is necessary to vary the terms of the trust so as to authorise the trustees to take the action, which is necessary to save the trust property from destruction or considerable damage.⁷ The classic example is where a power of sale is conferred in order to pay for essential repairs to trust property.⁸ In addition, the exact parameters of this jurisdiction are uncertain. It seems likely that this power extends only as far as a variation of trustees' administrative powers, but falls short of approving any adjustment of the beneficial interests.⁹

C. Where maintenance is paid out of income directed to be accumulated

1.06 Despite the fact that the trust instrument directs that income be accumulated (or used to pay debts), direct payments may be made to persons provided that they would under the terms of the trust anyway have received some benefit under the trust. These payments are subject to the requirement that these beneficiaries are in need of money to maintain themselves in a manner appropriate to their expectations under the trust.¹⁰ The rationale underpinning this jurisdiction is that the court can safely assume that the settlor does not intend the beneficiaries to go unprovided for or to be left without reasonable means.¹¹ However, this power is significantly restricted in that it can only be exercised in favour of an *infant* beneficiary and is of no assistance when the needy beneficiary happens to be, say, an incapacitated adult.¹²

D. 'Compromise' Jurisdiction

1.07 This jurisdiction applies only where there is in existence a genuine dispute as to the interpretation of the terms of a trust. Once a compromise is reached between all the beneficiaries who are *sui juris*, as to the correct interpretation, the court has jurisdiction to consent to this compromise on behalf of all remaining

⁷ See, for example, *Bank of Ireland v Geoghegan* (1955 - 56) Ir Jur Rep 7

⁸ However, in *Re New*, [1901] 2 Ch 534, the use of this jurisdiction reached its "high watermark." The facts were that the trust held shares in a company which was reconstructed. In consequence, the trustees were offered preference shares in which they were not empowered to invest. The Court of Appeal, nonetheless, authorised them to do so.

⁹ Wylie, *Irish Land Law*, (Butterworths, Third Edition, 1997) para. 10.092, *Bank of Ireland v. Geoghegan* (1955 - 56) Ir Jur Rep 7; *Neill v. Neill* [1904] 1 IR 515; *Re De Malahide* (1952) 86 ILTR 191.

¹⁰ See also *Conveyancing Act, 1881*, s.43 which also provides for the payment of maintenance in certain circumstances; *Havelock v Havelock* (1800) 17 Ch D 807; *Re Walker* [1901] 1 Ch 879

¹¹ Keane, *Equity and the law of Trusts in the Republic of Ireland* (Butterworths, 1988) para.10.32; *Re Collins* (1886) 32 Ch D 229

¹² *Conveyancing Act, 1881*, s.43; Keane, *Equity and the law of Trusts in the Republic of Ireland* (Butterworths, 1988) para.10.17

beneficiaries, who are not *sui juris*.¹³ The potentially expansive scope of this jurisdiction was reined in by the landmark case of *Chapman v. Chapman*.¹⁴

1.08 The facts in *Chapman* were that the terms of the settlement provided that, until the youngest of certain infant beneficiaries should reach the age of twenty-five, the trustees should apply the trust income at their discretion for the maintenance of infant beneficiaries. Owing to the presence of these clauses, liability for estate duty would have arisen on the death of the settlors. Under the proposed variation, the trustees would have been authorised to transfer the trust fund to new trustees, to be held on like trusts but without the provision for maintenance. The effect of this would be that no estate duty liability would arise. All *sui juris* beneficiaries had agreed to this arrangement and the Court was asked to approve it on behalf of the infant beneficiaries. The Court declined to do so, since, on the facts, there was no dispute among the beneficiaries. The *ratio* in the case was that it is only where there is a genuine dispute about the existence of rights, or genuine difficulty in enforcing rights, that a court has jurisdiction to approve arrangements on behalf of persons who are not *sui juris*.¹⁵ In particular, in *Chapman*, the House authoritatively rejected any notion that a court could give consent to a variation simply on the ground that it would be for the benefit of an infant.

1.09 Before the litigation culminating in *Chapman*, the question of whether a genuine dispute had to exist had not been squarely raised. The courts had drifted into the exercise of a very lax "compromise" jurisdiction and arrangements had been approved (in chambers) on the test of whether they would benefit beneficiaries not *sui juris* but without any actual dispute having to be shown.¹⁶ The net result of *Chapman* was to substantially close down what had been regarded as a safety valve to the rigours of the "no variation" doctrine. The post-war years in Britain had seen changes in taxation for a number of larger trusts, which had been drafted when such developments were concealed in the womb of the future. Consequently, the result of the case was to set alarm bells ringing in solicitors' and accountants' offices throughout the country.

1.10 In response to what was perceived as a gap in the law, disclosed in *Chapman*, the matter was referred to the English Law Reform Committee.¹⁷ The resulting Report was implemented, with commendable speed, as the *Variation of Trusts Act, 1958*. Similar legislation followed very quickly in, several other common law jurisdictions.

E. The need for Variation of Trusts legislation in Ireland

¹³ Keane makes the point, "that since the rights by definition are in dispute, this is hardly an example of altering the trust." (Keane, *Equity and the law of Trusts in the Republic of Ireland* (Butterworths, 1988) para.10.32 (iv)) However, in the interests of simplicity, we shall consider it at this juncture.

¹⁴ [1954] AC 429

¹⁵ *Ibid.* at 444-47, 457-68 and 469-471

¹⁶ *Chapman, ibid.*, at 464 per Lord Morton

¹⁷ English Law Reform Committee, *Court's Power to Sanction Variation of Trusts* (Sixth Report, 1957) Cmnd. 310

1.11 In other jurisdictions, the legislature has intervened to broaden the narrow sphere within which equity traditionally allowed a trust to be varied. Two categories of statute may be identified, the first giving general powers and the other granting powers which can be used in narrow, specific situations. Of the second category there are some Irish examples, for instance section 27 of the *Trustee Act, 1893* which states:

"Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land."

1.12 A second more recent example is the extensive range of provisions authorising property adjustment orders on separation or divorce. These provide for "the variation for the benefit of either of the spouses...of any...settlements,"¹⁸ which would presumably cover a variation as to management or the size of a party's interest under the settlement.

1.13 However, returning to the first category with which we are principally concerned here, there are no Irish examples of statutes which expand the general powers which trustees enjoy.¹⁹ Even the statutory extension of trustees' administrative powers, which occurred as part of the 1925 British land law reforms,²⁰ has no counterpart in Ireland. Thus, all we have, apart from the occasional specific statutory intervention, are the four narrow heads of the court's inherent jurisdiction, which have just been outlined.

1.14 Because of the dearth of Irish case law, in this area, we do not know whether the halt which was called to the onward march of the Court's inherent jurisdiction, in *Chapman*, is part of Irish law. On this point, Keane C.J, writing extra-judicially, has observed:²¹

"[T]here were two dissentients from the decision of the Court of Appeal and the House of Lords in *Chapman v Chapman*, Denning LJ and Lord Cohen. Denning LJ's judgment is a comparatively early example of his willingness to extend the frontiers of the equitable jurisdiction, in this case by a radical extension of the jurisdiction traditionally exercised in ease of minors and others under disability. Such an approach has not been the subject of any recorded Irish decision and, while it cannot be said that it would necessarily be rejected, it should be pointed out that, apart from any other difficulties, it is most likely to arise in case where the effect of the alterations will be to ease the tax burden on the beneficiaries. It remains to

¹⁸ *Family Law Act, 1995*, s.9(1)(d). See also *Family Law (Divorce) Act, 1996*, Part III

¹⁹ Wylie, *Irish Land Law* (Butterworths, Third Edition, 1997) para.6.43-44

²⁰ *Trustee Act, 1925*

²¹ Keane, *Equity and the law of Trusts in the Republic of Ireland* (1988, Butterworths) at p.130

be seen whether the courts would consider it appropriate to facilitate such an objective."²²

While the status of *Chapman*, in this jurisdiction awaits decision, it must be said, in an area where litigation is so rare, that the possibility of a wide expansion of the inherent jurisdiction is a very slim reed on which to rely. If there is a need here for a robust Variation of Trusts measure which gives the courts power to vary trust instruments, the source of that power must be legislative. That leaves the question of whether there is, in reality, a practical need for powers of this type in Ireland today, and it is to this issue that we now turn.

Typical deficiencies

1.15 As stated, a trustee will typically be constrained by two sources of legal authority: the *Trustee Act 1893*; and the trust instrument itself. Yet, often, neither will meet the trustees' legitimate needs once practical difficulties arise. Furthermore, once such problems arise, given the slimness of *Saunders v Vautier* and the other three inherent heads of jurisdiction, the trustee is unlikely to find a satisfactory solution in court. It is to these practical difficulties that we now turn.

1.16 The first range of difficulties consists of powers, omitted from the trust instrument, which transpire to be necessary *after* the trust has come into operation. These include: the power to sell land or other assets; the power to continue running a business;²³ investment powers wider than those contained in the 1893 Act; and the power to delegate. As regards the last item, at the moment general law operates a stringent form of the non-delegation rule in respect of trustees, and so, for instance, the signatures of all of the trustees may be required for such a routine matter as signing a cheque. A related source of difficulties is the frequent failure of trust instruments to adequately identify the trustees. For example, trustees have to be appointed by name.²⁴ Thus it is a flaw if - for instance, under a pension scheme - they are appointed *ex officio* and it is expected of an office-holder, that he should resign at the end of his term of office - yet he refuses to do so. Finally, there is no general power to remove a trustee. This is obviously a difficult area but there have been some situations where it may be desirable or even essential that there should be a simple power to remove (and replace) a trustee, for instance, if a trustee has a stroke and is incapable, so that he cannot come to meetings, but refuses to resign. These difficulties are all matters which, if anticipated, are capable of being catered for by the terms of a well drafted trust instrument. Yet all too often, they are overlooked. Experience shows that there are in existence a lot of trusts which were not well drafted, in that they fail to foresee the types of problems exemplified above. This is often true of simple will-trusts which by necessity have had to be settled in a hurry.

²² See generally: Delany, *Equity And The Law Of Trusts In Ireland* (Round Hall, Sweet and Maxwell, Second Edition, 1999) pp.432-36; Wylie, *Irish Land Law* (Butterworths, Third Edition, 1997) paras.10.087 *et seq.*

²³ Under the *Succession Act, 1965* ss.50,55 and 60, personal representatives are given this power, albeit in restricted terms. Similarly, under s.58 They are given a broader power of investment in respect of infants' property, where they act as trustees.

²⁴ See generally: Wylie *Irish Land Law* (Butterworths, Third Edition, 1997) at paras.10.003 and 10.006.

1.17 The second range of factors which can create a need to invoke Variation of Trusts legislation, are changes in family circumstances, not anticipated by the settlor. For instance, certain members of the family may become incapacitated or fall on hard times or, alternatively, may inherit money from another quarter. In this context, one should of course emphasise that there are limits to the variations which can be made. We have briefly considered the possibility that the legislation we propose might be so designed as to enable a trust to be redrafted to help other 'deserving' members of a family. For instance, what if the trust gives interest to some but not all the settlor's grandchildren: can anything be done to help the remaining grandchildren, who might turn out to be in need? The answer, we believe, is in the negative. This stems largely from the fact that the original beneficiaries' property interests, conferred by the trust instrument would be diminished by this type of variation. Any variation, we believe should be conditional on the court taking the view that it is for the benefit of any beneficiary who cannot or will not consent for himself. To go beyond this cardinal principle would be, in effect, to extend indirectly the *Succession Act 1965*, section 117.

1.18 The need for a change in the law as it currently stands can be demonstrated by examining the extremes to which parties have been forced to go in an effort to vary the terms of their trusts. Take, for example, the predicament of the Marquess of Sligo, Lord Altamont. In 1963, Lord Altamont (the Settlor) conveyed Westport House and its adjoining lands to trustees, "to the use of the Settlor and his Assigns during his life ... and from and after his death to the use of his first and other sons severally and successively according to seniority in tail male with remainder to the use of the right heirs of the Settlor forever." Put simply, the entire estate was entailed and could only pass along a male line of succession. Also, the settlor had not retained any power of revocation. After 1963, the settlor proceeded to have five daughters and, by 1993, was desperate to avoid the strict terms of his trust so that one or all of his daughters could inherit the estate. In the absence of Variation of Trusts legislation, Lord Altamont's sole recourse was to have private legislation passed in order to deal with the situation. Hence, the *Altamont (Amendment of Deed of Trust) Act, 1993*, was enacted.²⁵ Admittedly, this particular "comedy of marriages, manners and antiquated titles had a happy ending,"²⁶ but for most people who are lumbered with difficult trusts, the solution of a private act of parliament remains remote. Legislation which deals with the general need for a facility whereby trusts can be varied is surely preferable to occasional, piecemeal legislation which deals with individual cases without reference to the wider problem.

1.19 Finally, experience elsewhere shows that a frequent ground on which variations may be sought is to facilitate tax planning and efficiency. This is natural given that many trusts will have been set up in an earlier era of tax laws and, in time, may become strikingly tax inefficient.

²⁵ Section 2 thereof provides, that the original trust deed shall be construed as though it included the following clause, "1B: to such uses upon such trusts and with and subject to such powers and provisions as the Settlor shall from time to time by any deed or deeds revocable or irrevocable with the consent of the Trustees appoint and in default of and subject to any such appointment."

²⁶ Harry Browne, "Heirs and Graces" *The Irish Times*, 3 September 1993

1.20 Some of these are matters which could also be dealt with by way of reform of the 1893 Act. But this is no reason for not regarding them as also justifying Variation of Trusts legislation. For even when the 1893 Act is reformed there will naturally be particular situations in individual trusts, which could not be catered for in a general statute. That said, Variation of Trusts legislation does of course carry the disadvantage that a court application is necessary. Of its nature, that seems to be inevitable. In Chapter 7,²⁷ we attempt to ameliorate this difficulty by proposing that the Circuit Court should have jurisdiction in these matters.

1.21 As we stated in our Introduction, this report is published at the same time as, and designed to be read with, our *Report on the Rule against Perpetuities*, which recommends that Rule's abolition. The abolition of the Rule is an added justification for introducing Variation of Trusts legislation. It will undoubtedly provide a more fine tuned and less arbitrary solution to problems thrown up by long trusts than the blunt instrument currently offered by the Rule against Perpetuities.

²⁷ See paras.7.01-03, below

CHAPTER TWO: CONTRADICTION OF THE SETTLOR'S WISHES

A. An Objection in Principle

The Objection

2.01 The most obvious point of principle against the court being given authority to vary the terms of a trust, is that such variation would, by definition, contradict the wishes of the settlor. To put it at its simplest: the property was the settlor's and if the beneficiaries chose to accept his property as a gift, it is eminently reasonable that they should do so, on the settlor's terms. In this chapter, we address this objection of principle.

Counter-arguments

2.02 The objection outlined above will, in most cases, be adequately rebutted or, at least, qualified by reference to one or more of the following three arguments.

2.03 First, in most cases what will have happened is not that the settlor will have squarely decided against the course of action made possible by the proposed variation. On the contrary, the settlor probably never intended to prevent his progeny from, say, selling land or investing in profitable shares. Rather, it is more likely that the issue will have been overlooked or addressed in overly vague terms. This scenario is easy to conjecture in the context of an elderly, infirm or dying settlor.

2.04 Secondly, on another level, the ancient doctrine of 'presumed intent,' seems relevant. This expression refers to the test applied in many cases from other jurisdictions, *viz.* had the settlor known of the unforeseen changes in familial or fiscal circumstances which actually materialised, what should his intent be presumed to be? To take an example: the settlor anticipates for whatever reason, that one of her daughters Mary, will not be able to have children and, consequently, the settlor omits to include this daughter's pregnancy, together with her other grandchildren, as beneficiaries of the trust. However, subsequently, a child is born to Mary. Would she not have responded to some equitable version of the 'officious bystander,'¹ test by saying: 'Of course! If I had known what was going to happen, I would have included a variation to cater for the possibility of Mary's having a daughter.'

¹ The term "officious bystander" is borrowed from the field of contract law and refers to one of the law's stock characters which is used to decide whether the parties could have intended a particular implied term. McKinnon J. described the role of the officious bystander as follows, a term will be implied, "if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'Oh, of course.'" (*Shirlaw v. Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227)

2.05 Thirdly, in an admittedly small group of cases, adherence to the settlor's strict intentions may have the effect of violating public policy or the provisions of the Constitution. The terms of the settlement may have involved gender or racial discrimination, or a restriction on alienation. This issue arose in *Re Remnant's Settlement*,² where the proposed variation was the deletion of a forfeiture clause whereby beneficiaries who practised Roman Catholicism or married a Roman Catholic would lose their entitlement.³ These factors are more likely in cases where a substantial length of time has passed since the trust was established.

B. Is the objection insurmountable?

2.06 In respect of the basic question, posed at the outset of this chapter, namely whether there is an irrefutable objection to the power to vary to trust. We believe that, in the great majority of cases, any theoretical objection would be adequately rebutted in practice, by one or other of the three counter-arguments outlined already. We admit, however, that a minority of cases will arise where the settlor out of whatever belief or prejudice, wishes to do something which a member of the beneficiaries, supported by the court, subsequently seeks to vary. Here the criticism tentatively advanced above, plainly remains valid and must be addressed.⁴

2.07 A convincing response to this is to invoke the thinking which underpins the rule in *Saunders v. Vautier*,⁵ namely that if all the beneficiaries are competent and entitled to the entire beneficial interest in the trust, it is wrong to deny them the right to terminate the trust. It is only an extension of this thinking to say that the Court can consent on behalf of beneficiaries who are not competent, which is what the legislation under consideration here, would authorise. If the objection based on fidelity to the settlor's wishes carries no weight in a *Saunders* context, then, as a matter of logic and justice, nor should it be treated as insurmountable in a Variation of Trusts context.

2.08 A practical question is whether the settlor should be allowed some sort of veto over a variation. In line with the position elsewhere, we are against any such approach. The danger exists that a settlor might be so wedded to his original intention that he would seek to adhere to the terms of his original settlement regardless of any benefit gained by the variation. The settlor will, like other persons, have the right to put forward to the court his views as to whether there is a benefit to

² See the case of *Re Remnant S.T* [1970] 1 Ch 560

³ For comment, see Hanbury and Martin, *Modern Equity*, (Fourteenth Edition) pp.613-4

⁴ For the discussion of these issues in the Westminster Parliament, in the context of the *Variation of Trusts Bill*, see House of Commons: Hansard, Vol. 578, p.394; Vol. 579, pp. 765-807; Vol. 586, pp. 496-506; Vol. 591, pp. 1643-1645; House of Lords: Hansard, Vol. 208, p. 851; Vol. 209, pp. 833-856; Vol. 210, pp. 372-383, 610,674; Vol. 211, p. 6

⁵ It is of course possible to turn this argument on its head by questioning the underlying policy of the *Saunders v Vautier* rule: in certain other jurisdictions, it has been argued that this rule should be limited in order to take account of the settlors wishes. Legislation along these lines has been enacted in the (Alberta) *Trustee Act* section 61. And in most US Jurisdictions, the rule in *Saunders* has been superseded by the material purpose doctrine, by which there can be no variations of a trust that would negate its purpose.

the person on whose behalf consent is to be given by the court. Beyond this, we should not go. Nor do we think that, for reasons explained at paragraphs 2.15-16, there is any constitutional danger in this approach.

2.09 In this context a recent English Court of Appeal Authority is instructive. The facts of *Goulding v James*,⁶ were as follows. Mrs Froud, the testatrix, had set up a trust under which her daughter, J, took only a life interest in her (substantial) residuary estate. J's life interest was to be followed by an absolute gift of the estate to her grandson, M on his attaining the age of 40. If M predeceased J, or if M failed to reach 40, the estate would pass to such of Mrs Froud's great-grandchildren as should be living at the date of M's death. The variation proposed by J and M, would give each of them an absolute, 45% share in the estate and the remaining 10% would be held on trust for any great-grandchildren. It was not disputed that the provision to be made for the unborn great-grandchildren was considerably more generous than the value of their current interest in residue. In fact, the value of their interest stood to be increased approximately five fold.

2.10 Nevertheless, at first instance, Laddie J dismissed the application, on the ground that the proposed variation would be contrary to the testatrix's strongly-held wishes. The undisputed evidence was that her intention was that J should not be able to touch the capital of the estate at any time (since the testatrix disliked J's husband) and that M's interest should be postponed until he reached the age of 40 (since the testatrix regarded M as immature). The judge distinguished between a variation under the *Variation of Trusts Act, 1958*, and a variation under the rule in *Saunders v. Vautier*.⁷ Intention was relevant to the former, but not to the latter.

2.11 On appeal, Mummery LJ's conceptual view of the 1958 Act, "as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*,"⁸ was the key point of departure from the decision below. Writing for the Court, the judge cited three of Megarry J's judgements with approval and then concluded:

"The effect of Megarry J's observations in those decisions is this. First, what varies the trust is not the court, but the agreement or consensus of the beneficiaries. Secondly, there is no real difference in principle in the rearrangement of trusts between the case where the court is exercising its jurisdiction on behalf of the specified class under the 1958 Act and the case where the resettlement is made by virtue of the doctrine in *Saunders v Vautier* and by all the adult beneficiaries joining together. Thirdly, the court is merely contributing on behalf of infants and unborn and unascertained persons the binding assents to the arrangement which they, unlike an adult beneficiary, cannot give. The 1958 Act has thus been viewed by the courts as a statutory extension of the consent principle embodied in the rule in *Saunders v Vautier*."

It flows from this that the court does not simply approve an arrangement in the abstract. It does so on behalf of a specified class. Consequently, "the critical

⁶ [1996] 4 All ER 865 (ChD), and [1997] 2 All ER 239 (CA)

⁷ (1841) 4 Beav. 115

⁸ [1997] 2 All ER 239 (CA), 247

question is what relevance, if any, can [the testatrix's] intentions and wishes with regard to the interests in residue taken under the will by her daughter and grandson have to the exercise of the court's jurisdiction on behalf of unborn great-grandchildren of the [testatrix's]?"⁹ Concluding this analogy with the rule in *Saunders v. Vautier*, the Court decided that the intentions of the testatrix were, in the instant context irrelevant.

2.12 Mummery LJ went on to remark in an *obiter* passage:

"...even the most determined settlor or testator cannot exclude the jurisdiction of the court under the 1958 Act. The court has discretion to approve an arrangement under the Act, even though the settlement may make it crystal clear that the settlor or testator does not want any departure from any of the strict terms of the trust."

2.13 The case appears to have closed the door on the notion of a sacrosanct intention beyond which a variation may not go. All in all, it is hard to gainsay the view of one commentator on this case that, in England, "the position is now that once the requirement of benefit (whether financial, moral- social or both) is satisfied, the role of the intention of the settlor or testator is now much less important."¹⁰

Recommendation

2.14 Instinctively, one may balk at the idea of going against the settlor's (perhaps, dying) wishes. However, Variation of Trusts legislation, by definition, undercuts the concept of rigid adherence to the settlor's intentions. The only possible justification for the enduring use of the settlor's intention as some sort of threshold or guide, is by reference to the objection set out and rebutted at the outset of this Chapter. Once the force has been taken out of that objection, it is difficult to see why the courts should be in any way constrained by the settlor's intention. Secondly, Mummery J's perception of Variation of Trusts as a legislative extension of the rule in *Saunders v Vautier* is, we believe, accurate. This being the case, it seems illogical that the settlor's intention should be inconsequential in *Saunders* scenarios, and yet re-enter the picture in Variation of Trusts applications.

Accordingly, we recommend that the settlor should not have a veto over variations to the terms of the trust. Nonetheless, he may, like anyone else, make submissions on the specific issue of 'benefit'.

C. No Constitutional Difficulty

2.15 Finally, we should observe that we do not believe that any constitutional difficulty attaches to the general proposal allowing for the variation of trusts. The only possible danger could come from a rather extreme interpretation of a

⁹ *Ibid.*, p.250

¹⁰ (1997) All ER Annual Review 277

(surviving) settlor's property right.¹¹ Such an interpretation would, in fact, be based on the erroneous assumption that a settlor retains a proprietary interest in the trust property *after* the trust has come into operation. With the possible exception of revocable and sham trusts, settlors are generally viewed as divesting themselves of any and all interests in the trust property. As explained by the English Law Reform Committee, "When he makes the settlement, the settlor parts with his beneficial interest in the property and he ought not to retain any right to veto changes in his dispositions which the court considers to be desirable in the interests of his beneficiaries."¹² Indeed this view is borne out by the manner in which the settlor is treated in taxation practice, whereby the trust is effectively ignored for the purposes of assessing the settlor's tax liability.

2.16 The other theoretical possibility lies in the unlikely claim that there has been an infringement of the property rights of beneficiaries. The model Variation of Trusts legislation, which we propose, allows variations only where such a change would be of *benefit* to the beneficiaries. This test would undoubtedly bring this legislation within the permissible realm of statutory involvement in property rights envisaged by Article 40.3.2° of the Constitution. Secondly, most of the property right cases, and incidentally all those in which the plaintiff has succeeded, have been concerned with the tension between an individual's property right and, on the other hand, some head of the public interest which requires an interference with that right, whether by control, restriction of use or compulsory acquisition. By contrast the tension here is between two sets of individual property interests: those of the settlor and the beneficiaries under the rearranged terms of the trust. It seems probable that the courts would only enforce constitutional rights in a private law area in an extreme case and would be especially reluctant to do so in a field, which may be regarded because of *Saunders v Vautier*, as a long-established area.

We therefore conclude that there is no insurmountable principled nor constitutional objection to the variation of trusts, as we propose it.

¹¹ On property rights generally, see: Hogan and Whyte, *Kelly, The Irish Constitution*, (Third Edition, Butterworths) pp.1061-1092

¹² The English Law Reform Committee, *Court's Power to Sanction Variation of Trusts*, Sixth Report, (Cmnd. 310, 1957) See also Harris, *Variation of Trusts*, (Sweet and Maxwell, 1975) p.5 where the author remarks, "The Committee's Report represents a triumph for the doctrine of equitable property over the doctrine of fidelity to settlor's intentions."

3.01 Having set out the case, in principle, for Variation of Trusts legislation, we must now turn our attention to the precise content and design of the proposed legislation. In this, and in the two subsequent chapters, three distinct aspects of the Variation of Trusts legislation will be considered. These are, respectively:

1. the extent of the court's power;¹
2. the persons on whose behalf the court is authorised to consent;²
3. the criteria which the court is to apply in deciding whether to exercise its discretion.³

A. The English Model

3.02 The gap in the law, which we seek to address, was filled in England by the *Variation of Trusts Act, 1958*.⁴ The wording of that Act has been followed, in some cases word for word, and in other cases with minor changes,⁵ in Scotland, Northern Ireland, New Zealand, some Australian states and most Canadian provinces.⁶ It has thus been tried and tested over approximately forty years and in many jurisdictions with no major flaws coming to light. One can probably count it as being to the credit of the legislation that; "for a jurisdiction invoked thousands of times over

¹ Chapter 3, *inst.*

² Chapter 4, below

³ Chapter 5, below

⁴ In England, some legislative inroads, had already been made into the strict 'no variation rule' prior to the 1958 *Variation of Trusts Act* by the *Trustee Act, 1925, s.57* and *Settled Land Act, 1925, s.64*, which dealt with trusts and settlements, respectively. These earlier provisions have not been repealed so that in English Law, there is a substantial area of overlap between the 1958 Act and earlier legislation. However, this problem would not arise in Ireland as we have no equivalent legislation. This would seem to be a more satisfactory arrangement both because it means that all the law is in one place and, secondly, the same standards apply to different types of variation.

⁵ Where changes have been made, these have usually been to paragraph (b). This is discussed below at para.5.09-14

⁶ *The Trusts (Scotland) Act 1961, s. 1; The Trustee (Northern Ireland) Act 1958, s. 1; The Trustee Act 1956, s. 64A (NZ); The Trusts Act 1973, s. 95 (Qld.); The Trustee Act 1958, s.63A (Vic); The Trustees Act 1962, s. 90 (WA); The Trustee Act 1955, s. 31A (Alberta); The Variation of Trusts Act 1968 (BC); The Trustee Act 1952, s. 29A (New Brunswick); The Variation of Trusts Ordinance 1963 (Northwest Territories); The Variation of Trusts Act 1967 (Nova Scotia); The Trustee Act 1954, s. 63(6), (7), (8) (Manitoba); The Variation of Trusts Act 1959 (Ontario); The Variation of trusts Act 1963 (Prince Edward Island); The Variation of Trusts Act 1969 (Saskatchewan); The Variation of Trusts Ordinance 1971 (Yukon Territory).*

almost forty years there are remarkably few reported cases on its construction".⁷ In these circumstances, it would seem perverse not to take this foreign legislation as a working model. Accordingly in this Report, we adopt the approach of reviewing it to see whether it can be improved in any way, rather than starting with a legislative blank canvas. However, given changes in the style of legislative drafting, at least in the direction of plain language and certain substantive modifications, the draft which we have eventually recommended (Appendix A) differs to some degree in shape and detail from the 1958 Act.

3.03 It is convenient to set out the central part of the 1958 Act, at this point:

“1. (1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of -

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or,

(b) any 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, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or

(c) any person unborn, or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) 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:

provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.”

⁷ *Goulding v James* [1997] 2 AER 239, 241

General structure and clarity

3.04 The sequence of the English legislation is such that the persons on whose behalf the court may approve an arrangement are interposed before the reader is told the content of the power, which is given to the court by the provision. It is more comfortable for the reader to reverse this sequence.⁸ In other words, the power should come first, followed by the persons on whose behalf consent may be given. Secondly, the section might be clearer if the material therein were divided into two sub-sections, rather than one extremely long sentence.

Thus, apart from the substantive changes recommended below, we recommend that the structure be rearranged by transferring the list of persons, on whose behalf the court may consent to a separate sub-section.

B. The Extent of the Court's Power⁹

3.05 The portion of the English legislation, which determines the extent of the court's power is as follows:

"the court may if it thinks fit by order 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 properties subject to the trusts..." (our italics).

In the context of designing Irish legislation, it is useful to consider the words emphasised in this extract, in order to decide whether they should be changed.

(i) Arrangement

3.06 Evershed MR referred to an "arrangement" in *Re Steed's Will Trusts*,¹⁰ as a word which is "deliberately used in the widest possible sense to cover any proposal which any person may put forward for varying or revoking a trust".¹¹ It is not necessary for an arrangement to be "in some sense *inter partes*, or some kind of a scheme which two or more people have worked out" and "the approval of the trustees is not essential, although their views will be treated with respect."¹²

3.07 In particular, the term is wider than 'agreement' and does not require that two or more parties have agreed to the terms and then proposed it as a rearrangement of their interests. Typically, an adult life tenant might himself draw

⁸ This is consonant with the recommendations made in our recent *Consultation Paper on Statutory Drafting and Interpretation: Plain Language and the Law*, (LRC - CP14 - 1999) paras.5.09 *et seq.* and provisional recommendation 5.

⁹ On this section, generally, see McClean, "Variation of Trusts in England and Canada," [1965] *Canadian Bar Review* 181, 241-46.

¹⁰ [1960] Ch 407

¹¹ *Ibid* at 419

¹² Ford and Lee, *Principles of the Law of Trusts in Australia* (Third edition, 1996, LBC Information Services) at p. 9

up an arrangement to provide for an infant's remainder. And in *Re Steed's Will Trusts*,¹³ indeed, it was the protected life tenant who had drawn up and put forward the proposed arrangement.

In short, we recommend the use of the word, "arrangement."

(ii) Two types of arrangement

The English legislation clearly envisages two distinct types of variation or "arrangement." On the one hand, it describes those arrangements, "varying or revoking all or any of the trusts." On the other hand, it mentions those, "enlarging the powers of the trustees of managing or administering any of the property." A distinction exists between these alternative forms of re-arrangement. The first category consists of changes to the basic beneficial interests under the trust. The second category consists only of alterations to the powers of trustees. It is fair to say that the dividing line between these alternative variations is less than clear in the English legislation. The two are run together in the same paragraph, and are separated only by the word, "or."

In the interests of clarity, we therefore recommend that there should be indentation and separate paragraphing to emphasise that both categories of arrangement are being covered.

3.09 One commentator has advanced more fundamental criticism of the subdivision in the English legislation. McClean remarks:¹⁴

"It is rather difficult to see why there should have been this change of language in dealing with administrative powers. There appears to be no good reason why, like beneficial interests, they should not be susceptible to being varied or revoked."

McClean goes on to propose that the two forms of arrangement should be conflated by the use of the following simple form of wording: "any arrangement...varying...or revoking [the trust]."

3.10 At first glance, this 'catch-all' phrase is attractive in its simplicity and ease of application. However, we see a compelling reason to use a different formulation for the different types of alteration: namely that to do otherwise, would be to force the draftsman to utilise a form of words which would not be entirely appropriate in each of these cases just because of the difference in character between the two. What we would gain on the side of simplicity, we would sacrifice in terms of accuracy.

Accordingly, we do not recommend that the two types of variation should be conflated. Rather, we propose that they be more clearly separated than is done in the English legislation.

¹³ [1960] Ch 407

¹⁴ See McClean, "Variation of Trusts in England and Canada," [1965] *Canadian Bar Review* 181, 244

3.11 Below, we consider the adequacy of the language employed to describe each of these alternative forms of re-arrangement.

(iii) Varying or revoking all or any of the trusts

"Varying" or resettling?

3.12 The scope of the term "varying" is a key factor in determining the extent of the court's jurisdiction. There has been considerable debate as to whether or not the term goes as far as to allow a "resettlement", that is where a trust is terminated and replaced by a wholly different trust. In *Re Ball's Settlement Trusts*,¹⁵ an arrangement was proposed in which the trust fund was to be resettled on other trusts. Turning to the question of whether the power to vary encompassed the power to resettle, Megarry J said:¹⁶

"while there is plainly jurisdiction to approve the arrangement insofar as it revokes the trusts, in my view there is equally plainly no jurisdiction to approve the arrangement as regards 'resettling' the property at any rate *eo nomine*."

Nevertheless he allowed the proposal for an arrangement in that case on the grounds that:

"if an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts even though the means employed are wholly different and even though the form is completely changed."¹⁷

(We shall return to elaborate on the concept of the '*substratum*,' in paras.3.18-3.19, below)

3.13 Thus, while acknowledging the distinction between a variation and a resettlement, the judge went on to set a low threshold beyond which variations could not be authorised. The expansive view taken of variations in that case blurs the line between variations and resettlements, while refusing to abolish the distinction altogether.

3.14 Later, in *Allen v Distiller Co (Biochemicals) Ltd*,¹⁸ the court found that the proposed variation went too far. The case concerned an infant victim of the thalidomide tragedy. Eveleigh J refused to permit the legislation to be used to

¹⁵ [1968] 1 WLR 899

¹⁶ *Ibid.* at 903

¹⁷ *Ibid.* at 905

¹⁸ [1974] 2 WLR 481

postpone an infant's entitlement to damages beyond the age of majority. He stated: "I do not think that the so-called variation would be a variation at all. It would be a new trust made on behalf of an absolute owner."¹⁹

3.15 It is submitted that the decisive factor in deciding whether or not to exercise the court's discretion ought not to be whether or not a given arrangement falls on one or other side of the hazy line between variations and resettlements. Even the slightest variation could, in practical terms, have far-reaching consequences. By the same token, a resettlement might, in reality, effect only minor changes. To rest everything on this variation/resettlement divide, will inevitably throw up unjustifiable anomalies and disparities between similar cases.

3.16 Furthermore, this approach diverts attention away from what ought to be the principal issue, namely whether or not the proposal is for the benefit of the beneficiaries on whose behalf the court is being invited to consent. It leads to artificial conclusions as described in the following passage:²⁰

"...the courts in England have leaned over backwards to find that what is a revocation and resettlement is also a variation of the original trust. As long as the "*substratum*" of the original trust remains in the new trust which the arrangement proposes, it does not matter that the same purpose is to be achieved by wholly different means and in a completely changed form."

It is arguably the case that where the courts pursue a policy of classifying almost everything as a variation,²¹ an injustice is worked against those, admittedly very few, rearrangements that are for whatever reason still viewed as resettlements.

Our preferred approach

3.17 There are two related policy points here. First, should the court have the power to approve a resettlement, if appropriate? Secondly, if so, should this be stated explicitly in the provision? We recommend an affirmative answer to each of these questions on the ground that the sort of uncertainty or sophistry which exists in other jurisdictions is plainly undesirable. There seems to be no reason, in policy, to limit the court's power at the point of variation. To do so, without good reason, unnecessarily entangles the court in a difficult area of distinction between variation and resettlement.

¹⁹ *Ibid.* at 491. (As it happens, on the facts, Eveleigh J was able to allow what was proposed, on a different basis, *viz.*, the court's powers to authorise compromises on behalf of infant litigants.) See to similar effect, *Rettesian* 153 N.S.R. (2d) 122, paras 28-30 citing *Re Towlers S.T* [1963] 3 All ER 759 with approval.

²⁰ Waters, *Law Of Trusts In Canada*, (Third Edition) at p. 1075. The second passage was focussing in particular on *Re Ball's Settlement* [1968] WLR 899, 906 in which Megarry J. stated, "But if an arrangement, while leaving the substratum effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed."

²¹ For example, in *Re Spencer*, a fund-splitting arrangement which took everything out of the settlement, save insurance policies and bonds to meet unlikely contingencies, was classified as a "variation" and accordingly within the scope of the court's authority. (1970) 9 D.L.R. 3d 74, 86 *per* Dubinsky J.

Accordingly, we recommend that re-settlement be expressly mentioned in the legislation.

The substratum

3.18 Somewhat the same effect as would be produced by a narrow reading of 'variation' had in an earlier line of authority been achieved by the notion of the 'substratum'. In these earlier cases, the view was taken that any variation should stop short of upsetting the basic intention or 'substratum' of the trust. This approach was explained by Pennell J. in *Re Irving*,²² when he stated, "The search in all [the cases cited to him] was to find the intention of the founder of the trust and then to decide whether the proposed arrangement remains within the ambit of the intention."

3.19 One case in which the intention of the settlor was decisive is *Re Steed's Will Trust*.²³ The proposed re-arrangement in that case would have eliminated the protective element from a protective trust in favour of the settlor's housekeeper. The effect of the variation would have been that the housekeeper would become absolutely entitled to the property. The Court of Appeal withheld its approval, placing primary importance on the intention of the settlor, stating, "It is quite plain on the evidence that the testator, while anxious to show his gratitude to the plaintiff was no less anxious that she would be well provided for and not exposed to the temptation, which he thought was real, of being, to use a common phrase, sponged on by one of her brothers."²⁴

For broadly the same reasons rehearsed in paragraph 3.17, we prefer not to restrict the court's power by reference to the somewhat nebulous and obstructive idea of a 'substratum'. Again, by explicitly including "re-settlement" among the powers conferred on the courts, the 'substratum' line of authority will be avoided.

(iv) Enlarging the powers of the trustees of managing or administering

3.20 We turn next to the second limb of the court's power, namely "enlarging the powers of the trustees of managing or administering the property subject to the trusts." Again, the scope of this phrase is a key factor in determining the extent of the court's jurisdiction. A literal interpretation of the word "enlarging" might result in a finding that it is only existing powers which may be enlarged rather than new ones added. This would mean that for instance, a power of investment which already exists could be widened; but where none existed originally, none could be added. Such a restriction would be arbitrary and likely to cause practical problems for trustees. As it happens, no such argument has, so far as we know, ever been made in another jurisdiction. However, it is just possible that the case for a literal

²² (1975) 110 R, (2d) 443 at p. 448, 66 DLR (3d) 387

²³ [1960] Ch 407

²⁴ *Ibid.*, p.415 *per* Lord Evershed MR. It is notable that the only persons who might have been prejudiced by the proposed variation were those with only a remote contingent interest. Thus, the Court's refusal was not motivated by a desire to protect their interests, but merely by fealty to the testator's wishes. *Ibid.*, at 419.

interpretation might appeal to the courts at some future point. And, so, erring on the side of caution, it may be wise to make the provision read, "enlarging *or adding* to the powers of the trustees of managing or administering."

3.21 Another, albeit remote, possibility is that a court might be invited to vary, by reducing, rather than expanding, the powers of trustees. It is admittedly very unlikely but there seems no reason, as a matter of policy, to rule out this type of change. If it strikes the court as beneficial, then a technicality ought not to preclude the court from exercising its jurisdiction. An example might occur if the terms of the trust permit a form of investment which, in changed circumstances, has become risky and the variation sought would remove the power to make this kind of investment.

We recommend the use of the phrase, "varying, enlarging, adding to or restricting the powers of the trustees of managing or administering any of the property subject to the trusts."

(v) Managing or administering

3.22 A relatively expansive view has been taken of this phrase, and consequently of the court's jurisdiction in cases where it is relied upon. The power has been applied: to empower trustees to pay someone to nurse a beneficiary who had become of unsound mind;²⁵ to permit the distribution of a surplus in a pension trust; to allow trustee directors to retain remuneration received or to be received;²⁶ to confer powers of advancement upon trustees who happened to lack those powers;²⁷ and to enable trustees to purchase a residence for a beneficiary.²⁸ In *Re Greenwood*²⁹ and in *Palmer v McAllister*³⁰ the power was invoked to permit trust property to be sold against the clearly expressed intention of the settlor. Moreover the power is not limited to particular transactions, a general variation may be allowed.³¹

²⁵ *Re Pitta* [1967] VR 800 (Supreme Court of Victoria) following *Re Towlers S.T* [1963] 3 All ER 759

²⁶ *Re Cooper's Settlement* [1962] Ch 826 [1961] 3 AER 636

²⁷ *Re Lister's Will Trusts* [1962] 1 WLR 1441 [1962] 3 All ER 737

²⁸ *Re Burney's Settlement Trusts* [1961] 1 WLR 545 [1961] 1 All ER 856 (These are not the facts of the case itself)

²⁹ [1988] 1 NZLR 196

³⁰ (1991) 4 WLR 206

³¹ *Re Steed's Will Trusts* [1960] Ch 407 A particular problem in this field concerns the trustees' powers of investment:

"In England there was some doubt as to whether the court previously had power to enlarge trustees' investment powers (*Re Coate's Will Trusts* [1951] 1 WLR 375) and for some time following the passage of the *Trustee Investments Act* 1961 the courts discouraged such applications for that purpose; *Re Allen's Settlement* [1960] 1 WLR 6; *Re Thompson's Will Trusts* [1960] 1 WLR 1165; *Re Cooper's Settlement* [1962] Ch 826; *Re Kolb's Will Trust* [1962] Ch 531; *Re Clarke's Will Trusts* [1961] 1 WLR 1471. That policy has now changed: see *British Museum Trustees v A-G* [1984] 1 WLR 418." (Ford and Lee, *Principles of the Law of Trusts in Australia* (3rd ed, 1996, LBC Information Services) p.5).

3.23 The generally accepted meaning of "management or administration" has been really tested on only one occasion and has withstood the challenge. In *Re Downshire S.T.*,³² the case was made that since "management" and "administration" were separated by the disjunctive, "or", they must be taken as having separate and distinctive meanings. Management, it was argued, covered all the general care and control of the trust property. What meaning, then, was left to "administration"? The answer urged by counsel was that it covered all the remaining activities of a trustee, which, perforce, include paying income or dividing capital. In sum, it was argued that "administration" included the power to vary beneficial interests. This argument was (rather indignantly) rejected by the Court on the ground that what was suggested by the legislation was "management or administration" of the trust property according to the pattern of beneficial ownership as fixed by the settlor.

Since this view represents the general judicial consensus, it is recommended that the established phrase "management or administration" be used in Ireland.

C. Matters of General Concern

3.24 We now turn our attention to two matters which are of equal concern with regard to each of the two types of variation, set out already.

(i) *Single or general exercise of new power*³³

3.25 The next issue to be considered is whether the provisions envisage only a once-off exercise of the varied power, or effect a permanent change in the trustees' powers, or encompass both possibilities. Straightaway, it seems clear that the policy ought to be to empower the court to make changes of either or of both categories. In most cases, both categories of variation will be sought. However, in rare cases, there may be reasons why the beneficiaries might want the varied power to be effective on only one occasion. In any case, we recommend that here, too, the court should have as wide a discretion as possible. Nevertheless, we believe that the phrase, "any arrangement" is sufficiently broad to encompass both permanent and once-off alterations.

Accordingly, we recommend that the phrase, "any arrangement" be used, and that there is no need to elaborate it with regard to this point.

(ii) *Can a trust be varied more than once?*

3.26 Finally, we must consider the situation which arises if, after a trust has been varied once, it proves necessary to make a second application to a court to vary it again. Such successive applications to court will, in all likelihood, be very rare. As a matter of policy, we believe that in these rare cases, the court should be free to consider it in the usual way, as for instance by ascertaining whether there is a benefit to the person on whose behalf the court is consenting.

³² [1953] Ch 218, 251-52.

³³ McClean suggests the added phrase "partially or completely" but this seems unnecessary. See McClean, "Variation of Trusts in England and Canada," [1965] *Canadian Bar Review* 181, 245

3.27 Turning to the English model, such repeated applications appear to be permitted by the legislation. The general rule of interpretation is that, unless there is anything express or implied to the contrary in the statute, a statutory power can be exercised more than once.³⁴ Here, there appears to be no cause to depart from this general rule. The subject of the provision, as quoted above, is: "property...held on trusts arising...under any will, settlement or other disposition". And, speaking in response to the present query, a Canadian judge has stated:

"It would appear that the Variation of Trusts Act does permit such an intervention where it provides that the court may approve any arrangement varying or revoking a trust created 'under any will, settlement or other disposition'. In my opinion the trust created by the existing order falls under the head of 'other disposition'."³⁵

3.28 This view is consonant with the analysis of the legal effect of a variation given in *Goulding*.³⁶ According to Mummery J, "what varies the trust is not the court but the agreement or consensus of the beneficiaries".³⁷ In short, even after a variation, the entity remains, in essence, a trust.

We recommend accordingly that no departure from the English wording is necessary to deal with this point.

D. Recommended Draft

3.29 Assembling all the recommendations made in this chapter, we suggest that the provision to determine the extent of the court's power should be the drafted along the following lines:

1.- (1) the court may, if it thinks fit, on application by any person specified in *section 2* of this Act, by order approve, on behalf of any person referred to in *subection (2)* of this section, any arrangement -

³⁴ *Interpretation Act, 1937*, section 15(1), states, "Every power conferred by an Act of the Oireachtas ... may, unless the contrary intention appears in such Act or instrument, be exercised from time to time as occasion requires."

³⁵ *Re Hessian* (1996) 153 NSR(2d) 122, *per* Hall J. In some cases in England, too, trusts have been granted a second variation. See: Tasmanian Law Reform Commission, *Report on the Variations of Private Trusts*, (No 51 - 1987) para. 5.16.

³⁶ *Goulding v James* [1997] 2 All ER 239,

³⁷ *Ibid.* p.247

- (i) varying, resettling or revoking all or any of the trusts, or
- (ii) enlarging, adding to or restricting the powers of the trustees to manage or administer any of the property subject to the trusts,

CHAPTER FOUR: CRITERIA FOR THE COURT IN DECIDING A VARIATION OF TRUSTS CASE

4.01 It is abundantly clear that the proposed legislation must lay down guidelines to steer the court in its decision to approve or not to approve a given variation. However, it is far from clear what those factors or guidelines ought to be. The first, and often the only factor, is usually some form of requirement that the variation be for the benefit of the beneficiaries on whose behalf the consent of the court is being sought. Secondly, a very broad discretion is normally conferred on the court, using the formula of words, "the court may, if it thinks fit." Finally, the question has sometimes been posed as to whether a gain arising from greater tax efficiency ought, on public policy grounds, not to be counted as a 'benefit.'

A. The Concept of Benefit

4.02 Under the English, and almost all other legislation, the Court "shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit *of that person*," (our emphasis). In reviewing the legislation's operation, it is worth noting the recent observation of an English judge that as a matter of empirical evidence, it is most unusual for an application to fail on this ground.¹

4.03 An important preliminary point is that the concept of benefit is not confined to allocation of substantive interests. It extends to any arrangement which will bring about an improvement in the general administration of the trusts as any such improvement will clearly 'benefit' every beneficiary of the trust, albeit in non-financial terms.² For present purposes, it is only necessary to survey a few examples of case-law from other jurisdictions in order to give some idea of the sort of situations in which an Irish court might be called upon to assess the question of benefit. In doing so, we shall focus on the marginal cases, rather than those where it is plain that there is no benefit to the person on whose behalf consent is sought.³

(i) *Non-financial benefit*

¹ Per Laddie J in *Goulding v James* [1996] 4 All ER 865, 868

² *Re Seale's Marriage Settlement* [1961] Ch 574, 579

³ For example, *Re Hessian* 153 NSR (2d) (1996) (proposed variation would mean that residual beneficiary would lose eventual benefit of trust capital which would have been transferred to a charity); *Re Dalhousie Staff Association* (1999) 87 A.C.W.S. 3d 1257 (the proposed variation would effectively end the pension trust and permit the distribution of the money in it, with no compensatory benefit to future employees).

4.05 The great majority of Variation of Trusts cases will turn on the existence of some financial benefit. However, the concept of 'benefit' extends beyond the narrow confines of financial gain, to encompass other, often less tangible, advantages. These non-financial benefits are inherently more difficult to identify. Take, for example, the case of *Re T's Settlement*.⁴ Here a young woman was on the point of reaching her majority, at which point she would become entitled under the terms of the trust to a large capital sum. Her mother adduced evidence of her immaturity and the Court approved a re-settlement by which the daughter's interest would be converted into a protected life interest which was to come to a close at a date by which she would be expected to have matured. This case also demonstrates another important point, namely that benefit is to be judged not by reference to the wishes of the beneficiary, but according to the judgment of the court. This objective view of 'benefit' enables the court, somewhat paternalistically, to agree to rearrangements which the minor or infant beneficiary, if consulted, would abhor.⁵

4.06 Plainly, a delicate balancing exercise must be conducted. For instance, adult beneficiaries may have agreed to sacrifice some of their interest so that another beneficiary (or class of beneficiaries) might gain. In such circumstances, the Court, acting on behalf of an infant or unascertained person, would still have to decide whether it should approve the same act of sacrifice.⁶ Another borderline case is where the variation would result in the parents of infants or of the unborn receiving more and the infants or unborn less. The question then arises, should the court approve this variation on the basis that the improvement in the parent's position will mean a more comfortable upbringing for their offspring?⁷ Finally, the variation may involve the termination of a remainderman's interest, combined with a "pay-off" to the erstwhile remainderman, possibly out of an insurance fund established for this purpose. However, in at least one case, it was felt that in these circumstances, insurance did not suffice.⁸

4.07 A category of cases, described by Hanbury and Martin as "Trouble in the Family"⁹ cases fall under this heading of non-financial benefit. The most famous of these cases is the aforementioned, *Re Remnant's Settlement*,¹⁰ where the proposed variation was the deletion of a forfeiture clause which stated that beneficiaries who practised 'Roman Catholicism' or married a 'Roman Catholic' would lose their entitlement. Removal of the forfeiture clause, it was held, would confer a 'benefit' in that the beneficiaries could freely choose a Catholic spouse, if they so wished and the possibility of family dissension would be reduced. In another case,¹¹ which is likely to be of more general significance, it was established that a benefit is

⁴ [1964] Ch 158

⁵ See further *Re Irving* (1975) 66 DLR (3d) 387

⁶ *Re Tweedie* 64 DLR (3d) 549 (BC)

⁷ See *Kuwater v Royal Trust Corp. of Canada* (1980) 23 BCLR 287.

⁸ *Farrington v Rogers* (1980) 6 ETR. 156 (BC). See generally, Waters, *Law of Trusts in Canada* (Third Edition) at pp. 1079-81

⁹ Hanbury and Martin, *Modern Equity*, (Fourteenth Edition), p.616

¹⁰ [1970] Ch. 560 See above para.2.05

¹¹ *Re C.L.* [1969] 1 Ch 587, 596-600

conferred on a person where a re-arrangement is made which financially benefits not that person, but someone else (for instance, a child) whom that person can safely be presumed to wish to advantage or assist.

(ii) Possible, probable or certain benefit?

4.08 One quandary which a court may have to confront is that a benefit or disadvantage may not be a certainty but merely a possibility or probability. It appears that, the only way of facing such a situation is by adopting a pragmatic approach whereby the court asks itself whether this is the sort of risk which a reasonable adult would be prepared to take. In *Re Cohen's Will Trusts*,¹² Danckwerts J. approved an arrangement notwithstanding that it would not confer a benefit in the unlikely event of one of the testator's children predeceasing his widow, who was now aged nearly eighty years. Harris states, "If people ask the court to sanction this sort of scheme, they must be prepared to take some sort of risk and if it is a risk that an adult would be prepared to take, the court is prepared to take it on behalf of an infant."¹³

4.09 Precise actuarial predictions are not necessary as this would be at odds with the principle that 'benefit' need not be purely financial. From a practical perspective, if actuaries' opinions became necessary, the expense of applications would increase significantly. Indeed, such precise predictions are impossible as so much depends on the use by trustees of the varied power after the application to court has been made and granted. Rejecting nice mathematical evidence, Harris writes:¹⁴

"Although actuarial calculations are sometimes taken into account in assessing financial benefit, it is not essential to the establishment of a "benefit" to show that the actuarial value of the beneficiary's interest *ex ante* (that is, under the terms of the settlement to be varied) is less than the actuarial value of his interest *ex post* (that is, under the settlement as varied by the arrangement)."

It is doubtful whether some of the contingent elements which the court has to take into account are susceptible of actuarial calculation at all. For instance, the effect of an arrangement may depend to some extent on the use which trustees will make of powers conferred upon them by the arrangement. In certain circumstances, it will not be clear how the trustees will exercise their powers, and the court will have to make an assessment on this point.

¹² [1959] 1 W.L.R. 865, 868. This decision was approved by Stamp J. in *In Re Cohen's Settlement Trusts* [1965] 1 W.L.R. 1229, 1235, and by Megarry J. in *In Re Holt's Settlement* [1969] 1 Ch. 100, 122. It has also been followed in New Zealand - *Re The Parker Trust* 1956 [1964] N.Z.L.R. 573; *Re Aitken's Trust* [1964] N.Z.L.R. 838.

¹³ Harris, *Variation of Trusts*, (Sweet and Maxwell, 1975) p. 56 In *Re Robinson's S.T.*, Templeman J. pithily stated that the court, "may take a broad reasonable view but not a galloping gambling view." [1976] 3 All ER 61.

¹⁴ Harris, *Variation of Trusts*, (Sweet and Maxwell, 1975) p.61

(iii) Mixed consequences

4.10 The Court may be confronted with a situation where proposed variation would draw with it, both benefits and disadvantages. Where one of these is in the financial field and the other in the non-financial area, the trade-off may be particularly difficult to assess. An instance is *Re Weston's Settlement Trust*,¹⁵ where the variation would have transferred the trust to Jersey. In financial terms, the child beneficiaries would have gained under Jersey's generous tax régime.¹⁶ However, the trust and its beneficiaries would have to be moved to Jersey. The Court of Appeal held that the benefit of the tax savings was outweighed by the social benefits to the children of being brought up in their own country. Lord Denning M.R. remarked:¹⁷

"There are many things in life more worthwhile than money. One of these things is to be brought up in this our England, which is still "the envy of less happier lands." I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax ... many a child has been ruined by being given too much."¹⁸

(iv) Our recommended approach

4.11 This brief survey of case-law elsewhere is intended to demonstrate the sort of contexts in which a court would have to operate the test of benefit. We must now turn to the issue of the adequacy of a simple test of benefit. In our proposed legislation, ought the word be amplified and elaborated upon, or is it sufficient on its own? In Manitoba, alone of the jurisdictions which have this type of legislation, the legislature went beyond the bare word benefit, and formulated the following criteria:

"...without limiting the generality of the word "benefit", an arrangement in respect of a trust is for the benefit of a person

- (a) if it would enhance the financial, social, moral or family wellbeing of that person; or
- (b) where the person on whose behalf the court is being asked to consent to the arrangement, is a corporation or association, if it would advance or further the purposes of the corporation or association; or
- (c) where the persons on whose behalf the court is being asked to consent to the arrangement are persons who might derive some benefit from benefits used for a specified purpose, if it would advance or further that purpose."

¹⁵ [1969] 1 Ch 223

¹⁶ Under current Irish law, the financial advantage of an equivalent arrangement would be reduced, if not wiped out, by the presence of an "exit charge" on all trusts leaving the country.

¹⁷ *Ibid.*, p.245

¹⁸ As it was put by Hanbury and Martin, "the best interests of the children were to their financial disadvantage." *Modern Equity*, (Fourteenth Edition) p.615. Also, compare *Re Weston, Re Windeatt's WT*, [1964] 1 WLR 692, 696, in which Jersey was the family's genuine, not transitory home.

4.12 Extensive as this may be, we do not recommend any departure from the ordinary test of 'benefit'. The case-law, outlined above, demonstrates that the range of possible sources of benefit, coupled with trade-offs against corresponding disadvantages, is so wide that a comprehensive statutory formulation would have to be impossibly detailed. Such a formulation would import the danger that if so many detailed categories of benefit were expressly included, there would be a danger that if one were not mentioned, a court might reach the conclusion that it was intended to be excluded. It seems better then to go to the other extreme - that is, the single word "benefit" - especially since this appears to have operated satisfactorily elsewhere.

4.13 Other variations on the basic theme of 'benefit', ought to be addressed before we proceed. Two such variations are thrown up by the South Australian, *Trust Act, 1973*. The first, in s. 59 (C) (3) (b) requires:

"...the Court must be satisfied...
(b) that the proposed exercise of powers would be in the interests of beneficiaries of the trust and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class;"

Ford and Lee remark about the South Australian formulation:¹⁹

"[it] requires benefit and fairness with respect to classes of beneficiaries, whereas the English precedent requires benefit to each individual beneficiary. It may be possible for the court to see benefit to a class as a whole although some individual members of that class may not be benefited or may even be disadvantaged, for instance by a variation of the shares of a particular fund to which members of a class are entitled."

In short, so far as there is any difference, it is that the English form of words is more stringent than the South Australian version, in its protection of each individual beneficiary. For this reason, and because the English formulation is simpler, we prefer the English model and recommend its adoption.

4.14 The second possible variation contained in the South Australian statute states:

"...the court must be satisfied...that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers..."

This provision is radically different from the 1958 Act in that it introduces the concept of the "reasons justifying the exercise of the powers." It requires the court to discern the motives of the applicant beneficiaries, and then to determine the minimum variation necessary to give effect to them. By contrast, the 1958 Act looks only at the benefit or detriment to the beneficiaries on whose behalf it is

¹⁹ Ford and Lee, *Principles of the Law of Trusts in Australia* (Third edition, 1996, LBC Information Services) p.18

consenting, but stops short of the more difficult task of assessing the motives of the applicants. It is possible that the difference arises from the fact that the South Australian provision allows for a variation, despite the fact that some or all of the beneficiaries of full capacity have not consented. In other words, it goes much further than the 1958 Act. It is perhaps for this reason that this additional control has been imposed. In any event, it seems to us that given the provisions which we propose, there is no need for this additional control and we do not recommend it or anything like it.

Accordingly, we recommend that the sole test of 'benefit', without any other elaboration or restriction, should be the test employed by the court in deciding whether or not to approve a proposed variation.

B The Court's discretion

4.16 Every existing statute, which allows for the variation of trusts, explicitly states that the Court always retains its discretion to refuse approval. For example, the English *Variation of Trusts Act, 1958*, section 1(1) states that "the court may, if it thinks fit, approve" a re-arrangement. We believe that the case for reserving such a discretion to the court is a strong one.²⁰ The test of benefit, in the wise sense in which we understand it, will be adequate in most situations. However, not every contingency can be catered for by legislation, and the discretion will act as a sensible precaution against unexpected and undesirable applications. For instance, many of these cases will concern delicate family situations, where for reasons obvious to the court the alleged benefit is more apparent than real. In such circumstances, hard and fast rules are unhelpful and the better approach is to retain a degree of flexibility.

We recommend the reservation of a judicial discretion at this point.

C. Taxation

4.17 Finally, we turn to the thorny issue of whether, as a matter of policy, we should allow Variation of Trusts legislation to be relied upon to minimise tax liability. In other jurisdictions, equivalent legislation has been widely used for this purpose and there is no reason to expect that things would be any different here. In most, though not all, cases judges have accepted that minimising tax should be regarded as a 'benefit'.²¹ It seems likely, in view of cases such as *McGrath v McDermott*,²² that given the same legislation, the same attitude would be taken here.

²⁰ See Harris' comments, *Variation of Trusts*, (Sweet and Maxwell, 1975). p70

²¹ *Re Whittome's Trust* [1962] NZLR 773; *Re Beetham's Trust* [1964] NZLR 576; *Re Clitheroe's S.T.* [1959] 1 WLR 1159.

²² [1988] IR 258 Here the court was considering a decision of the Appeal Commissioners, which had purported to adopt the doctrine of 'fiscal nullity'. Under this doctrine, financial transactions, which had no purpose other than the avoidance of tax and which did not involve a real loss, were to be disregarded. The court rejected this doctrine (despite the fact that it had already been unanimously accepted by the House of Lords in *Ramsay v I.R.C.*[1982] AC 300).

However, one ought to note the cautious words of Keane J. (as he then was) writing extra-judicially,²³

“...it should be pointed out that, apart from any other difficulties, it is most likely to arise in cases where the effect of the alterations will be to ease the tax burden on the beneficiaries. It remains to be seen whether the courts would consider it appropriate to facilitate such an objective.”

4.18 The question, therefore, arises whether a prohibition on variations for this purpose ought to be incorporated into our legislation. South Australia - alone of any of the jurisdictions which have Variation of Trusts legislation – deals specifically with variations to reduce taxation. *The Trustee Act, 1936*, s.59E(3)(c) states that the Court's approval will not be granted if the application is "substantially motivated by a desire to avoid, or reduce the incidence of tax."²⁴ We are opposed to any similar restriction in Irish legislation, on several grounds.

4.19 First, the variation of trusts is just one of many financial rearrangements by which tax can be avoided. If tax avoidance is to be tackled, it ought to be done in a manner that applies equally to these other arrangements, rather than targeting the variation of trusts specifically. To do otherwise would be to adopt an inconsistent and piecemeal approach to tax avoidance. In fact, the legislature, in the last decade or so, has established a wide-ranging and sophisticated battery of laws with which to deal with tax avoidance.²⁵ These include section 811 of the *Taxes Consolidation Act, 1997*.²⁶ Put briefly (and the actual text of the provision is four pages long) this provision seeks to prevent any advantage being obtained from what, in the "opinion of the Revenue Commissioners...is [primarily] a tax avoidance transaction".²⁷ The provision goes on to state that where there is tax avoidance (as defined in the provision) then the Revenue Commissioners may take what steps they wish in order to ensure that "the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned." These steps include: "allow[ing] or disallow[ing] any deduction...or recharacteris[ing] for tax purposes the nature of any payment or other amount."²⁸ The omission of an explicit restriction on tax avoidance from our proposed legislation would not deprive the Revenue of any of its usual powers under this, or any other, section.

4.20 There is a further principled objection to the blanket prohibition of all variations which happen to minimise a trust's exposure to tax. That is that many, if not most, of these trusts will have been conceived in ignorance of future family and

²³ Keane, *Equity and the Law of Trusts in the Republic of Ireland*, (Butterworths, 1988) p.130

²⁴ Inquires to South Australia for more information elicit the response (from the Attorney General's Office) that the section does to appear to have been very much used, perhaps because it will be difficult to predict in any particular case, whether the court will be minded to vary a trust and because it cannot be used merely to achieve tax advantages.

²⁵ Note in particular the *Finance Acts 1993-1996* which contain general anti-avoidance mechanisms for trusts.

²⁶ Originally section 86 of the *Finance Act, 1989*

²⁷ Sub-section (5)(a)

²⁸ Sub-section (6)(b)

taxation developments, and will have become extraordinarily tax-inefficient. Far from the world of high finance, most applications are likely to emanate from modest, antiquated or badly drafted trusts which happen to have been unexpectedly caught in a web of soaring taxes. It seems unfair to single out these rearrangements - ahead of all others - for special tax avoidance measures.

4.21 In summary, it has been stated in Britain, in the present context,

"indeed, it would be a very hard principle of taxation if people were to be compelled to keep property in order that they should be liable to pay tax on it... If anyone wants to say that dispositions of capital should be made illegal because they involve a loss to the Revenue, we shall give careful consideration to that view, but let us do it generally and not in relation to this limited class."²⁹

The last sentence from this quotation seems especially sensible: in principle anti-avoidance law ought to apply generally and according to objective principles, and not depend upon the random accident of whether property happens to be caught in an antiquated trust.

We accordingly recommend that there is no need for any special provision along the lines of the South Australian section, quoted above, since we assume that the general body of tax law applies here, as it does to other areas.

²⁹ OFFICIAL REPORT, 7th November, 1949; Vol. 469, c. 910 quoted by the sponsor of the 1958 Bill at Hansard Vol. 579, Vol. 778

CHAPTER FIVE: WHOSE CONSENT IS DISPENSED WITH?

A. Policy Concerns

5.01 Most statutes, allowing for the variation of trusts, contain an exhaustive list of persons on whose behalf the court may give its consent to a proposed rearrangement. The scope, drafting and interpretation of these lists are crucial factors in determining the reach and effect of Variation of Trusts legislation. Broadly speaking, there are two policy justifications underpinning these lists of categories of persons. These are:

Category one: these are included because their personal circumstances (infancy, incapacity or not being born) make it impossible to secure their actual consent.

Category two: others are included because their interests are so conditional that it is not worth the time and trouble of securing their consent and, secondly, and possibly more important, because it was probably thought wrong to allow them a power of veto.

5.02 These two policies may occasionally overlap, but in the discussion that follows, we examine both policy justifications, in turn. In relation to each we use examples from the English *Variation of Trusts Act 1958*, although strikingly similar legislative provisions are in existence elsewhere.

B. Category one: persons who cannot consent

5.03 The straightforward policy underpinning this category of persons is that the courts' jurisdiction ought to extend to those who, for whatever reason, are incapable of consenting to the variation. The *Variation of Trusts Act 1958*, gives effect to this policy by means of section 1 (a) and (c), which describe, respectively:

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or...
- (c) any person unborn.

The policy articulated above, is equally relevant to beneficiaries who cannot be identified or found. Legislatures elsewhere have gone beyond the English prototype to include 'any unknown person,'¹ 'any missing person,'² and 'any person whose whereabouts are unknown.'³

¹ *Trustee Act, 1956 (NZ)* section 64A

5.04 While we agree with the extension of jurisdiction to include missing or unknown persons, we have minor reservations with the above formulations. The natural meaning of a person being 'unknown' is that the party seeking them does not know of their existence, whereabouts, or identity. However, this may simply be because the seeker does not employ sufficient industry, resources etc. in the hunt. In such circumstances, it is surely not our intention that the court should be empowered to approve a variation. Thus, a more objective test is preferable. Also, on its own the word 'person' is also rather vague. We would prefer 'identity, existence or whereabouts'.

Accordingly, we propose the following list of persons:

- (a) any person having an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,⁴
- (b) any person unborn,
- (c) any person whose identity, existence or whereabouts cannot be established by taking reasonable measures,

C. Category two: persons with conditional interests

5.05 In this second category, the courts' intervention is justified by reference to the remote nature of the beneficiary's interest, rather than their ability to consent. As such, it is important to note that this category of persons can and will extend to fully competent adult beneficiaries. The basic issue here is how contingent and insubstantial a beneficiary's interest should be before the law says that the court should be empowered to consent on behalf of that beneficiary. Ultimately, in regard to this policy question, there are three realistic options. The Court might be authorised to approve on behalf of a beneficiary whose interest is:

contingent;
vested in possession; or
vested in interest.

The problem of the recalcitrant adult beneficiary

5.06 In the context of these three options, we ought to consider a situation in which the beneficiaries of a trust will include fully competent, ascertainable adults with the ability and desire to object to a given variation. This fact forces us to

² *Trustee Act, 1987, (Manitoba)*, section 59(5)(d)

³ *Tasmanian Variation of Private Trusts (Report No 51) Draft Bill*

⁴ The term "assenting", rather than "consenting", has been used because it does not preclude approval of an existing arrangement. By contrast, the term "consent" would seem to suggest that no arrangement can be possible without such "consent". The chosen term has the added advantage of following the English precedent (*Variation of Trusts Act, 1958*) which, as stated in the Report has been widely tried and tested.

consider the extent to which it would be acceptable to override the wishes of a recalcitrant but competent adult beneficiary. Depending on one's response to this question the category of conditional interests to which this power extends will be narrowly or broadly drawn.

5.07 On one side of the debate, the possibility exists that a recalcitrant adult might thwart the wishes of the other beneficiaries solely to extract an unreasonable level of compensation (which would be a form of blackmail). In the eyes of some commentators, the prospect of such obstructionist tactics justifies empowering the courts to consent on behalf of adults, including those whose interests are vested in interest or in possession. McClean, criticising the failure of the English and Canadian legislation to go this far, writes:⁵

"The consent of all the beneficiaries being a prerequisite to a variation under the present Act the refusal of even one adult beneficiary (with possibly the minutest of interests) to co-operate would render the Act inoperative. There would be some well justified reluctance to acting in defiance of the wishes of an adult when in general the law leaves him to conduct his affairs as he sees fit. On the other hand much may be said for the argument that the courts should have a residual authority to overrule the recalcitrant adult when his objections are blocking a proposal obviously beneficial to the trust as a whole; in such a case his is not the only interest involved. One would imagine that the occasions on which such a power had to be exercised would be exceedingly rare, but it is not undesirable for it to be there before rather than after the need for its use arises."

5.08 The obvious, and we believe, persuasive response to these arguments is that the extension of the court's power to all adult beneficiaries, irrespective of the nature of their interests, would constitute an unwarranted interference with the adult's vested property rights. The adult, no matter how unreasonably, has the right to withhold his consent and to bargain with the other beneficiaries. It is also true that, with one exception, none of the other jurisdictions which has Variation of Trusts legislation has adopted the option of extending the court's jurisdiction to adults vested in interest or in possession and this has not, to judge by the case-law, led to difficulty.

In response to this basic policy question, we recommend that the court's power to consent on behalf of a recalcitrant adult should be strictly limited to those cases where the adult's interest is merely contingent.

Paragraph (b) of the English Variation of Trusts Act

5.09 In England, the policy on this point has been implemented mainly by way of section 1 (b) of the 1958 Act, which reads as follows:

(b) any person (whether ascertained or not) who may become entitled directly or indirectly, to an interest under the trusts as being at a future date

⁵ McClean, *Variation of Trusts in England and Canada*, [1965] Canadian Bar Review 181, 236

or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or...

Broadly speaking, the thrust of this two-part provision is to establish a double-contingency test.

5.10 The first part of the paragraph authorises consent on behalf of a person only if he 'may' become entitled...to an interest' in the future, thereby excluding persons who, at the date of the application are entitled to an interest. The important and surprising restriction which, emerged from *Knocker v Youle*⁶ is that the word "interest" includes even a contingent interest.⁷ In *Knocker*, there was a trust, created in 1937, in favour of the settlor's daughter, with default clauses that could cause the property to be held on trust for her cousins. There were seventeen cousins, some of whom lived in Australia so that it was not practical to get their approval to a proposed variation. However, Warner J held that he did not have jurisdiction to grant approval on their behalf because a person who has an actual interest directly conferred upon him or her by settlement, albeit a remote, contingent interest, cannot properly be described as one who "may become" entitled to an interest, and hence falls outside the scope of even the first part of paragraph (b).

5.11 This interpretation has been severely but reasonably criticised by Riddal,⁸ on the basis that such a broad interpretation of 'interest' leaves precious little of substance to paragraph (b) and that it was not what was intended by the legislature. However there has been no subsequent case on the point and it is accepted as the law in England. If a similar form of words were used here, there is a strong chance that the English authority would be followed.

5.12 The second part of paragraph (b) contains a proviso, further restricting the scope and application of the section. It can be paraphrased as follows: despite the fact that a person's interest is subject to some future event, the court cannot consent if the person would have had an interest in the trust, if the event that would render them a beneficiary had in fact occurred. Taken together, the net result of the main part and the proviso is that a person's consent may be dispensed with only if his interest depends on *two* distinct contingencies being satisfied, rather than merely one contingency. Plainly, this further reduces the scope of paragraph (b), a point which is illustrated by the English High Court case of *Re Moncrieff's Settlement*

⁶ [1986] 2 All ER 914,

⁷ In *Knocker* [1986] 2 All ER at 916, Warner J stated:

"Each of the cousins is, however, entitled now to an interest under the trusts, albeit a contingent one (in the case of those who are 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. *None the less, it is described in legal language as an interest*, and it seems to me plain that in this Act the word 'interest' is used in its technical, legal sense. Otherwise, the words 'whether vested or contingent' in para (a) of s 1 (1) would be out of place." (Our italics)

⁸ J G Riddall [1987] Conv. 144, P. Luxton 136 NLJ 1057-59

Trusts.⁹ In this case, a trust was established: "in favour [of M] then for such of her issue as she appointed, and in default of appointment, to those entitled on intestacy." The court's approval to a variation was sought on behalf of M's adult adopted son. The Court rejected this application since the son fell within the scope of the proviso, in that if M had died, he would have had an interest. However, there was also before the court, an application for approval on behalf of the next of kin. This approval could be granted on the basis that the next of kin would be entitled to an interest only on two conditions being satisfied, namely the death of both M and her son.

5.13 To address the problems thrown up by paragraph (b), one solution is to simply omit the text of the proviso, thereby broadening the scope and usefulness of the provision. This option has been implemented in the Canadian provinces and was recommended in Tasmania.¹⁰ However, this suggestion falls short of dealing with the interpretative difficulties with the first part of the provision, explained in paragraphs 5.10 and 11. The threat of a very restrictive interpretation, as occurred in *Knocker*, would remain. Another line of criticism which, could be made of paragraph (b) stems from the simple policy that law should not be unduly complicated and uncertain of application. It is suggested that paragraph (b) fails on each score.

5.14 This negative conclusion does not settle what substitute for paragraph (b), we should recommend. The fine distinctions contained in paragraph (b) are not the result of unskilful drafting but of a fundamental policy choice. This is the policy, discussed at paragraphs 5.06-08, that the court should not be empowered to give its consent on behalf of a competent adult with an interest under a trust. We agree with this stance but have decided to implement it in much simpler terms than are found in paragraph (b). Returning to our list of three options set out in paragraph 5.05, we propose that the courts should be empowered to consent on behalf of a beneficiary with a contingent interest, but not on behalf of a beneficiary with an interest vested in either interest or possession. This straightforward proposal will, we hope, avoid some of the confusion and restrictive interpretation endemic in the language of paragraph (b).

Therefore, we recommend that the simple formulation "any person with a contingent interest should be included"

D. A third category?

5.15 A final category of persons on whose behalf the courts are empowered to consent, under the English *Variation of Trusts Act, 1958*, s.1(d), is described as follows:

⁹ [1962] 1 WLR 1344

¹⁰ Tasmanian Law Reform Commission *Report on the Variation of Private Trusts* (No 51, 1987), para. 7. 10.

any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined.

The “protective trusts” mentioned in this paragraph, are trusts where restraints on alienation are imposed on beneficiaries.¹¹ These “spendthrift trusts”, as they are sometimes called, are designed to protect the trust property in cases of bankruptcy and/or to limit the ability of married women to alienate their interests. The English legislation, quoted above, permits the court to consent on behalf of persons who may become entitled to an interest in the trust property if the restraints are breached.

5.16 A similar provision would be unlikely to be of any use in an Irish context. Firstly, this category of persons will be subsumed within and catered for by paragraph (b) of our proposed section which will cover “any person with a contingent interest.” Secondly, protective trusts are uncommon in Ireland. Whilst in England¹² and in Northern Ireland,¹³ they can be easily created using the shorthand stipulation that the property is to be held on, “protective trusts.” This facility is unavailable in Ireland. Finally, the provisions of the *Married Women’s Status Act, 1957*, s.6, curtail the restraints which can lawfully be placed on alienation by a married woman. In sum, the provision would, we think, be superfluous and irrelevant in an Irish context.

Accordingly, we do not recommend the inclusion of any equivalent to paragraph (d) of the English 1958 Act in the Irish legislation.

E. Recommendation

5.17 *Assembling our recommendations in this Chapter, leads to the following draft list of persons on whose behalf the court may consent:*

(2) The court may by order approve an arrangement under *subsection (1)* of this section on behalf of the following persons:

(a) any person having an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,¹⁴

(b) any person unborn,

¹¹ See generally, Wylie, *Irish Land Law*, (Third Edition, 1997) para.9.083-084.

¹² *Trustee Act, 1925*, s.33 See generally, Hanbury and Martin, *Modern Equity*, (Fourteenth Edition, 1993) pp.192-3

¹³ *Trustee Act (NI) 1958*, s.34

¹⁴ The term “assenting”, rather than “consenting”, has been used because it does not preclude approval of an existing arrangement. By contrast, the term “consent” would seem to suggest that no arrangement can be possible without such “consent”. The chosen term has the added advantage of following the English precedent (*Variation of Trusts Act, 1958*) which, as stated in the Report has been widely tried and tested.

(c) any person whose identity, existence or whereabouts cannot be established by taking reasonable measures,

(d) any person having a contingent interest under the trusts, other than a person to whom *paragraph (a)* of this section applies.

CHAPTER SIX: SPHERE OF APPLICATION

A. Which Trusts?

6.01 To which categories of trust should the proposed Act apply? To which should it not apply? We believe, first, that it should apply to all private trusts. But we consider that it should not extend to 'implied,' 'resulting,' or 'constructive,' trusts. It is unnecessary, for present purposes to go into the definition of these categories nor into the often blurred distinctions between them.¹ In simple terms, implied trusts have been found to exist in a number of situations, on the basis that they are necessary to give effect to the intention of the parties. A resulting trust is a particular case of an implied trust, in which the beneficial interest reverts to the settlor or his estate. With a constructive trust, the trust arises by operation of law, independent of the intention of the parties. A classic example is where a trustee makes a profit out of the trust property, in which case that profit must be held on a constructive trust for the beneficiaries. What may be regarded as a statutory constructive trust would be a trust that arises where an infant is entitled to an intestate estate.²

6.02 In each of the situations outlined in the previous paragraph, particular policy needs, often far removed from the usual field of trusts, have made it convenient for the law to superimpose the well-established corpus of trust law. Often (for instance a resulting trust in which the settlor holds the entire beneficial interest), there will be no place for Variation of Trusts legislation. In any case, in these circumstances, we do not consider it appropriate to extend to such trusts, the power of variation which is intended for the ordinary personal trust.

6.03 In order to achieve these objectives, we recommend the following wording which catches the trusts which we wish to be within the scope of the proposed legislation and which is used in most other jurisdictions:

"Where property...is held on trusts arising...under any will, settlement or other disposition..."

B. Revocable Trusts

¹ For more detail, see Delany, *Equity and the law of Trusts in Ireland* (Round Hall, Sweet and Maxwell, Second Edition, 1999) pp 67-69; Wylie, *Irish Land Law*, (Third Edition) pp.539-53

² *Succession Act, 1965*, ss 57, 58. Note that the *New Zealand Trustee Act, 1956*, s 64 A (1) but not the English and other Acts, extends to trusts arising on intestacy.

6.04 We have considered whether or not to exclude revocable trusts from the scope of the legislation. These are trusts in which the trust instrument states that the settlor, or occasionally some third party, such as a spouse, may revoke the trust. One type of situation in which this device is used is where a farmer creates a trust of the family farm in favour of his son, but wishes to retain some ‘leverage’ in case the son does not look after the farmer or his wife in their old age. In form there may be many categories of revocable trust. First, the trust may be unqualifiedly revocable, so that the settlor will have a veto over any variation of which he disapproves and, consequently, the Act will usually not mean much in practice. However other revocable trusts are only revocable on the happening of some event or the lapse of some period of time. As long as the event has not occurred or the time has not elapsed, the legislation would be viable and we see no reason why, in such cases, the beneficiaries should not have the possibility of using the legislation. Even in regard to the first category of trust, which is unqualifiedly revocable, no harm is done by having the legislation available in principle. An important practical point is that any form of words, which would exclude such trusts would have to be very complicated.

We recommend that the balance of advantage lies in not attempting to exclude revocable trusts or any particular category thereof.

C. Pension Schemes

6.05 Pension schemes are usually set up under trusts, and benefits to be made thereunder are commonly made contingent on beneficiaries attaining a pensionable age. The question of whether this marginal category of trusts ought to be excluded from the scope of the proposed legislation is addressed in the paragraphs, below.

The current position in Ireland

6.06 At present, there is no legislative solution, in the *Pensions Act 1990* or elsewhere, available to Irish pension schemes which require some alteration in the terms of their trust deeds.³ Admittedly, most pension schemes will include their own clause enabling amendment. However, for those that have no such clause, or where the necessary change falls outside the scope of the clause, there is currently no relief.

The position in England

6.07 The English *Variation of Trusts Act, 1958*, contains no explicit reference to pension trusts, and the Act’s application to such trusts has only been tangentially addressed by the courts. However, the wording of section 1(1) of the Act, “trusts arising...under any will, settlement or other disposition,” gives no reason to suppose that pension trusts are excluded from its provisions. The issue was raised in *Mason v. Farbrother*,⁴ which concerned a pension fund for employees of a co-operative

³ This statement is subject to the existence of the four heads of inherent jurisdiction outlined at paras.1.04-07 of this Report.

⁴ [1983] 2 All ER 1078

society. The Court was invited to expand the trustees' existing powers of investment. The jurisdiction of the Court to do so was considered under three heads: the inherent 'compromise jurisdiction' of the Court; the *Trustee Act, 1925*, s.57(1); and, briefly, the *Variation of Trusts Act, 1958*. Ultimately, the 1958 Act was not relied upon "perhaps because of difficulties in connection with the representative parties,"⁵ but it was not doubted that the power to vary embraced pension trusts.

The position in Canada

6.08 The application of the relevant Canadian legislation to pension trusts has been confirmed by the Canadian courts in three important cases. In *Re Sandwell & Co Ltd*,⁶ *Re Versatile Pacific Shipyards*,⁷ and *Re Bentall Corporation v. Canada Trusts Company*,⁸ the consent of the Court was sought on behalf of "contingent beneficiaries," that is, beneficiaries who may or may not derive a benefit by an appointment or upon the death of another beneficiary. The provisions of the enabling Act were in point and were used.

The case for excluding pension trusts

6.09 Firstly, the vast majority of modern pension trusts enjoy an in-built flexibility, by way of an amendment clause which will, in most cases, negate the need for Variation of Trusts legislation. Secondly, the proposed legislation might appear to sit uneasily with the policy, running throughout pensions law, in favour of protecting members' interests. It may result in the *appearance* of alterations to the pension trust being made over the heads of contributors who have not been consulted.

6.10 Finally, the legal framework for pensions involves both a trust for the beneficiaries/members and also a scheme or contract between employer and employee under which contributions are paid. It might be thought that a variation in this context would upset the contractual relationship between employee and employer, and even facilitate a breach of contract. However, this fear, is misconceived. The general basis of the proposed legislation is that a variation which may be approved by the court (on behalf of the unborn, unascertained etc.) goes no further than a variation which could be approved, on his own behalf, by a fully competent beneficiary.

The case for including pension trusts

6.11 The strongest argument in favour of the inclusion of pension schemes, within the scope of the proposed legislation, is the existence of a real, though occasional, need for this type of facility in a pensions context. In almost every pension fund there will exist a group of beneficiaries whose interests are deferred or

⁵ *Per* Blackett-Ord VC, *ibid.*, p.1086

⁶ (1985) 17 DLR 4th 337

⁷ (1991) 84 DLR 4th 761

⁸ [1996] BCJ 1760 Note also the case of *In re Dalhousie Staff Association Contingency Fund*, (1999) 87 ACWS 3rd 1257 where the Nova Scotia Supreme Court refused to approve a variation because it "would be of no benefit to future members of the DSA," *per* Hamilton J.

contingent. In both cases, it is eminently likely that most or all of these beneficiaries will be unknown or infants or both. Thus, where difficulties arise, the facility provided by Variation of Trusts legislation will be of particular value. The Canadian cases, mentioned earlier, most of which take place against a backdrop of financial difficulties on the part of the employer, are testimony to the usefulness of this legislation in a pensions context. The dearth of English cases on this point may be attributable to the presence, in that jurisdiction, of the *Trustee Act, 1925*, s.57(1), which enables the courts to expand trustees' administrative powers. In addition, the presence in most pension trusts of an in-built amendment clause, does not obviate the need for Variation of Trusts legislation in the case of the few trusts which lack that element of flexibility. Also, a proposed variation might conceivably fall outside the terms of the amendment clause, and consequently require court approval.

6.12 Finally, the apprehension of abuse, referred to in paragraph 6.09, is unwarranted in the context of Variation of Trusts applications. Every case will necessarily involve the courts and will be subjected to a strict scrutiny by reference to the test of "benefit" to the beneficiaries. Also, pension trusts will continue to be controlled by the provisions of the *Trustee (Authorised Investments) Act, 1958*, the *Pensions Act, 1990*, and to be monitored by the Pensions Board.⁹

On balance, we recommend that pension trusts be included within the scope of the proposed legislation. This could be done either expressly or merely by using the standard form of words proposed at paragraph 6.03. The former is unnecessary and the latter is preferable as it avoids any technical difficulties involved in formulating a definition. Accordingly we would use the words proposed at paragraph 6.03

D. Charitable Trusts

The position in Ireland

6.13 As the law currently stands, charitable trusts which run into the sorts of difficulty for which Variation of Trusts legislation is designed have the following two options outlined in the next two paragraphs. We shall first consider these and then review the position in other jurisdictions, before addressing the basic question of whether Variation of Trusts would add anything, in the context of charitable trusts.

1. Cy près

6.14 At common law, this jurisdiction could be exercised only where two preconditions were satisfied. Firstly, it had to be demonstrated that it was impossible or impracticable to give effect to the donor's wishes in the precise terms which he intended. Secondly, the terms of the trust had to indicate a "general (or paramount) charitable intention," on the part of the donor.¹⁰ Although section 47 of

⁹ The Pensions Board publishes the *Trustee Handbook*, and *Codes of Practice for Trustees of Occupational Pension Schemes*. See also, the Irish Association of Pension Funds book of guidelines entitled, *Investing the Assets*.

¹⁰ It ought to be noted that this requirement of "general (or paramount) charitable intention" applies only to cases of initial failure of charitable purposes, and not to cases of subsequent

the Irish Charities Act 1961 laid down broader parameters for the exercise of this jurisdiction, section 47(2) preserved the test of “general (or paramount) charitable intention.”¹¹ Not all charitable trusts will satisfy this test.¹²

2. *Commissioners of Charitable Donations and Bequests*

6.15 Under the *Charities Act, 1961*, section 29, the Commissioners of Charitable Donations and Bequests were given jurisdiction to frame a cy-près scheme. This jurisdiction applies only to charitable gifts of less than £250,000,¹³ and the normal requirement of “general (or paramount) charitable intention,” continues to apply.¹⁴

The question remains, should the proposed legislation also encompass charitable trusts?

The position in England

6.16 The English *Variation of Trusts Act, 1958* applies to, trusts arising “under any will, settlement, or other disposition.” While it is silent as to its applicability to charitable trusts specifically, in *Re Roberts’ Settlement Trusts*,¹⁵ Vaisey J. confirmed that the Act conferred jurisdiction to approve variations to the terms of charitable trusts.¹⁶ In addition to the *Variation of Trusts Act, 1958*, the English courts can vary the terms of a charitable trust under the *Trustee Act, 1925*, Section 57 and the *Charitable Trusts Act 1853-1925*. In practice, these alternative means of achieving a trust variation have proved to be more useful and are availed of more frequently than the 1958 Act.¹⁷ However, no harm appears to have resulted from the co-existence of three similar statutory schemes.

failure of charitable purposes. Delany, *Equity and the Law of Trusts in Ireland*, (Round Hall, Sweet and Maxwell, Second Edition, 1999), pp.353 *et seq.*

¹¹ Section 47 (2) states that the provisions of the Act are not “to affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près except insofar as these conditions require failure of the original purposes.”

¹² Hanbury and Martin, *Modern Equity*, (Fourteenth Edition, 1993) pp.439 *et seq.*

¹³ Court and Court Officers Act, 1995, Section 52(a).

¹⁴ Under the *Charities Act 1973*, section 4, the jurisdiction of the Commissioners was expanded to cover charities established or regulated by statute or charter.

¹⁵ [1961] TR 401. Since charities were not within the class of persons to whom the Act applied, the Court was asked to approve the variation, not on behalf of the charity, but on behalf of any future wife of the settlor. As is customary, the interests of the charity were represented by the Attorney General.

¹⁶ This extension was confirmed obiter in *Re Allen’s Settlement* [1959] 3 All ER 673 and in *Trustees of British Museum v. Attorney-General* [1984] 1 WLR 418. See also: *Halsbury* (Fourth Edition) Vol.5(2) para.137, n.6

¹⁷ “Alternatively, jurisdiction may be exercised under the *Variation of Trusts Act 1958*; such cases can rarely arise.” *Halsbury* (Fourth Edition) Vol.5(2) para.137, n.6

The position in Canada

6.17 Again, the Canadian statutes are silent on the issue of charitable trusts. In *Re Canadian National Institute for the Blind*,¹⁸ the Supreme Court of British Columbia proceeded on the assumption that the *Trust Variation Act R.S.B.C., 1979*, extended to the area of charitable trusts. Similarly, in *Re Baker*,¹⁹ the applicability of the equivalent Ontario statute was not disputed. In both, the proposed variations were rejected because the persons on whose behalf the Court was supposed to consent were not identified.²⁰ This is a common stumbling block in these charitable trust cases.

The position in New Zealand

6.18 In *Baptist Union of New Zealand v. Attorney General*,²¹ it was confirmed that the *Trustee Act, 1956, s.64*, applied to charitable trusts. The proposed variation was rejected, but for reasons unconnected with the charitable nature of the trust.

The recommended approach

6.19 At first glance, it might appear that the courts' Variation of Trusts jurisdiction will overlap, to a considerable extent, with the existing jurisdiction of the Commissioners of Charitable Donations and Bequests, as well as with the courts' existing *cy-près* jurisdiction. This might suggest that the establishment of Variation of Trusts legislation in the present field would, at best, cause confusion, and at worst, give rise to conflicts between the two decision making bodies over the appropriate course of action.

6.20 In reality, the overlap between the existing and proposed jurisdictions will be very slight. Admittedly, *cy-près* and Variation of Trusts both have the effect of altering the terms of a trust instrument. However, the two facilities are appropriate to two distinct situations, which are unlikely to coincide often. *Cy-près* is the appropriate remedy where the purposes of a charitable gift cannot be carried out. Variation of Trusts legislation will be of relevance *only* in cases where there is a beneficiary who is not *sui juris*, who cannot be found or who has a contingent interest. A charity, as a legal corporation, is always *sui juris*. This was noted in *Re Roberts' Settlement Trusts*,²² where it was stated, *obiter*, that the Court had no jurisdiction to give its consent on behalf of the charity itself. The net effect of these observations is that any possible overlap between *cy-près* and Variation of Trusts would be confined to those marginal cases where there is a gift to a charity *and* a gift to a person who falls within one of the categories on whose behalf the court is empowered by Variation of Trusts legislation to consent. The other marginal case in

¹⁸ [1981] 9 ACWS 2d 327

¹⁹ [1984] 11 DLR 4thed. 430

²⁰ *Re Hessian* (1996) 153 NSR(2d) 122

²¹ [1973] 1 NZLR 42

²² [1961] TR 401. Since charities were not within the class of persons to whom the Act applied, the Court was asked to approve the variation, not on behalf of the charity, but on behalf of any future wife of the settlor. As is customary, the interests of the charity were represented by the Attorney General.

which an overlap might possibly occur is where the charity's interest in the trust property is contingent. It is further contended that, even if there were a case in which the old and new jurisdictions were to coincide, trustees would usually prefer to approach the Commissioners, rather than going through the trouble and expense of an application to court.

6.21 A further point is that conflicts between the courts and Commissioners are unlikely to arise, for two reasons. Firstly, the existing practice of the courts in relation to *cy-près* applications is to ascertain the views of the Commissioners. The Commissioners must be put on notice of every *cy-près* application to the Court and will usually signify their consent in writing.²³ It is unlikely that this co-operative practice will be abandoned in the context of Variation of Trusts applications. Secondly, the likelihood is that in all but a few exceptional cases, the same proposed rearrangement will not be brought before both the court and the Commissioners, without some alteration having been made to its terms. Thus, if the two bodies reach different decisions, it will probably be because they will have been presented with substantially different proposed variations.

6.22 Finally, as things stand, not all trusts which are classified as "charitable" under the principles set out by Lord Macnaghten are amenable to *cy prè*s jurisdiction because they fail to satisfy the more stringent test of "general (or paramount) charitable intention."²⁴ If we exclude all charitable trusts from the reach of Variation of Trusts legislation, those charitable trusts which fall between two jurisdictions will be unjustifiably left without any solution when difficulties arise. This seems particularly unfair, bearing in mind the altruistic nature of the settlor's intentions.

Accordingly, we recommend that charitable trusts be included within the scope of the proposed legislation. This can be effected by making no modification to the draft proposal set out at para.6.03, above.

E. Pre-existing Trusts

6.23 The English *Variation of Trusts Act 1958* applies, according to section 1(1), to "trusts arising, whether before or after the passing of this Act". This prompts the question of whether the Irish legislation should extend to cover trusts which were already in existence when the legislation was enacted. Certainly, if it does not, then a lot of the good which it might otherwise achieve, would be lost.

6.24 But is there any disadvantage or even a constitutional flaw in giving the legislation retrospective effect? Given that any variation must benefit the person(s) whose consent has not been given to the variation, then it is hard to see that anyone's constitutional property rights or other interest, has been violated. We have already expressed doubts about the possibility of any infringement of the settlor's

²³ *In Re Worth Library* [1994] 1 ILRM 161; *In Re Deighton* (1952) 86 ILTR 127

²⁴ *Commissioners for Special Purposes of Income Tax v. Pemsel*, [1891] AC 531, 583 *per* Lord Macnaghten. See generally, Delany, *Equity and the Law of Trusts in Ireland*, (Round Hall, Sweet and Maxwell, Second Edition, 1999) pp.290-5

property rights. In any event, if the settlor's rights are affected – and we do not think that they are – this is not, principally, a consequence of any retrospective operation of the law.

We therefore recommend that the Variation of Trusts legislation apply equally to trusts arising both before and after the passing of the Act.

F. Pre-existing Powers

6.25 In Chapter One, we described the four existing grounds upon which trusts can currently be varied. Strictly speaking, the introduction of Variation of Trusts legislation, which boasts a much wider remit, renders these existing powers obsolete. However, circumstances may arise where it is more convenient or appropriate for an applicant to rely on these existing methods of effecting a variation. We conclude that there is no reason to disturb any of the other (rather few) powers, statutory or inherent, which a court has or may have to vary trusts.

Accordingly we recommend, as a matter of caution, that the legislation should state that it does not derogate from any such powers.

G. Settlements

6.26 We have considered whether the proposed legislation allowing for the variation of trusts, should extend to the variation of strict settlements, as is done in many of the other jurisdictions.²⁵ At first sight, the case for doing so appears strong since the two institutions have a similar function, namely as a structure to support and convey limited interests. However, there are differences which mean that the problems which necessitate *Variation of Trusts* legislation do not arise in the case of settlements. By today, the principal difference is that the Settled Land Acts 1882-90 confer upon the tenant for life of a given settlement substantial authority,²⁶ which includes a wide discretion in most important areas. Hence, inclusion of settlements within *Variation of Trusts* legislation would be superfluous.

H. Statutory Trusts

6.27 In very rare cases, trusts are established under a private Act of Parliament. These trusts are set up in exceptional circumstances and are governed by special legislation of their own.

In light of the peculiar nature of these trusts, we recommend that nothing in the Act shall apply to trusts affecting property settled by Act of Parliament.

²⁵ For England, see Settled Law Act, 1925, s.1; Cheshire, *Modern Law of Real Property* (13th ed.) p.185 See also Law Reform Committee Sixth Report (Cmnd. 310) paragraphs 12, 25 and 27 (4)

²⁶ On which see Wylie *Irish Land Law* (Butterworths, Third Edition) paras.8. 019 – 027 and Lyall, *Land Law in Ireland*, (Oak Tree Press, 1994) Chapter 14. Settled Land Act, 1882, s.2(1). See also; The 1882 Act definition is the same as that in the English 1925 Act.

I. Recommendation

Assembling our recommendations in this Chapter, we propose that the various trusts intended to be brought within the legislation are adequately described in the following standard, and simple, form of words:

Section 1. "Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition..."

A. Forum

Concurrent Circuit Court and High Court Jurisdiction

7.01 In the experience of practitioners, with whom we have consulted, it is more often than not smaller trusts that experience the sorts of problems which Variation of Trusts legislation is designed to combat. For this reason, it is reasonable to consider whether the Circuit Court ought to be given concurrent jurisdiction, with the High Court, to consider such applications. Applications to the Circuit Court would have the advantages of being faster and cheaper than equivalent High Court proceedings. Indeed, while the English legislation originally confined jurisdiction to the High Court, it was amended by the *County Courts Act 1984, section 23 (b)* so as to confer jurisdiction on the county courts.¹

7.02 We can see no countervailing policy against this extension. Most applications will not be contentious.² Indeed, even if they were contentious, the Circuit Court is not unaccustomed to handling hotly contested cases. For example, the Circuit Court has already been given jurisdiction in relation to the delicate question of family adjustment orders in separation and divorce proceedings.³ In these cases, the only restriction on the Circuit Court's jurisdiction is that, "where the rateable valuation of any land to which proceedings in the Circuit Court exceeds £200, that Court shall *if an application is made to it* in that behalf by any person having an interest in the proceedings, transfer the proceedings to the High Court..."⁴ (Our emphasis).

7.03 One question which arises is whether there should be a similar limitation in the present context. It might be more meaningful (since the assets of a trust will often be funds, rather than land) for the qualification to be measured by reference to a financial amount rather than a land valuation. In any case, given that this is also a matter of general legislative policy regarding the extent of the Circuit Court's

¹ See, Hansard, Fourth Edition, paragraph 923. This County Court jurisdiction is limited to cases where the trusts fund or property does not exceed in amount or value the County Court limit. Otherwise, under the *Variation of Trusts Act 1958* (as amended) the parties cannot by consent confer jurisdiction on the County Court.

² This assertion is based on the advice of the Land and Conveyancing Law Working Group, and on the English experience of Variation of Trusts applications, spanning over 40 years. See also the comments of Mummery J "for a jurisdiction invoked thousands of times over almost forty years there are remarkably few reported cases on its construction". (*Goulding v James* [1997] 2 AER 239, 241)

³ Family Law Act, 1995, s.38; Family Law (Divorce) Act, 1996, s.38

⁴ 1995 Act, s.38; 1996 Act, s.38 (2).

jurisdiction, we think it best not to make a specific recommendation but to leave this issue to be dealt with as the responsible authorities consider best, at the time when our proposals are being put into legislative form.

Accordingly, we recommend that the Circuit Court be given concurrent jurisdiction with the High Court in Variation of Trusts applications.

Open Court?

7.04 The next issue is whether or not these hearings should be held in open court. In the present context, a strong argument in favour of open hearings is that they would ensure, especially at the outset, some degree of uniformity in the exercise of the judicial discretion which is at the heart of the legislation. The analogous phenomenon of family law proceedings held in Chambers or *in camera*, has been frequently blamed for undesirable levels of inconsistency as between similar cases. Finally, in an Irish context, there is an added constitutional aspect to the case for open hearings. Article 34.1^o of the Constitution states that "...save in such special and limited cases as may be prescribed by law, [justice] shall be administered in public."

7.05 Persuasive as these arguments may be, in a general sense, we believe that there are compelling reasons for allowing Variation of Trusts applications to be heard in private, in certain circumstances. Many of these cases will concern infants and the private affairs of families, and it may be undesirable that such matters should be aired in public. This concern certainly underpins section 119 of the *Succession Act, 1965*, which provides that all section 117 proceedings "shall be heard in chambers." As to the constitutional policy of open hearings, it is important to note that this is not a blanket ban, and exceptions are envisaged in the text of Article 34.1^o. Furthermore, considerations pertinent to infants and families have been acknowledged in cases interpreting the parameters of Article 34.1^o.⁵ Accordingly, it seems likely that if, as we recommend, an express provision is included in the legislation, it would be constitutional by virtue of falling within the saver in the Article, namely, "...save in such special and limited cases."

7.06 To turn to the English approach, it is true that, at the inception of the legislation, a considerable number of applications were heard in open court. Latterly, however, the general scope and procedure under the legislation being settled, hearings in chambers are much more common.

7.07 It is clear is that, by virtue of Article 34.1^o, if nothing is said in the proposed legislation, applications will have to be heard in public, irrespective of the delicate nature of the issues involved. In *Re R Ltd*,⁶ a majority in the Supreme Court stated that Article 34 removed any *general* judicial discretion to have proceedings held in private and that such a discretion will only exist where expressly conferred by Statute.⁷ Bearing this in mind, we think it best to explicitly and unequivocally

⁵ *In re: R Ltd*. [1989] IR 126, 137-38 (*Semble*)

⁶ [1989] IR 126

⁷ See also, *De Gartori v Smithwick* [2000] ILRM 463, 476-477.

state in the legislation that the court has a discretion to hear an application *in camera*.

We recommend the inclusion in the legislation of the following provision, or something similar, "An application under this Act may be heard otherwise than in public."⁸

B. Procedure

Who should be represented?

7.08 Given the differing levels and configurations of the persons affected by a variation of a trust, there has, in other jurisdictions, been a good deal of discussion as to who should be represented at these applications. For instance, one judicial decision in England laid it down, as a general rule, that there should be separate representation of adult beneficiaries on whose behalf the court is asked to approve.⁹ But the contrary view has been taken in Scotland.¹⁰

7.09 Against the backdrop of these divergent views about *who* should be represented, the point with which we are immediately concerned is *whether* we should enact specific rules, either in legislation or in the Rules of Court, to designate those who may or may not be heard. A precedent for this exists in Tasmania, and states, "In any proceedings, the interests of all actual and potential beneficiaries of the trust shall be represented [and the Court may appoint counsel to represent the interests of any class of beneficiaries who are at the date of the proceedings unborn or unascertained]."¹¹ By contrast, most other jurisdictions have left the matter to be dealt with by way of judicial decision and practice statement.¹² Our preferred approach is dealt with in paragraph 7.11.

Who may apply?

7.10 We turn now to an analogous question: who should be entitled to make an application for a variation? The relevant foreign legislation, with one exception, is completely silent as to who may apply to have a trust varied. The question of standing is left entirely to the courts to decide. The exception to this general approach is the South Australian *Trusts Act, 1973*, section 59(c)(1), which confines the category of those who may apply for the court's approval to "a trustee or any person who has a vested, future or contingent interest in property held in trust.

Our preferred approach

⁸ A wide variety of statutory formulae are in existence. For a list, see Hogan and Whyte, *Kelly, The Irish Constitution*, (Third Edition, Butterworths) p.403.

⁹ *Re Whigham's S.T.* [1971] 1 WLR 831

¹⁰ See Harris, *op. cit.* pp. 27-29

¹¹ This is a conflation based in part on section 13(5) of the (Tasmanian) Trustee Act, 1994. The portion in square brackets is not to be found in the Act but only in the drafted legislation, recommended by the Tasmanian Law Reform Commission in chap. 7

¹² For England, see Supreme Court Practice 1988 Vol. 1, pp.1311-15.

7.11 In response to both questions, namely, who may be represented, and who may apply, we recommend an inclusive policy of allowing the courts discretion to exclude persons, where appropriate. In general, the history of Irish law has been a march away from strict standing requirements.¹³ The danger with any rigid list, is that a deserving party might emerge who either wants to be represented or to make an application, but is not covered by the list. Particularly in the present area, it is quite possible that some person who might be outside the permitted range of applicants would wish to apply. Take for instance, a person who is physically or mentally incapacitated. If he is a ward of court, an application may be made by his 'committee'.¹⁴ But he may not be a ward of court. In this case, some other person not a formal agent, for instance his carer, might legitimately wish to make an application. We do not want to bar the way to such an application by a failure to anticipate this or any other eventuality in the drafting of the legislation.

Accordingly, we recommend the following provision:

"The following persons may apply for, or appear and be heard at an application for, an order under *section 1* of this Act:

- (a) any trustee under the will, settlement or other disposition,
- (b) any beneficiary thereunder,
- (c) such other person as the court sees fit.

¹³ Cf. Hogan and Morgan, *Administrative Law in Ireland* (Third edition, Round Hall Press, 1998), para.13.5

¹⁴ That is, the formal agent of a ward of court

CHAPTER EIGHT: SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

8.01 At the close of Chapter 1, we conclude that there exists a genuine need for legislation allowing for the variation of trust instruments and that this need is, in all but a few cases, not being met.

A. Contradiction of the settlor's wishes

8.02 In Chapter 2 we contend that there is no insurmountable principled nor constitutional objection to the Variation of Trusts, as we propose it. (*Paragraphs 2.07, 2.15-16*)

8.03 We conclude that there is no logical reason why the courts should be constrained by the settlor's intention at the time of the settlement. We propose that the courts' sole point of reference should be whether or not a given variation will be for the *benefit* of the beneficiary on whose behalf the court's consent is being sought.

Accordingly, we recommend that the settlor should not have a veto over variations to the terms of the trust. Nonetheless, he may, like anyone else, make submissions on the specific issue of 'benefit'. (*Paragraphs 2.08-14*)

B. Extent of the Court's power

8.04 We recommend that the court should have the power to approve a resettlement, if appropriate, and that this should be stated explicitly in the provision. To do otherwise unnecessarily entangles the court in a difficult area of distinction between variation and resettlement. For similar reasons, we also reject the notion of 'substratum,' or level of basic intent, beyond which the court cannot go. (*Paragraphs 3.12-19*)

8.05 We recommend the use of the phrase, "enlarging, adding to or restricting the powers of the trustees of managing or administering any of the property subject to the trusts," in delimiting the range of alterations which can be legitimately made to trustee's powers. Also, we recommend that the established phrase "managing or administering" be used in order to describe the nature of a trustee's power. (*Paragraphs 3.06, 3.20-23*)

8.06 Where court approval is given to a variation of trustees' powers, we recommend that the court should be empowered to confine that variation to a once-off use of the power or, instead, to approve a general – and probably permanent – alteration. (*Paragraph 3.25*)

8.07 A trust, once varied, should not be precluded from being re-varied, once the necessary procedural steps have been adhered to. (*Paragraph 3.28*)

C. Criteria for the Court in deciding a Variation of Trusts case

8.08 We recommend that the sole test of 'benefit', without any other elaboration or restriction, should be the test employed by the court in deciding whether or not to approve a proposed variation. That said, the incorporation of a judicial discretion in any Irish legislation is recommended. (*Paragraphs 4.11-13, 4.16*)

8.09 In applying that test of 'benefit,' we recommend that the word be construed as encompassing more than purely financial gain. Also, we see no reason why a tax advantage should not be accepted as a benefit, for the purposes of the test. Of course, the general body of tax law will apply to this area, as it does to others. (*Paragraph 4.21*)

D. Whose consent may be dispensed with?

8.10 We propose the following list of persons on whose behalf the court may approve an arrangement: (*Paragraphs 5.17*)

- a. any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or,
- b. any person unborn; or,
- c. any person whose identity, existence or whereabouts cannot reasonably be ascertained; or,
- d. any person with a contingent interest.

E. Sphere of Application

8.11 We do not consider it appropriate to extend the scope of Variation of Trusts legislation as far as implied, resulting, or constructive trusts. (*Paragraph 6.01*)

8.12 We see no reason why the proposed legislation should not apply to revocable trusts. It is also recommended that pension trusts and charitable trusts be included within the scope of the proposed legislation. In relation to all three trusts, their inclusion can be achieved simply by not excluding them. Section 1 of the draft legislation achieves this. (*Paragraphs 6.04, 6.12 and 6.19*)

8.13 Finally, we recommend that our proposed legislation should apply to trusts created either before or after the legislation is implemented. Without this retrospection, many of the advantages of introducing Variation of Trusts legislation, would be lost. In addition, we envisage no constitutional difficulty with this retrospection. (*Paragraph 6.24*)

F. Forum and Procedure

8.14 We recommend that the Circuit Court be given concurrent jurisdiction with the High Court in Variation of Trusts applications. Also, we recommend the inclusion in the legislation of the following provision, or something similar, "An application under this Act may be heard otherwise than in public." (*Paragraphs 7.01-03, 7.05-07*)

8.15 Turning to the issues of who may be represented and, also, who may apply, we recommend an inclusive policy, whereby the courts are given a discretion to exclude persons, where appropriate. (*Paragraphs 7.08-11*)

APPENDIX A: DRAFT LEGISLATION

Draft of Bill
Entitled/
Variation of Trusts Bill, 2001

ARRANGEMENT OF SECTIONS

Section

1. Jurisdiction of courts to vary trusts.
2. Persons who may apply under section 1.
3. Hearing of applications otherwise than in public.
4. Jurisdiction of Circuit Court.
5. Saver for existing jurisdictions.
6. Non-application of Act.
7. Short title.

Acts Referred to *(if any)*

[]

Variation of Trusts Bill, 2001

BILL

Entitled

AN ACT TO EXTEND THE JURISDICTION OF COURTS OF JUSTICE TO VARY TRUSTS IN THE INTERESTS OF BENEFICIARIES AND SANCTION DEALINGS WITH TRUST PROPERTY AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Jurisdiction
of courts to
vary trusts.

1.- (1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may, if it thinks fit, on application by any person specified in *section 2* of this Act, by order approve,¹ on behalf of any person referred to in *subsection (2)* of this section, any arrangement² -

- (i) varying, resettling or revoking all or any of the trusts, or
- (ii) enlarging, adding to or restricting the powers of the trustees to manage or administer any of the property subject to the trusts,

whether or not there is any other person beneficially interested who is capable of assenting thereto and:

provided that the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) The court may by order approve an arrangement under *subsection (1)* of this section on behalf of the following persons:

- (a) any person having an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting,³
- (b) any person unborn,
- (c) any person whose identity, existence or whereabouts cannot be established by taking reasonable measures,
- (c) any person having a contingent interest under the trusts, other than a person to whom *paragraph (a)* of this section applies.

¹ The term "approve" would appear to be more appropriate in this context than "consent to". The former connotes sanction by a higher authority, the latter agreement by an equal.

² The phrase "any arrangement" is very broad and encompasses both permanent and once-off arrangements.

³ The term "assenting", rather than "consenting", has been used because it does not preclude approval of an existing arrangement. By contrast, the term "consent" would seem to suggest that no arrangement can be possible without such "consent". The chosen term has the added advantage of following the English precedent (*Variation of Trusts Act, 1958*) which, as stated in the Report has been widely tried and tested.

Persons who may
apply under
section 1.

2.- The following persons may apply for, or appear and be heard
at an application for, an order under *section 1* of this Act:

- (a) any trustee under the will, settlement or other
disposition,
- (b) any beneficiary thereunder,
- (c) such other person as the court sees fit.

Hearing of
applications
otherwise than
in public.

3.- The court may hear an application for an order under *section 1* of this Act otherwise than in public.

Jurisdiction
and venue of
Circuit Court

4.- (1) The Circuit court shall, concurrently with the High Court, have all the jurisdiction of the High Court to hear and determine an application under *section 1* of this Act⁴.

(2) The jurisdiction conferred on the Circuit Court by this Act may be exercised by the judge of the circuit in which any of the parties to the proceedings ordinarily resides or carries on any business, profession or occupation.

⁴ For alternative precedents, see: s. 22 of the *Courts (Supplemental Provisions) Act, 1961*, as amended, and s.38 of the *Family Law (Divorce) Act, 1996*, both of which are examples of the conferral of limited concurrent jurisdiction on the Circuit Court. In particular, note that s. 2 (1) (a) of the *Courts Act, 1981* amends column (3) at reference number 18 of the Third Schedule of the said *Courts (Supplemental Provisions) Act, 1961* with the apparent effect that it results in full concurrent jurisdiction in the Circuit Court in proceedings for the dissolution of a partnership or the taking of partnership or other accounts where the property of the partnership consists of personalty. It seems unlikely that the above provision could be thought unconstitutional, under Article 34.3.4°. See Casey, *Constitutional Law in Ireland* (Round Hall, Sweet and Maxwell, 2000) p.281.

Saver for
existing
jurisdictions.

5.- Nothing in this Act shall be taken to derogate from any power of varying, resettling or revoking a trust or enlarging, adding to or restricting the powers of the trustees to manage or administer any of the property subject to the trust which may, whether before or after the passing of this Act, be vested in any person or court,⁵ by statute or otherwise, and the powers conferred by this Act shall be in addition to, and not in substitution for, such first-mentioned powers.

⁵ "Person" by virtue of the *Interpretation Act, 1937*, includes both an unincorporated and an incorporated body. It has been included so as to leave unaffected powers vested in bodies other than the courts, for example those powers vested in the Commissioners of Charitable Donations and Bequests by virtue of the *Charities Act, 1961*, section 29.

Non-
application of
Act.

6.- This Act shall not apply to trusts affecting property settled by any enactment being-

- (a) a British statute,
- (b) a Saorstát Éireann statute, or
- (c) an Act of the Oireachtas (whether passed before or after this Act).

Short title. **7.- This Act may be cited as the Variation of Trusts Act, 2001.**

APPENDIX B: LIST OF LAW REFORM COMMISSION'S PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl. 5984) [out of print]	[10p Net]
Working Paper No. 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	[£ 1.50 Net]
Working Paper No. 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	[£ 1.00 Net]
Working Paper No. 3-1977, Civil Liability for Animals (November 1977)	[£ 2.50 Net]
First (<u>Annual</u>) Report (1977) (Prl. 6961)	[40p Net]
Working Paper No. 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	[£ 1.00 Net]
Working Paper No. 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	[£ 1.00 Net]
Working Paper No. 6-1979, The Law Relating to Seduction and the Enticement and Harboursing of a Child (February 1979)	[£ 1.50 Net]
Working Paper No. 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	[£ 1.00 Net]
Working Paper No. 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	[£ 1.50 Net]
Second (<u>Annual</u>) Report (1978/79) (Prl. 8855)	[75p Net]
Working Paper No. 9-1980, The Rule Against Hearsay (April 1980)	[£ 2.00 Net]
Third (<u>Annual</u>) Report (1980) (Prl. 9733)	[75p Net]

First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	[£ 2.00 Net]
Working Paper No. 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	[£ 1.75 Net]
Fourth (<u>Annual</u>) Report (1981) (Pl. 742)	[75p Net]
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	[£ 1.00 Net]
Report on Defective Premises (LRC 3-1982) (May 1982)	[£ 1.00 Net]
Report on Illegitimacy (LRC 4-1982) (September 1982)	[£ 3.50 Net]
Fifth (<u>Annual</u>) Report (1982) (Pl. 1795)	[75p Net]
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	[£1.50 Net]
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	[£ 1.00 Net]
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	[£ 1.50 Net]
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	[£ 3.00 Net]
Sixth (<u>Annual</u>) Report (1983) (Pl. 2622)	[£ 1.00 Net]
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	[£ 3.50 Net]
Working Paper No. 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	[£ 2.00 Net]
Seventh (<u>Annual</u>) Report (1984) (Pl. 3313)	[£ 1.00 Net]
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	[£ 1.00 Net]
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	[£ 3.00 Net]
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	[£ 2.00 Net]

Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	[£ 2.50 Net]
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	[£ 2.50 Net]
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Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	[£ 3.50 Net]
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Eighth (<u>Annual</u>) Report (1985) (Pl. 4281)	[£ 1.00 Net]
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Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	[£ 7.00 Net]
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Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	[£ 3.00 Net]
Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	[£ 3.00 Net]
Report on Malicious Damage (LRC 26-1988) (September 1988)	[£ 4.00 Net]

Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (October 1988)	[£ 5.00 Net]
Tenth (<u>Annual</u>) Report (1988) (Pl. 6542)	[£ 1.50 Net]
Report on Debt Collection: (2) Retention of Title (LRC 28-1988) (April 1989)	[£ 4.00 Net]
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	[£ 5.00 Net]
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	[£ 5.00 Net]
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Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)	[£ 4.00 Net]
Eleventh (<u>Annual</u>) Report (1989) (Pl. 7448)	[£ 1.50 Net]
Report on Child Sexual Abuse (LRC 32-1990) (September 1990) [out of print]	[£ 7.00 Net]
Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990) (September 1990)	[£ 4.00 Net]
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	[£ 5.00 Net]
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	[£ 6.00 Net]
Consultation Paper on the Civil Law of Defamation (March 1991)	[£20.00 Net]
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	[£ 7.00 Net]
Twelfth (<u>Annual</u>) Report (1990) (Pl. 8292)	[£ 1.50 Net]
Consultation Paper on Contempt of Court (July 1991)	[£20.00 Net]
Consultation Paper on the Crime of Libel (August 1991)	[£11.00 Net]
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Report on the Crime of Libel (LRC 41-1991) (December 1991)	[£ 4.00 Net]
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Consultation Paper on Occupiers' Liability (June 1993) [out of print]	[£10.00 Net]
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Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	[£20.00 Net]
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