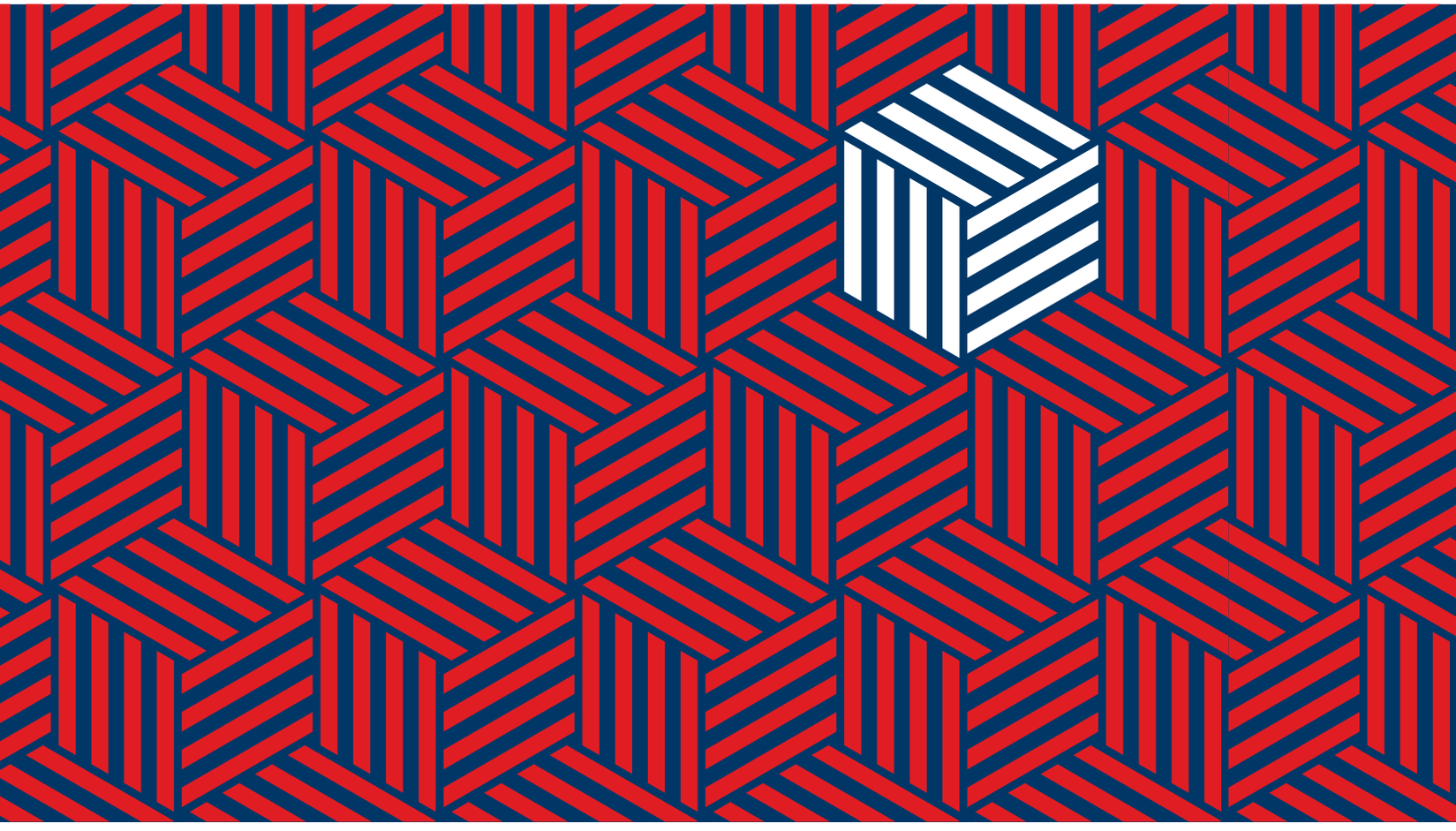
Singapore Academy of Law
Law Reform Committee

Report on Introducing a Statutory Variation of Trusts Jurisdiction

April 2019



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Report on Introducing a Statutory Variation of Trusts Jurisdiction

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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EXECUTIVE SUMMARY

1 A Variation of Trusts Act modelled on the United Kingdom's Variation of Trusts Act 1958 (6 & 7 Eliz II, c 53) should be enacted to confer jurisdiction on the High Court to approve consensual variations of trusts where these will benefit beneficiaries who are unable to consent to the variation. The UK statute has been replicated widely and the proposed enactment will fill a needful gap in the Singapore law. Its adoption will also modernise the law of trusts and make Singapore a more attractive trust jurisdiction. Experience with similar legislation in the Commonwealth has shown that certain modifications to the statute will enhance its efficacy and we therefore recommend adoption of the UK statute with modifications.

RECOMMENDATION 1

2 The settlor should not be given a power to veto a variation of trust nor should the Act expressly require that his or her wishes in respect of the variation be taken into consideration. It is sufficient that the courts in practice take the settlor's wishes into consideration, particularly when considering whether the variation is beneficial to the persons on whose behalf the court is concerned to give its approval.

RECOMMENDATION 2

3 The Act should not authorise the court to override the refusal of any adult and consenting beneficiary (*ie*, a beneficiary capable of giving his or her consent) to consent to the variation.

RECOMMENDATION 3

4 The Act should not authorise the court to give its approval to a variation only if the applicant for variation has obtained consent from all consenting beneficiaries or after service is made on all consenting beneficiaries.

RECOMMENDATION 4

5 The Act should authorise the court to approve a variation in the widest sense, including a revocation of the trust or a resettlement which is essentially a new trust from the original trusts.

RECOMMENDATION 5

6 The Act should authorise the court to approve not only an enlargement but also a restriction, deletion or termination of any power of a trustee to manage or administer any property subject to the trusts.

RECOMMENDATION 6

7 We do not recommend that statutory trusts and charitable trusts be excluded from the Act. A charitable trust can be varied under the Act where it is for the benefit of non-consenting beneficiaries. The court can also be asked to give its consent on behalf of a charitable trust which is a beneficiary under a trust that is itself being varied where the charity trustees have no capacity to give their own consent to the variation.

8 We do not, however, recommend that the Act should include a *cy-près* power to vary a public but non-charitable trust. Likewise, we do not recommend that the Act extend to the *waqf* or *wakaf*.

RECOMMENDATION 7

9 Under the Act, the court should only give its approval on behalf of a designated person to a variation of beneficial interests if and only if the variation is for the benefit of that person. This means that where designated persons form a class, every member of the class must benefit from the variation though it is not required that every member must benefit in the same manner and to the same extent.

10 In the case of a variation of the powers of the trustee to manage or administer any property subject to the trusts, the Act should authorise the court to act if and only if the variation will benefit the designated persons as a whole.

RECOMMENDATION 8

11 The definition of benefit in the Act should not be restricted to financial benefit but should include educational and other social benefits.

RECOMMENDATION 9

12 The designated persons on whose behalf the court may approve a variation should include missing persons and persons whose whereabouts cannot be ascertained despite reasonable measures having being taken to locate them.

RECOMMENDATION 10

13 The Act should authorise the court to approve a variation on behalf of persons who may become entitled to an interest under the trusts whether or not they have become presumptively entitled at the time of application for approval to a variation.

14 However, we do not recommend that persons who may become entitled to interests under perpetuitous trusts be included as designated persons who may become entitled to a contingent interest under trusts to be varied.

RECOMMENDATION 11

15 The Act should authorise the court to approve a variation on behalf of a person a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the court. This recommendation extends the scope of the corresponding provisions in the UK statute in respect of protective trusts beneficiaries.

RECOMMENDATION 12

16 The Act should provide that the jurisdiction to approve a variation on behalf of designated persons is to be exercised by the High Court.

17 We do not recommend for the time being that a District Court should have concurrent jurisdiction to approve a variation in respect of trusts subject to its monetary limit. The possibility of concurrent jurisdiction in a District Court should be reconsidered at a more opportune time.

RECOMMENDATION 13

18 The Act should not provide that persons on whose behalf the court is asked to approve a variation should be separately represented by legal representatives.

RECOMMENDATION 14

19 Consent given by the court on behalf of infant beneficiaries and incapable adult beneficiaries should not be an exclusive means of obtaining their consent to a variation. It should be open for such consent to be obtained by other alternative means available under the law.

RECOMMENDATION 15

20 The Act should provide expressly that the High Court may consent to a variation of a trust whatever the law governing it may be, unless an order of the court consenting to the variation is prohibited under the foreign governing law.

CHAPTER 1

INTRODUCTION

1.1 This report is prepared as part of the reform of trust capital and income allocation rules, in turn part of an ongoing process to modernise the Singapore law of trusts in order to make it more responsive to current needs and circumstances.

1.2 In this report, we recommend, and explain why we recommend, introduction of variation of trusts legislation in Singapore, and highlight the salient features that the legislation should contain. The reform is not novel. Its English precursor dates back to 1958.[1] Since then the English Act has been replicated in whole or in large part in more than 15 common law states.[2] Its application over the course of more than four or five decades has mainly been trouble-free and the variation of trusts legislation has been applied thousands of times without needing to involve courts in serious difficulties of construction.[3] This is remarkable testimony of its enduring efficacy.

1.3 As there is no lack of materials for consideration, this report will not dwell at length on the merits of the reform but concentrate on explaining where there ought to be modifications to adapt to the country's circumstances and conditions.

1.4 We are pleased to add that we were able to consult the Singapore Trustees Association ('STA') on the proposed reform contained in this report. In their response, for which we are particularly grateful given the tight deadlines, the STA expressed strong support for the reform. They agreed with all the recommendations we made save one. We explain the modified recommendation the STA would support as well as our final response at paragraph 6.2 below.

1.5 The draft Bill which implements our recommendations is set out in the Appendix.

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1 The Variation of Trusts Act 1958 (6 & 7 Eliz II, c 53).

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

3 *Goulding v James* [1997] 2 All ER 239 at 241, CA (England & Wales).

CHAPTER 2

THE GAP TO BE FILLED

2.1 The law of trust posits as a cornerstone that a settlor's express intentions to benefit his or her beneficiaries by way of a trust are sacrosanct. These intentions are to be respected under all circumstances. The courts will not rewrite the trust instrument. Nor will they supplement or augment its terms even if the result would be a better trust; likewise although the modified trust would be one that the settlor himself or herself would have created had he or she been better advised or had superior foresight of the unfolding circumstances.

2.2 Short of rewriting the trust, the courts do have inherent jurisdiction to approve or sanction an urgent course of action by trustees which would otherwise be a breach of trust where this would avert significant unforeseen or perhaps unforeseeable damage or prejudice to the trust beneficiaries.[4] Since 1925 in Singapore, the inherent jurisdiction has existed concurrently with the statutory jurisdiction conferred by section 56 of the Trustees Act.[5] This statutory jurisdiction, copied from section 57 of the UK Trustee Act 1925,[6] is wider than the inherent jurisdiction in that it does not predicate the existence of an urgent situation or an emergency. It merely requires that the course of action to be pursued by the trustees should be expedient in the management and administration of any property vested in the trustees and for the benefit of the trust as a whole. It is also a general jurisdiction unlike that provided in the Settled Estates Act.[7] The latter is a more circumscribed statutory jurisdiction to order a sale of property subject to a settlement if considered proper and consistent with due regard for all parties entitled under the settlement.[8]

2.3 Both the inherent and section 56 jurisdiction are *ad hoc* in nature and subject to two important limitations. By *ad hoc* it is meant that the courts exercising the jurisdiction will approve if at all a proposed course of action only in the circumstances and for the specific purposes of the application. Nothing in the trust instrument is altered. Neither jurisdiction, however, can be invoked to overcome a prohibited course of action. In *Rajabali Jumabhoy*

4 Variously described as an emergency or salvage jurisdiction: see *Re Jackson* (1882) 21 Ch D 786 HC (England & Wales).

5 Cap 337, 2005 Rev Ed.

6 15 & 16 Geo V, c 19 (UK).

7 Cap 293, 2013 Rev Ed.

8 Section 4(1). See *British & Malayan Trustees Ltd v Abdul Jalil bin Ahmad* [1990] 2 SLR(R) 449, HC (Singapore), which was concerned with the former provision which required the court to have "due regard to the interests of the beneficiaries and provided and to the extent not prohibited by the settlement".

v Ameerali R Jumabhoy,[9] it was held in the Court of Appeal that the jurisdiction predicates that "the same [*ie*, the act or transaction] cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument".[10] It was held to be not available, as it was the case with the inherent jurisdiction, where the trust deed prohibited investment in Singapore securities.[11]

2.4 More importantly for the present purposes, neither jurisdiction can be invoked to adjust or vary beneficial interests by way of rewriting, remoulding or rearranging the trust.[12] There are only three exceptions to this limitation against altering the beneficial interests. By judicial development, the courts accept that there is jurisdiction to recognise compromises reasonably and legitimately reached between *sui juris* beneficiaries and trustees in relation to beneficial dispositions which are ambiguous and need to be interpreted, or between contesting heirs and trust beneficiaries. The court may consent to such compromises to a genuine and *bona fide* dispute on behalf of infant beneficiaries and possible after-born beneficiaries.[13]

2.5 The courts also accept that there is power to authorise trustees to pay an infant beneficiary in need of income despite a direction to accumulate income in his or her favour, on the presumptive basis that the settlor would have intended this if the infant beneficiary was in need of money.[14]

2.6 Third, a few scattered relevant statutory *ad hoc* jurisdictions exist. A notable *ad hoc* statutory provision which authorises the courts to affect the beneficial interests in restrictive circumstances is section 46 of the Trustees Act. It stipulates that "[w]here any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into

9 [1998] 2 SLR(R) 434, CA (Singapore).

10 *Ibid* at [84].

11 There is also authority that it cannot be used to modify a charitable trust. See *Baptist Union of New Zealand v Attorney-General* [1973] 1 NZLR 42, SC (NZ).

12 *Jumabhoy*, above, n 9 at [83]. See also *Re Downshire Settled Estates* [1953] Ch 218 at 248, CA (England & Wales); *Chapman v Chapman* [1954] AC 429, HL (UK); *Sutton v England* [2009] EWHC 3270 (Ch), HC (England & Wales); and *Re Dion Investments Pty Ltd* [2013] NSWSC 1941, SC (NSW).

13 *Chapman v Chapman*, *ibid*. It is well known that this decision provided the rationale for the English reform. See *Golding v James* [1997] 2 All ER 239, CA (England & Wales), and also English Law Reform Committee, *Sixth Report (Court's Power to Sanction Variation of Trusts)* (Cmnd 310) (London: Her Majesty's Stationery Office, 1957) at [16].

14 Identified as one of four exceptions to the inherent jurisdiction in *Chapman v Chapman*, *ibid*. The first two exceptions were mentioned in paras 2.4 and 2.5. The other two exceptions where the court has jurisdiction to vary a trust where there are unborn or minor beneficiaries are cases where the court effects changes in the nature of the infant's property or allows trustees of settled property to enter into some business transaction which was not authorised by the settlement. See also s 33 of the Trustees Act, above, n 5.

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." Another is section 34 of the Trustees Act which confers powers on trustees to make an advancement of capital money subject to a trust to a capital infant or minor beneficiary in the limited circumstances there prescribed.[15]

2.7 Against this backdrop, the proposed reform is significant in allowing adjustments or variations to be made to beneficial interests in accordance with its terms. Unlike the *ad hoc* provisions mentioned in paragraph 2.6, the proposed reform is also universal. The reform will overlap with the *ad hoc* provisions to an extent. As we explain shortly, the reform is conditional on the court consenting to a proposed variation beneficial to and on behalf of any beneficiary who cannot consent for himself or herself. If the beneficiaries who are *sui juris* also happen to agree to a course of action covered by the *ad hoc* provisions, application may be made under the proposed legislation for the court to consent to the variation on behalf of beneficiaries who are unable to so consent. The *ad hoc* provisions are distinguished in that they give the court jurisdiction to direct the course of action in question without the need to obtain the consent of beneficiaries who are *sui juris*, provided only that the course of action is specific to the provisions and beneficial to the trust. **In the specific circumstances which the *ad hoc* provisions delineate, the courts should continue to have jurisdiction to intervene to protect the trust without needing to act on the consent of all *sui juris* beneficiaries. The merits of such specific and limited non-consensual variation are well recognised. We do not recommend that these provisions be replaced by or subsumed under the proposed consensual variation of trusts reform.**

2.8 For the sake of being comprehensive, we note that there are two notable omissions to provide for non-consensual alterations in the beneficial interest where such provisions might be expedient. Although the courts have jurisdiction to divide matrimonial assets between divorcing spouses and order a lump sum or capital transfer from one to the other spouse, no written law provides expressly that they may vary the beneficial interests of either divorcing spouse under any nuptial settlement. Section 112 of the Women's Charter[16] will most probably not allow such variation although it empowers the court "when granting or subsequent to

15 Any payment may be ordered notwithstanding that the interest of the capital beneficiary is liable to be defeated or diminished. Strictly speaking, without altering the beneficial interests, section 34 allows trustees to anticipate the enjoyment of those beneficial interests. However, as was decided in *Pilkington v Inland Revenue Commissioners* [1964] AC 612, HL (UK), in appropriate circumstances an advancement may be made by way of resettlement of trust property affecting only the beneficial interests of the advancees.

16 Cap 353, 2009 Rev Ed.

the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable." This matter is discussed more extensively at paragraphs 10.1 to 10.3 below.

2.9 Another noteworthy omission is that the Inheritance (Family Provision) Act[17] makes no provision for varying non-consensually a testamentary trust which disposes of the property of the decedent. The Act empowers the court to intervene where the disposition of the deceased's estate effected by his or her will, or the law relating to intestacy, or the combination of his or her will and that law, does not make reasonable provision for the maintenance of a dependant. In these circumstances, the court may order reasonable provision be made out of the deceased's net estate for the maintenance of the dependant. There is, however, presently no power to rewrite a testamentary trust to make such reasonable provision for the maintenance of 'deserving' members of the decedent's family. This matter is also discussed separately at paragraph 10.4 below.

2.10 In relation to the two instances of omissions mentioned in paragraphs 2.8 and 2.9, any reform will require a court-ordered variation which goes beyond the proposed consensual variation of trust legislation. **As the changes will predicate extensions of the existing principles of spousal property division and personal succession, as the case may be, we explain in our paper why such extensions are worthy of further and separate consideration. We do not however make any recommendations as they fall strictly speaking outside the remit of this paper.**

17 Cap 138, 1985 Rev Ed.

CHAPTER 3

THE ADVANTAGES OF THE REFORM OVER ALTERNATIVE SOLUTIONS

3.1 There are a number of ways whereby alteration of beneficial interests without judicial intervention can be achieved. Each of them suffers from one or another shortcoming. The proposed reform will overcome all such shortcomings.

3.2 In a well-drafted trust instrument, the settlor will confer on his or her trustees or reserve for himself or herself a power of amendment or variation of the terms of the trust. This power will be available for the purposes of rewriting the trust so as to make it more responsive to changed circumstances. The same objective can be achieved to a lesser extent by the settlor giving the trustees dispositive powers such as powers to add or remove beneficiaries or powers of appointment or to invade capital or income. Trusts containing such powers will not be in need of variation in varying degrees, unless in exceptional circumstances the powers cannot be exercised or the trustees refuse to exercise them.

3.3 Where the settlor of a trust has not or insufficiently anticipated the need to vary the trusts he or she has created, all the beneficiaries, being *sui juris* and consenting, can acting in concert terminate the trust. Under the rule in *Saunders v Vautier*[18] such agreement is fully effective to terminate the trust, in whole or in part. The trustees cannot insist on continuing with the trust on the ground that the settlor's purposes will be frustrated as a result of termination. It is commonly thought that if the beneficiaries so direct and the trustees are willing to do so, they need not terminate the trust but can continue it on such modified terms as the beneficiaries so direct (*ie*, that they can vary the trust).[19] The courts should permit the beneficiaries to accomplish in one step what would otherwise require two, namely termination followed by conveyance to the beneficiaries and then a reconveyance to the trustee on the modified trust. It is less clear whether the rule also permits the consensual termination of the trust and immediate creation of completely new trusts to be administered by the same trustees ('resettlement' in this paper).

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18 (1841) 4 Beav 115, 41 ER 482, Ct of Chancery (England & Wales). See also *Green v Spicer* (1830) 1 R & M 395, 39 ER 153, Ct of Chancery (England & Wales).

19 There is no decision to this effect but it is supported by *obiter dicta*. See *Re Philips New Zealand Ltd* [1997] 1 NZLR 93 at 101, HC (NZ). See also British Columbia Law Institute, *Report on the Termination and Variation of Trusts* (BCLI Report No 25) (Vancouver: British Columbia Law Institute, 2003) at n 11, and *Inland Revenue Commissioners v Holmden* [1968] AC 685 at 713, HL (UK), *per* Lord Wilberforce: "If all the beneficiaries under the settlement had been sui juris, they could, in my opinion, have joined together with the trustees and declared different trusts which would supersede those originally contained in the settlement".

3.4 Both the settlor-driven and beneficiary-driven devices to vary a trust come with limitations. A power of amendment or appointment must be conferred or reserved at the onset of the trust. The courts have no jurisdiction to add a new power in the course of the trust at the behest of the settlor however desirable that may be and notwithstanding this may have the consent of the beneficiaries. The rule in *Saunders v Vautier*, on the other hand, cannot avail if there are contingent beneficiaries or future unborn beneficiaries who are unable to consent, or the whereabouts of a fully capacitated beneficiary cannot be ascertained.[20]

3.5 While it is of course open to all beneficiaries tacitly to agree in a course of action which is not in accordance with the trust instrument, no trustee will likely undertake such course of action without an indemnity against liability for breach of trust. A variation of trusts statute will therefore have at the least a distinct practical advantage of avoiding the need for recourse to partial or unstable or transient devices to alter beneficial interests. It will also provide immediate clarity in an area where litigation is uncommon and hence where opportunities for judicial development are slow to develop.[21]

20 This limitation in turn has led to difficult litigation over how the trust instrument should be construed between those who wish to rely on the rule to 'vary' the trust and those who do not.

21 See Law Reform Commission of Ireland, *Report on the Variation of Trusts* (LRC 63-2000) (Dublin: The Commission, 2000) at 7.

CHAPTER 4

THE NEED FOR REFORM

4.1 Variation of trusts legislation may be and has traditionally been invoked to relieve beneficiaries of restrictions on their beneficial interests, or allow beneficiaries to receive their benefits free of the trust or on improved terms beyond those imposed by the settlor which avert the impact of unforeseen changes in their circumstances. It has more exceptionally served to delay the falling in of the beneficial interest (by extending the duration of the trust, for example), where this is beneficial to all trust beneficiaries.

4.2 Admittedly, the frequently invoked and primary rationale for judicial variation of trust in many trust jurisdictions is to facilitate alterations of the beneficial interests for the sake of avoiding or minimising unforeseen tax burdens.[22] This tax-mitigation need is less urgent in the case of modern trust instruments which contain powers expedient for operation of the trust in a tax-efficient manner.[23] If suitable powers exist, recourse to variation of trusts legislation would not be necessary in order to relieve beneficiaries' tax burdens. Older trust instruments, however, will very likely have been created under very different tax conditions. Trustees and beneficiaries can only expect to benefit from tax reduction alterations to the trust if there is access to judicial variation of trusts.

4.3 We recognise that the minimisation of unforeseen tax liability is an important consideration,[24] although alone it will not justify judicial variation.[25] We also recognise that the tax laws in this country do not posit a pressing need for a variation of trusts jurisdiction. There have been no dramatic changes in the tax laws or escalations in tax burdens which might provide a strong impetus to extend the life of the trust or convert income interests into capital interests and *vice versa*. The tax laws are also favourable or not inimical to offshore trusts which are locally administered, as pointed out by Mr Michael Hwang, SC.[26] The question, however, is whether there is a need for judicial variation for the sake of offshore trusts which are governed by foreign law but administered in Singapore for the

22 See *Re Druce's Settlement Trusts* [1962] 1 WLR 363, HC (England & Wales); *Re Sainsbury's Settlement* [1967] 1 WLR 476, HC (England & Wales); *Gibbon v Mitchell* [1990] 1 WLR 1304, HC (England & Wales). This was also the original rationale for the English Act, so that income would not be absorbed by large taxes and capital depleted by estate duty.

23 That is, which post-date World War II.

24 See *Re Clitheroe's Settlement Trusts* [1959] 1 WLR 1159, HC (England & Wales).

25 See *Re Weston's Settlements* [1969] 1 Ch 223, CA (England & Wales).

26 Michael Hwang & Nicholas Thio "Why Does Singapore not have a Variation of Trusts Act?" (2011) 23 Sing Acad LJ 58.

benefit of non-resident beneficiaries. If this is right, there will be a need at minimum to afford the same facility which is likely to be available under the governing law of the trust. We believe it is right. It is expedient if not necessary to ensure that the Singapore law of trusts is in step with the laws of trusts which apply elsewhere so that settlors of new trusts or migrating trusts will not be disadvantaged by the lack of a variation of trusts legislation in Singapore.

4.4 The proposed reform will also accommodate a greater need for variation of trusts in the wake of the reform of the 'rule against perpetuities' which was introduced in 2004.[27] As a result of implementation of the statutory principle to wait and see if in certainty of fact the trust will become too remote before invalidating it, there will be a number of trusts which will not be void at the outset for being perpetuitous. Such trusts which become valid within the statutory perpetuities period of 100 years can benefit from the availability of variation of trusts legislation.

4.5 Although it is not an advantage we would stress, the variation of trusts legislation has perhaps unexpectedly afforded contingent beneficiaries some respite from the strictures of public policy which evolve over time. It has permitted the court to uphold a varied trust where the trust unaltered would fail for being contrary to public policy in the wake of changes in public policy over time. Where a trust is not contrary to public policy at its inception but will become so in time, the court can also consent to a variation which would remove the terms which will have the effect of violating changing public policy.[28]

4.6 Finally, while the 2004 amendments to the Trustees Act have impressively enlarged the administrative powers of trustees, they make it clear that such enlargement shall not be effective against a contrary intention in the trust instrument. A prime example of such contrary intention is a prohibition or mandatory abridgment on trustee powers. Against such terms, both the inherent and statutory jurisdiction of the courts are powerless. In our view, there is a need to be able in appropriate cases to vary a trust by superseding a prohibition or mandatory abridgment imposed by the settlor.

4.7 In summary, a variation of trusts legislation will equiparate the variation of both the domestic and offshore trust, and enable the courts to facilitate changes in beneficial interests or administrative powers which are beneficial to all beneficiaries, especially when trusts of long duration become unsuitable or inexpedient over time. We recognise that there is no single compelling reason for the proposed reform. The cumulative

27 See the Civil Law Act (Cap 43, 1990 Rev Ed), ss 32 and 34; and the Trustees Act, above, n 5, s 89.

28 See *Re Remnant's Settlement Trusts* [1970] Ch 560, HC (England & Wales), where the court agreed to the deletion of a forfeiture clause which defeated the interests of beneficiaries who practised Roman Catholicism or married a Roman Catholic.

advantages of judicial variation of trusts, however, support the proposed reform. We agree with the conclusions reached by Mr Michael Hwang, SC, that the absence of variation of trusts legislation is "a significant gap" because the "[the] various practical and legal workarounds to this problem […] do not allow for the adjustment of beneficial interests in unforeseen circumstances".[29]

29 Hwang & Thio, above, n 26 at 72–73.

CHAPTER 5

MODIFYING THE ENGLISH MODEL

5.1 It is sufficient to highlight salient features of the English Variation of Trusts Act 1958 which has been copied or has inspired similar legislation in numerous countries. In theory, any contradiction between upholding the settlor's intention and varying the beneficial dispositions he or she has decreed is explained away on the basis that the legislation is merely a statutory extension of the rule in *Saunders v Vautier*.[30] Once the settlor has created the trust, he or she has placed the beneficial owners above himself or herself and they can at any time collectively override his or her wishes and terminate the trust if they so wish and if not under any legal incapacity. The only difference between the rule and the legislation is that the court in exercising the jurisdiction gives consent on behalf of those who cannot do so (the specified or designated beneficiaries). The English model therefore will not allow the settlor to veto the variation of trust although he or she is permitted to object with reasons and this will be taken into account where relevant. Nor will it justify the court overriding the refusal of any non-specified or non-designated beneficiary to consent to the proposed variation. We note that there are trust jurisdictions which may place more emphasis on the settlor's intention in order to assure settlors that the terms of their trusts will be enforced and thereby encourage accumulation of wealth.[31]

5.2 **In recommending adoption of the English model and its consensual basis, we do not recommend that the settlor be given the power to veto a proposed variation. Nor would we recommend that the legislation should state expressly that the settlor's wishes are an important consideration and should be considered in all cases.** The recent case law on the English model clearly establishes that the settlor's intention, wishes, and the purposes of his or her trust will not be disregarded but will be given proper consideration to the extent they bear on whether there is benefit to the persons for whom the court supplies its

30 *Per* Mummery LJ in *Goulding v James*, above, n 3 at 247: "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*."

31 As in Jersey: see *Re the Y Trust and the Z Trust* (2017) JRC 100 where the Royal Jersey Court regarded the upholding of a settlor's intentions as a consideration of public policy relevant to the court's discretion to vary a trust. See also *Re Irving* (1975) 66 DLR (3d) 387, HC (Ont), where Pennell J said: "The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flaunted arbitrarily. It can never be pretended that the Court has the power to make a new will in the guise of approving an arrangement under the Variation of Trusts Act." This was rejected in *Sandwell & Co v Royal Trust Corp of Canada* (1985) 17 DLR (4th) 337 at 342, CA (BC).

assent.[32] We think that this strikes an appropriate balance between maximising efficient use of trust property and upholding the settlor's wishes on use of trust property. **Moreover, if a beneficiary is a 'consenting' beneficiary but refuses to give his or her consent, we agree that the model should not enable the court to override his or her refusal no matter how beneficial that would be.** The rule in *Saunders v Vautier* will only permit the court to decree partial termination if the non-consenting beneficiaries' interests will not be prejudiced or affected.[33] Likewise, the variation of trusts legislation.

A. NO REQUIREMENT FOR AGREEMENT BEFORE APPLICATION

5.3 Under the English model, there is no requirement that such beneficiaries as might consent to a proposed variation should have done so prior to application to the court for judicial variation of trust. The English Act provides that "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 […]".[34] In *Re Steed's Will Trusts*, Lord Evershed MR said that the term *arrangement* was "deliberately used in the widest possible sense to cover any proposal which any person may put forward for varying or revoking a trust."[35] The term is not restricted to an *inter partes* arrangement or even one "which two or more people have worked out".[36] Nor is it restricted to arrangements proposed by the trustees or with the agreement of the trustees, though the court in deciding whether to approve of the variation will take into account the trustees' views and the grounds for their views.[37]

5.4 The English model is further notable in not requiring applications for variation to be made only after the applicant has obtained consent from consenting beneficiaries or after service is made on all beneficiaries capable of giving their consent to the proposed variation. An application may be made for the court to approve a variation on behalf of a beneficiary incapable of giving his or her consent whether or not there are other consenting beneficiaries.[38] Where such consent has been given by the court, trustees may nevertheless not treat the trust as varied without

32 See *Goulding v James*, above, n 3, and *Pemberton v Pemberton* [2016] EWHC 2345 (Ch), HC (England & Wales); especially the former explaining the peculiar circumstances in *Re Steed's Will Trusts* [1960] Ch 407, CA (England & Wales), which led the court to place importance on the settlor's intentions and wishes.

33 See *Re Radcliffe* [1982] 1 Ch 227, CA (England & Wales).

34 Variation of Trusts Act (UK), above, n 1, s 1(1).

35 [1960] Ch 407, CA (England & Wales).

36 *Id* at 419.

37 *Id* at 420.

38 *Perpetual Trustees Victoria Ltd v Barns* (2012) 34 VR 387, CA (Vic).

seeking the consent of all other beneficiaries who have not been served with notice of the application.

5.5 **This is an expedient and practical result and we recommend the same wide scope for the Act in Singapore.**

B. WHETHER VARIATION OR REVOCATION SHOULD INCLUDE RESETTLEMENT

5.6 There is a significant theoretical and practical difference between varying an existing trust and re-creating a new trust by terminating the pre-existing trust and resettling the trust property on a new trust. The orthodox construction of the English Act is that the jurisdiction to consent on behalf of beneficiaries unable to consent or object to variation (*ie*, designated persons) is limited to modifying an existing trust or revoking it in whole or in part. Resettlement is impossible under the Act since it would involve both revoking the former trust and creating (not modifying) a new trust. Whilst accepting this as a valid difference in *Re Ball's Settlement*,[39] Megarry J added a qualification that whether a proposed variation went beyond variation to resettlement is one of substance and not form. Megarry J said: "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."[40]

5.7 **Resettlement, in short, is the creation of a new trust for purposes which diverge from the purposes of the original trust. We recommend that variation should include resettlement with consent of the trustees. This will not preclude the court from consenting to a resettlement on terms as to payment of costs but will be salutary in avoiding splitting hairs over fine distinctions between variation and resettlement when the benefits which will accrue are obvious.**

C. WHETHER VARIATION SHOULD INCLUDE RESTRICTING POWERS OF MANAGEMENT OR ADMINISTRATION

5.8 Despite the ambivalent phraseology of limb one of the primary variation provision in the English Act, it is commonly acknowledged that there are two categories of variation; namely, variation (or revocation) of beneficial interests and enlarging powers of management or administration. Past cases have tended to involve enlargement of powers. For reasons of history, it was more common for trust instruments to be restrictively drafted in the past; hence the greater need for enlargement of powers.

39 [1968] 1 WLR 899, HC (England & Wales).
40 *Id* at 906.

Drafting conventions, however, have changed and trust instruments are now more likely to contain an abundance of administrative powers including trustee powers to act in positions of conflict of interest and duty. Just as trusts have been varied in order to impose restrictions on beneficial interests or to delay the falling in of such interests, there is similarly no reason for limiting the variation of administrative powers to enlarging them. **For this reason, we recommend that the Singapore Act should clarify that variation includes restricting (as well as deleting or terminating) the powers (such as the powers to act in positions of conflict) conferred by the trust.**

5.9 **It should also be clarified that the court is not bound to agree or disagree to an arrangement to vary the beneficial interests as being mutually exclusive of any arrangement to vary the administrative powers. In appropriate cases, the court may invite the parties to agree to vary the administrative powers instead of the beneficial interests.**

D. WHETHER TO UNIFY VARIATION OF TRUSTS UNDER A SINGLE ACT

5.10 The English Act applies to any trusts arising "under any will, settlement or other disposition," without differentiating between type such as pension and non-pension; or revocable and irrevocable; or statutory and voluntary; or charitable and non-charitable trusts. It is clear that the need for judicial variation varies among these various types of trust. Pension fund trusts, for example, are very likely to contain powers of amendment to keep the trust dynamic and flexible and recourse to judicial variation will seldom be necessary.[41]

5.11 We considered whether the legislation should exclude statutory and public (both charitable and non-charitable) trusts. Statutory trusts which arise upon intestacy in favour of infant or minor children of the deceased will 'benefit' from recourse to variation of trusts legislation where proposals to vary are made to advance more than the statutory one-half limit on the size of advancement of capital money imposed by section 34 of the Trustees Act. Moreover, recourse to the legislation will be necessary in order to preserve the beneficial interests of such children where they are to be adopted and the legal consequence is that they will cease to be the children of the deceased upon adoption. Presently, there is nothing in the Adoption of Children Act[42] that preserves the beneficial interests of children who are adopted. **We therefore do not recommend exclusion of statutory trusts from the proposed reform.**

41 Compare *Bentall Corp v Canada Trust Co* [1997] 4 WWR 414, SC (BC).
42 Cap 4, 1985 Rev Ed.

5.12 Charitable trusts notably are subject to the court's inherent or general charitable jurisdiction as enlarged by the statutory jurisdiction contained in sections 21 and 22 of the Charities Act[43] to direct a scheme or order a *cy-près* application of the trust property.[44] Despite this, in *Re Roberts' Settlement Trusts*,[45] Vaisey J held in effect that the UK Variation of Trusts Act 1958[46] also conferred concurrent jurisdiction to approve variations to the terms of charitable trusts. The settlor had established charitable trusts under a settlement for the benefit of employees of certain companies, and his wife was a potential future beneficiary since she might become an employee of one of the companies. The proposed variation to exclude the settlor and his wife from the class of beneficiaries was approved by the court on behalf of the potential wife because the settlor undertook to pay any future spouse of his a sum certain for her life.

5.13 Comparisons between the *cy-près* jurisdiction and the variation of trusts jurisdiction show that the co-existence of multiple jurisdictions is not a matter of serious concern or a source of real confusion or conflict. In many instances, recourse to the general inherent jurisdiction to direct a scheme or the general and statutory *cy-près* jurisdiction would be preferred. We note, however, that if in a case such as *Re Roberts' Settlement Trusts*[47] charity trustees do not seek to vary the original purposes of the charitable trust but only to add administrative powers which they do not have under the trust deed constituting the trust, but which it would be expedient that they should have, judicial variation would be preferred to application of the *cy-près* jurisdiction given that jurisdiction's relatively more stringent requirements.

5.14 In the view of the Law Reform Commission of Ireland ('Irish Law Commission'), the two main instances of overlap between the *cy-près* jurisdiction and the variation of trusts jurisdiction are "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 […] [and] where the charity's interest in the trust property is contingent".[48] The Commission perceived that these would be marginal cases.[49] Anticipating that giving to charity will take on more sophisticated

43 Cap 37, 2010 Rev Ed.

44 Generally, the court's inherent jurisdiction may be invoked where a charitable trust is created without specifying the means whereby the purpose is to be carried out, where there is initial failure of a charitable disposition, and where there is subsequent failure of a charitable disposition (*ie*, after the disposition has taken effect). See also *Re Royal Society Charitable Trust* [1956] Ch 87, HC (England & Wales).

45 Re Roberts' Settlement Trusts (unreported, 26 February 1959) *per* Vaisey J, HC (England & Wales), *The Times* (London; 27 February 1959).

46 Above, n 1.

47 Above, n 45.

48 *Report on the Variation of Trusts*, above, n 21 at [6.20].

49 Another instance is where the charity's interest is a remainder interest following on prior dispositions of the life interest to individuals. The variation legislation will be apposite if the charity trustees have, in fact, no legal capacity to consent to a

(*cont'd on the next page*)

forms, we think that increasing recourse to contingent remainder charitable trusts as a way of making charitable donations will set the stage for greater recourse to a variation of trusts legislation. Many offshore trusts are already structured as discretionary trusts with a gift over to charity or in default of exercise of any appointment. Judicial variation will enable the court to cover such trusts.

5.15 The Irish Law Commission was particularly concerned that in view of the technicalities of charity law, the exclusion of all charitable trusts from the reach of variation of trusts legislation could be unfair to "those charitable trusts which fall [outside the *cy-près* jurisdiction by reason of want of general charitable intent and which] will be unjustifiably left without any solution when difficulties arise".[50] We agree. We note additionally that if charity trustees do not seek to vary the original purposes of the charitable trust but only to add administrative powers which they do not have under the trust deed constituting the trust, but which it would be expedient that they should have, judicial variation would be preferred to application of the *cy-près* jurisdiction given that jurisdiction's relatively more stringent requirements.

5.16 From a procedural viewpoint, given that the variation of the terms of a charitable trust implicates the performance of the charity's objectives and hence the public interest, our view is that any such variation ought not to be carried out without public notification and participation of the Attorney-General or the Commissioner of Charities. **We recommend that where judicial variation of trusts is sought under the proposed reform and a charitable trust is implicated, the Attorney-General or Commissioner of Charities should be served as if application had been brought for a scheme or *cy-près* application.**

5.17 The other question is whether there should be additional provisions to cater to the categories of anomalous purpose trusts which exist in Singapore as well as the many social and philanthropic trusts ('public trusts' hereafter) which are popularly acknowledged to be valid in Singapore. The variation of trusts model contained in the English Act predicates that the trusts to be varied are primarily private beneficiary trusts. Its language may not be apposite where the sole beneficiary is, as it were, a non-charitable purpose and judicial variation is sought. Moreover, judicial variation of public trusts requires more specific treatment to ensure that the court will be mindful of the need to moderate between present achievement of the relevant public objectives and the settlor's historic intention. The court's inherent or common law *cy-près* jurisdiction covers

variation and the court is asked to approve on its behalf. A charitable corporation or trust can give consent for purposes of the rule in *Saunders v Vautier*: see *Wharton v Masterman* [1895] AC 186, HL (UK). An unincorporated charity, however, may not have full legal capacity to consent to a variation as a consenting beneficiary.

50 *Id* at [6.22].

such public trusts[51] and the Executive probably retains its Executive prerogative to modify or vary some public trusts. However, it is highly doubtful whether the enlarged statutory *cy-près* jurisdiction is available. A gap clearly exists and the need to fill this gap by being able to vary public trusts may have become palpable with the lengthening of the perpetuities period from 21 years to 100 years.[52] **We do not however recommend that the variation of trusts legislation should contain provisions similar to those of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.**[53] **These provisions basically replicate the statutory *cy-près* jurisdiction for public trusts and empower the court to reorganise public trusts in order that the resources of the trust can be put to more effective and suitable use having regard to the spirit of the documents constituting the trust. In our view, the merits of any such extension should be considered in the context of charity law reform so as to ensure that it is appropriate in the light of and in a manner comparable to the statutory *cy-près* jurisdiction as it applies to charities.**

5.18 **For the avoidance of doubt, we also do not recommend that the variation of trust legislation should be extended to the *waqf* or *wakaf*.** In *Mohamed Shariff Valibhoy v Arif Valibhoy*,[54] it was held that the High Court does not have jurisdiction under the Trustees Act to remove and appoint trustees of and to a *wakaf*. The court gave two reasons for this conclusion. First, subject matter jurisdiction in respect of the *wakaf* rested exclusively in the Majlis Ugama Islam Singapura (MUIS; the Islamic Religious Council of Singapore), and second, the *wakaf* being a Muslim law juridical creature could not be equated to an English law trust. These reasons are of a general character and go beyond the particular question decided in the case. They apply equally to a jurisdiction to vary a trust and explain why it would be inappropriate to extend the legislation to a *wakaf*.

E. PRINCIPLE OF BENEFIT TO GUIDE THE COURT'S APPROVAL

5.19 Under the English model, which substantially extends the *Saunders v Vautier* rule, the court's role is limited to acting on behalf of the specified or designated beneficiaries. This is a passive role. The arrangement varying the trust will be drawn up proactively by those who seek to vary the trusts and the court will evaluate the proposal for benefit to the designated persons on whose behalf it is requested and authorised to act. It does not appear that the passive role of the court when directing a scheme or application of charity funds *cy-près* is materially different in this respect.

51 See *Re Trustees of the R S MacDonald Charitable Trust* [2008] CSOH 116, Outer House, Court of Session (Scotland).
52 Trustees Act, above, n 5, s 89.
53 1990 c 40.
54 [2016] 2 SLR 301, HC (Singapore).

The court similarly acts upon an application by the trustees or an interested person *ex relatione* the Attorney-General.

5.20 The cardinal principle is that the variation must also be for the benefit of all and each of the persons on whose behalf the court gives its consent. As provided in English variation of trusts model, with one exception, 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*".[55] Construing those provisions, the courts have held that the court is not to consider intra-class comparisons or motives but must be satisfied that the carrying out of the variation to be approved is for the benefit of every person on whose behalf the court is concerned to approve.[56] Further, it must not approve a variation with unjustifiable differential effects across designated persons and consenting beneficiaries but must be satisfied that the variation is in its nature a fair and proper one.[57] Nor is it enjoined to ensure parsimonious variation so that it must only consent to such variation as is necessary to achieve the explicit purposes of the application for variation. But the court will ask if the persons on whose behalf consent is to be given were competent and reasonable, the bargain is one that they would enter.[58]

5.21 We considered whether the principle of benefit should be relaxed, giving the courts greater flexibility to consent to variation although the benefits are not uniform across various classes of beneficiaries. One option is to have the courts consider the likelihood of the contingent or future interest materialising and to factor in this likelihood when assessing the benefit to the pertinent type of designated beneficiary of the proposed arrangement. The courts would be permitted to consent to variations which confer greater benefit on the consenting beneficiaries if the likelihood of the future interest materialising and vesting in the designated persons is small. The objection to this option is that it would be wrong to ignore the value at stake since a small likelihood of the interest materialising is a sizeable loss where the value of the interest is large. In our view, any refinements to provide greater flexibility will not be simple. Variation proceedings, as we explain below, must be open court hearings and giving the courts greater flexibility to operate the principle of benefit will mean raising costs to be defrayed out of the trust estate. **We do not think that is a good idea and therefore recommend adhering to the principle of benefit embodied in the English Act. However, there should be slight modifications as follows.**

55 Variation of Trusts Act 1958 (UK), above, n 1, proviso to s 1(1) (emphasis added).

56 See *Re Remnant's Settlement Trusts*, above, n 28 at 565; *Re Tinker's Settlement* [1960] 1 WLR 1011, HC (England & Wales).

57 See *Re Remnant's Settlement Trusts*, *ibid*.

58 *Re Van Gruisen's Will Trusts* [1964] 1 WLR 449 at 449–450, HC (England & Wales).

5.22 **If the designated persons form a class, such as the unborn children of a named person, we recommend that when varying the beneficial interest the court should only consent if all members of the class will benefit from it, though it is not essential that each member's benefit should be identical to another's.** The English wording is apt to produce this result since approval must not be given unless the variation would be for the benefit of "that person". This is consonant with the principle that a beneficiary ought not to be deprived of his or her interest unless it is for his or her benefit. **So far as variation of powers is concerned, we recommend that the legislation should clarify that the requirement of benefit shall be deemed to be met if benefit will accrue to the class considered as a whole.** This will ensure that a variation of powers will not be frustrated by reason only that it may have differential impact among members of the designated class where trustees have discretion in exercising those powers.

5.23 **We do not recommend limiting the meaning of 'benefit' to financial benefit.** The most famous of the cases which adopt a non-technical interpretation are *Re Remnant's Settlement Trusts*[59] and *Re Weston's Settlements*.[60] In the first-mentioned case, the court considered that removal of the forfeiture clause would be beneficial in promoting free choice of a Catholic spouse and in minimising the possibility of family dissension over matters of religion. In the second-mentioned, the court refused to approve a variation which would involve migration of the English settlement of which the settlor's unborn grandchildren were beneficiaries to Jersey. The court considered that for the unborn grandchildren the educational and social benefits of an English residence outweighed the fiscal advantages of such migration. In numerous cases, the courts have considered that tax minimisation or avoidance is a benefit[61] and we have also explained why this is right. The fact that benefit is not limited to financial benefit will expose the court to the problem of weighing up and balancing non-commensurate financial and non-financial benefits (such as educational and social benefits).[62] This problem has been described as "a legal minefield".[63] Our view is that the difficult exercise is not likely to be a common occurrence since those who support variation in terms of non-financial benefit will have to provide cogent evidence of it, while those who assert that the court should be unimpressed by the financial benefits accruing from the variation will have to provide cogent evidence that the non-financial prejudice outweighs the financial benefits. The burden of proof in either case will not be easily discharged.

5.24 Our recommendation is not intended to, and will not, alter the effect of the case law on the nature of the principle of benefit. As we mentioned in

59 Above, n 28.
60 Above, n 25.
61 See, *eg*, *Re Weston's Settlements*, *ibid*.
62 Hwang & Thio, above, n 26 at 73.
63 *Id* at 72–73.

paragraph 5.20, notwithstanding the proposed variation is beneficial to the pertinent designated persons, it must in addition be fair and just in its nature so that it is proper in all the circumstances to approve it.[64] This means *inter alia* approaching the proposed variation "in a practical and business-like manner" having regard to "the total amounts of the advantages which various parties obtain and their bargaining strength".[65]

F. DESIGNATED PERSONS ON WHOSE BEHALF THE COURT MAY CONSENT – UNBORN AND UNASCERTAINED BENEFICIARIES

5.25 The English model enumerates three categories of persons on whose behalf the court is authorised to approve a variation of trust. These are persons (1) unable to give consent (by reason of non-existence such as unborn beneficiaries or legal incapacity); (2) who may become entitled to beneficial interests such as persons with contingent interests and are not presumptively beneficiaries at the date of application for variation; or (3) with discretionary interests under protective trusts where the interest of the principal beneficiary has not failed or determined.

5.26 The first category is self-explanatory but **we recommend that the category be extended to cover missing persons as well as persons whose whereabouts cannot be ascertained despite reasonable measures being taken. Such extension would be useful to allow the jurisdiction to be exercised in the case of more mobile beneficiaries who move around frequently without maintaining contact and whose absence could delay a beneficial variation requiring urgent approval. In our view, a requirement that such persons cannot be ascertained without inordinate expense or difficulty would set too high a standard and be detrimental to a trust with a modest corpus. The amount of trust funds available for distribution ought not unduly to be depleted by expenditure of trust resources in attempting to locate missing persons for the purposes of seeking their actual consent.**

G. DESIGNATED PERSONS ON WHOSE BEHALF THE COURT MAY CONSENT – PERSONS WHO MAY BECOME ENTITLED TO AN INTEREST

5.27 The second category designates particular potential or contingent beneficiaries of a trust who "may become entitled to an interest" if relevant future events occur. Suppose a trust for the benefit of X and his or her (future) spouse. If X is not yet married or his or her marriage has been

64 *Re Remnant's Settlement Trusts*, above, n 28 at 565.

65 *Re Van Gruisen's Will Trusts*, above, n 58 at 450 *per* Ungoed-Thomas J, approved in *Goulding v James*, above, n 3 at 249. For the court's approach to risk of the benefit not materialising, see *Re Cohen's Will Trusts* [1959] 1 WLR 865 at 868, HC (England & Wales).

dissolved, his or her future spouse is a potential beneficiary and is a person on whose behalf the court may approve a variation. The designation of such a category enjoys wide support. In respect and on behalf of contingent beneficiaries, the courts ought to have and are given the power to decide whether to approve a variation. The question is to what extent the court ought to have power to override the wishes of such persons if they happen to be presumptively ascertained at the time of application to vary the trust.

5.28 The English Act adopts a restrictive approach to this question by excluding from the designated class those potential beneficiaries who are presumptively entitled to an interest at the time of application for variation (the exclusion proviso). In *Knocker v Youle*,[66] the contingent beneficiaries under the ultimate trust (the issue of the settlor's sisters) had interests contingent upon (1) failure or determination of exercise of a power of appointment vested in the life tenant, the settlor's daughter, as well as (2) failure or determination of exercise of a similar power vested in the settlor's son in turn. At the time of application for approval by the court of the proposed variation of trust, some contingent beneficiaries were in existence but their whereabouts were unknown. The court held, dismissing the application by the life tenant and the settlor's son to vary the trust, that it had no jurisdiction to approve the variation on behalf of the fully capacitated contingent beneficiaries whose whereabouts were unknown. Being in existence they were presumptively entitled to an interest and their consent had to be obtained. The court could not give consent in their stead. The court reasoned that if the pertinent future events (namely the deaths of both the life tenant and her brother without exercise of their respective powers of appointment) had occurred, the existing issue of the settlor's sisters would be persons with an interest in the trust property. They would not be persons who "may become entitled to an interest" but persons who have an interest. Such persons are entitled to decide for themselves and have in effect a power to veto the variation if they refuse consent.

5.29 In other words, the exclusion proviso excludes from the designated class of contingent beneficiaries any such person who is presumptively ascertained (*ie*, in existence) at the date of application. In a case like *Knocker v Youle*, the court could only approve a variation on behalf of future, yet unascertained, issue of the settlor's sisters. To further illustrate the operation of the proviso, suppose that a trust has been created under which income is payable to A for life, and on A's death the principal is payable to B unless A has appointed it by will to trustees for the benefit of C's children giving them discretion to appoint to such children and in such amount as they should think fit. Suppose further that, at the time of application for judicial variation, A is alive and has yet to exercise his or her power of appointment. Persons who are objects of a possible discretionary trust are clearly persons on whose behalf judicial consent can be given

66 [1986] 1 WLR 934, HC (England & Wales).

since they are persons "who may become entitled" to an interest. C's children, therefore, are persons who may become entitled to a beneficial interest. Even so, according to the proviso, if F and G are C's children at the time of application for variation, they would presumptively have an interest in the trust, if the event that would render them beneficiaries, *ie*, the exercise of the power by A had in fact occurred at the date of application to the court. The effect of the proviso is that the court cannot give consent on behalf of F and G who are already in being or ascertained at the date of application for judicial variation. The court can only consent on behalf of the yet unascertainable children of C.

5.30 The exclusion proviso was dropped in the Canadian provinces when the model contained in the English Act was adopted. The effect of this omission was considered in a prominent case. In *Bentall Corporation v Canada Trust Co*,[67] the Ontario counterpart of the English Act which omits the proviso fell to be considered. Under the trust constituted by the Bentall Corporation Retirement Plan, 276 employees were beneficiaries with actual vested interests in the pension benefits of the plan and contingent interests in the surplus fund. The proposed variation was intended to deal with the surplus fund and would not affect the actual vested interests. Seven employees refused to consent to the proposal. It was held that the court had jurisdiction to approve the proposal despite the absence of unanimous assent of all employees who might become entitled to the surplus fund. The court could approve it on behalf of all contingent beneficiaries so long as the actual interests of the seven refusing employees were not adversely affected, which was the case.

5.31 **In line with the Canadian approach, we recommend that the Singapore legislation should drop the proviso and retain only the first limb of section 1(1)(b) of the UK Variation of Trusts Act 1958. Persons with contingent interests who are ascertained at the time of proposed variation ought not to be allowed unreasonably to hold the rest of the beneficiaries who desire and consent to variation to ransom where the court is able to form the opinion that the variation is beneficial to yet unascertained contingent beneficiaries as well as for the benefit of the objecting presumptively entitled contingent beneficiaries. The views of presumptively entitled contingent beneficiaries should be considered but they should not have a power of veto.**

5.32 It will be necessary to clarify that contingent beneficiaries under trusts, otherwise void at common law for perpetuities but which are not invalidated under the statutory principle of wait and see, should not be regarded as contingent beneficiaries for the purposes of judicial variation. This clarification will ensure that the relaxation of the rule against perpetuities does not have the effect of widening the number of contingent beneficiaries beyond those originally contemplated prior to the

67 Above, n 41.

introduction of wait and see. When the rule was enforced strictly (prior to the introduction of wait and see in 1964), remote contingent interests were nullified and such trusts as passed the scrutiny of the perpetuities rule were bound to contain only non-remote contingent interests which would vest, if at all, within the prescribed period. In the light of the amendments to the perpetuities rule, a trust in favour of potentially remote contingent beneficiaries will not be void *ab initio* but will only be void if and when it has become certain that their interests will never vest within the period of 100 years. **We recommend that such persons should not be regarded as persons who may become entitled to an interest. The courts should not be obliged to consider on their behalf whether a variation of the trust would be of benefit to them.**

H. THE SPECIAL CASE OF PROTECTIVE TRUST BENEFICIARIES

5.33 We considered whether the statutory protective trust should be accommodated within the proposed legislation. The English model deals with the protective trust in two respects. First, it provides for an exception to the principle of benefit where the court is to give consent on behalf of persons who are mere possible objects of a future discretionary trust in relation to a statutory protective trust.[68] A statutory protective trust protects the primary beneficiary by substituting when certain protective events materialise the primary trust with a secondary discretionary trust for the benefit of the primary beneficiary and related persons of his or her family. Where the primary interest has not failed or determined, the protective discretionary trust is a future trust and its objects are merely persons with a contingent interest. An exception which relaxes the principle of benefit is recognised so as to permit the court to consent more readily to variation of the primary trust. After all, the secondary trust is intended to benefit the primary beneficiary too. However, the protective trust will protect two mutually exclusive groups of the primary beneficiary's family. First, where the unmarried principal beneficiary who is without children, his or her next-of-kin is the secondary discretionary trust beneficiary. Second, where the principal beneficiary is married or has children, the secondary beneficiaries are members of his or her immediate family. As between them, the first group of the primary beneficiary's next of kin does not compel the same attention as the second group. This should make a difference in the way the principle of benefit is relaxed in the case of a statutory protective trust. **We recommend that the legislation should clarify that the requirement of benefit shall be deemed to be met as long as the variation will not prejudice a possible object of a future discretionary trust**. Application of the lower test of benefit which is recommended will likely lead to a further difference. Where the principal beneficiary of a statutory protective trust is unmarried and without children, the court will only need to guard against the very unlikely or small

68 See the proviso to the Variation of Trusts Act 1958 (UK), above, n 1, s 1(1)(b).

prospects of prejudice to his or her next-of-kin. In any other case, the court will consider any likely prospects of prejudice to his or her immediate family of the proposed variation. **We do not however recommend that this matter of degree in application of the requirement of benefit be elaborated in the proposed legislation.**

5.34 It is already obvious from paragraph 5.33 that the English model specifies the objects of a possible future discretionary trust arising upon failure of the primary beneficiary statutory protective trust as designated persons. Whether we should likewise specify such persons is a more controversial question. There is considerable doubt whether protective trusts are practically meaningful in Singapore and thus whether a third category of such designated persons will serve a useful purpose. As prescribed by section 35 of the Trustees Act, the two determining events which will cause failure or determination of the primary beneficial interest are the beneficiary's bankruptcy and alienation by a married woman of property left in trust for her separate use. The principal or primary beneficiary's interest cannot be reached by his or her creditors or any alienee from him or her. If he or she becomes bankrupt or purports to alienate as a married woman, as the case may be, persons specified under section 35 are conferred discretionary interests and can be appointed to the trust property. These persons include the bankrupt, his or her spouse, or issue; or, if the bankrupt is unmarried, the bankrupt and the persons who would, if he or she were actually dead, be entitled to the trust property (*ie*, the next-of-kin).

5.35 There are two reasons that the secondary beneficiaries are designated persons when the protective trust has not yet determined under the English model. The first is that the primary beneficiary cannot be a consenting beneficiary since once the beneficial interest with restraint on alienation of the interest has been accepted, the beneficiary ceases to be able to release it.[69] On the happening of the event of bankruptcy his or her interest under the protective trust will fail or determine, and persons with discretionary interests will be the relevant beneficiaries to consent, if at all. It follows that where that interest has not yet failed or determined, the persons with discretionary interests which include the primary beneficiary are designated persons on whose behalf the court can give consent to a judicial variation. Likewise in the case of a protective trust which has yet to determine because there has yet to be an alienation by a married woman of her separate beneficial interest – having accepted the restraint on her beneficial interest, she would have no effective consent to now release it.

5.36 The problem is that the need for protection by a statutory protective trust is not very relevant under present conditions. Protective trusts which protect a profligate life tenant from his or her financial weaknesses do not seem to be commonly utilised. The second type of protective trusts which

69 See, *eg*, *Re Steed's Will Trusts* [1960] Ch 407, CA (England & Wales).

protect a married woman's property from dissipation by her husband made sense in an earlier age when a married woman ceded control of her property to her husband. This protection is no longer realistically needed. In the light of the very limited use of protective trusts in Singapore, we do not think there are strong reasons for recommending the replication of the statutory protective trust provisions in the proposed legislation. One option is to recommend this replication only for the sake of recognising that as section 35 of the Trustees Act has not been abrogated, there is a residual need to address the peculiar problems which impede judicial variation of the protective trust.

5.37 Another option is to provide for judicial variation of the statutory protective trust but also include other kinds of protective trusts. The statutory protective trust converts the interest into discretionary interests upon the determining event. Another kind of protective trust provides that any attempt to assign the protected interest will operate to cause the interest to cease and the trust to be administered as if the beneficiary had died at the termination of his or her interest. A third kind imposes solvency as a condition precedent to the vesting of the interest. The second option which is more inclusive can be implemented along the lines of section 13(3)(d) of the Tasmanian Variation of Trusts Act 1994[70] which refers to "a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the Court". **We recommend adoption of the second option**.

70 No 52 of 1994 (Tas).

CHAPTER 6

WHETHER JURISDICTION IN DISTRICT COURT

6.1 We recognised that court involvement is an inevitable price to pay for flexibility in variation of trust. Consistent with the grave nature of any order varying the trust, open court hearings with representation by counsel (including the appointment of *amicus curiae* to oppose the variation if necessary) should be the norm while chamber dispositions should be exceptional. This was recently acknowledged as settled practice in England and described as a general principle, necessary for the sake of ensuring uniformity of practice in a serious matter.[71] We agree.

6.2 This means that variation of trust applications will be costly and we considered whether conferring concurrent jurisdiction on the District Court and, if necessary, raising the limits of the District Court's jurisdiction with respect to judicial variation of trust, could be a way to keep costs down. This could be desirable since it is the relatively smaller trusts which typically are most in need of variation. This point is forcefully made by the Singapore Trustees Association ('STA') in their response to our earlier recommendation contained in this paragraph in draft (which was that nevertheless only the High Court should have jurisdiction to approve a variation of trust under the proposed reform). In making that recommendation, we relied on external evidence that the costs of open court judicial variation hearings would be manageable. In Scotland, this experience was described as follows by the Scottish Law Commission: "Hearings normally take the form of ex parte applications in which the court proceeds on the basis of the documents lodged and the statements of fact made in the petition and by counsel at the bar. The procedure is reasonably expeditious and hearings normally last less than an hour."[72] We also thought it important that no beneficiary ought to be deprived of his or her interest except upon the fullest consideration by a superior court. We had in our draft report recommended therefore that only the High Court should have jurisdiction to approve a variation of trust.

6.3 In the wake of the STA's comments, we reconsidered the merits of giving concurrent jurisdiction to the District Court, raising the limits of its jurisdiction if necessary. We noted that the Irish Law Commission was in

71 *V v T* [2014] EWHC 3432 (Ch), HC (England & Wales), citing *Re Chapman's Settlement Trusts (No 2)* and *Re Rouse's Will Trusts*, reported together as a Practice Note at [1959] 2 All ER 47n, [1959] 1 WLR 372 at 375, HC (England & Wales). Applications may be heard in chambers if there is a special reason to avoid publicity such as a need to preserve and protect confidential facts relating to a ward of court.

72 Scottish Law Commission, *Discussion Paper on Variation and Termination of Trusts* (Discussion Paper No 129) (Edinburgh: The Stationery Office, 2005) at [2.20].

favour of concurrent jurisdiction, pointing out that although "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."[73] The New Zealand Law Commission in its comprehensive examination of trust law reform likewise favoured concurrency but importantly thought that the question was part of a larger question whether the High Court should continue to have exclusive jurisdiction to make orders under the Trustees Act.[74] In this country, the equity jurisdiction of the District Court is provided by section 26(b) of the State Courts Act.[75] In the same manner as pointed out by the New Zealand Law Commission for the position in New Zealand, a serious limitation on the court's equity jurisdiction is that the court cannot exercise any of the powers under the Trustees Act. The Act confers exclusive jurisdiction on the High Court. We agree that the time is opportune to re-examine the equity jurisdiction of the District Court in a comprehensive manner, and that a proposal for concurrent jurisdiction to vary trusts cannot and should not be ruled out for the future. It would presently be incongruous to give the District Court concurrent jurisdiction to vary a trust when it does not yet have jurisdiction to exercise somewhat related jurisdictions such as the section 56 jurisdiction and, more generally, the jurisdictions under the Trustees Act to remove or appoint trustees or make other orders affecting trustees. The concurrent jurisdiction, however, should be considered as part of a comprehensive reform of the equity jurisdiction and we would modify our earlier recommendation to make it clear that in our view there is no countervailing policy against this extension. **For the time being, we recommend that the jurisdiction should be exclusive to the High Court in order that authoritative and more concrete guidance as to how the jurisdiction should be exercised may be developed by the judges of the Supreme Court and be available for future reference and application in the District Court.**

73 *Report on the Variation of Trusts*, above, n 21 at [7.01] (emphasis original); see also [7.02].

74 Law Commission (New Zealand), *Review of the Law of Trusts: Preferred Approach Paper* (Issues Paper 31) (Wellington: Law Commission, 2012), ch 12.

75 Cap 321, 2007 Rev Ed.

CHAPTER 7

COSTS AND SEPARATE REPRESENTATION FOR BENEFICIARIES ON WHOSE BEHALF THE COURT'S APPROVAL IS SOUGHT

7.1 We did not consider that special rules of costs are necessary in order to facilitate proceedings to vary a trust under the proposed jurisdiction. Ordinarily, trustees should and will adopt a neutral position and the applicant for a variation order will bear the costs of and incidental to the application if the order is denied. The applicant may be allowed to defray the costs of the proceedings from the trust estate if the order is granted since the proceedings will have been for the benefit of the trust to be varied and all interested parties. It should be possible, however, for the court to exercise its discretion to order the successful applicant to bear the costs of the application in an appropriate case.

7.2 We do not recommend that separate representation by counsel for the beneficiaries on whose behalf the court is asked to approve the proposed variation should as a rule be required. Although the jurisdiction is not conditional on the participation of all interested persons, the applicant in practice will have good reason to obtain the consent of all consenting beneficiaries before beginning proceedings to obtain the court's approval on behalf of identified designated persons. The applicant bears the onus of proof that variation will be beneficial to these beneficiaries, and, if the variation will result in giving up an interest, should of course provide details including actuarial reports as to how the interest will be replaced by an equivalent substitute of at least the same value. In practice, accordingly, proceedings will be non-contentious if there are no divergent interests and disputed facts or factors relevant to the variation, and the only question is one for the court to determine, namely, whether the court should approve the proposed variation.[76] We think that in all other cases it is sufficient that the court should have discretion to order separate representation by counsel when it is of opinion that the benefit cannot be determined without proper representation in order to inform the court of all factors relevant to the variation, or having regard to the lack of substantial similarity of interests between the consenting and non-consenting beneficiaries.

76 See, *eg*, *Ridgwell v Ridgwell* [2007] EWHC 2666 (Ch), HC (England & Wales).

CHAPTER 8

ALTERNATIVE METHOD OF OBTAINING CONSENT OF INFANT OR INCAPACITATED ADULT BENEFICIARY

8.1 The English Act specifies infants and incapable adults as designated persons on whose behalf the court may give consent to a variation of trust. **We agree with this subject to one qualification.** There are presently alternative ways of obtaining a valid consent from an infant or incapable adult who is actually vested in interest. A guardian may be appointed on behalf of an infant to act on its behalf in relation to its property.[77] A donee may be authorised by a lasting power of attorney to act on behalf of the donor who has become incapable in relation to the donor's property.[78] The qualification therefore is that **we do not recommend that judicial variation should be the exclusive means of obtaining the consent of infant beneficiaries or incapable adult beneficiaries.** Rather, it should be open to the parties seeking a variation to procure the consent of an infant beneficiary or incapable adult beneficiary given by the legal representative without the need for an application under the variation of trusts legislation. Understandably, if there will have to be a prior court application to obtain the guardianship order or appointment of a donee, it may be considered more advantageous to obtain the court's consent directly in a variation of trusts application.

77 But there are severe restrictions on the guardian's powers to deal with the infant's property. See the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), ss 11 and 12.

78 See the Mental Capacity Act (Cap 177A, 2010 Rev Ed), s 11, and also s 12.

CHAPTER 9

QUALIFICATION FOR OFFSHORE TRUSTS

9.1 We mentioned earlier that the variation of trusts legislation should extend to foreign trusts. The English Act and indeed its Australian counterparts are silent on this matter. But the courts have not thought it problematic. They have acted on the basis that there being no contrary indication of any such limitation, foreign trusts, meaning trusts not governed by the *lex fori*, also come within the legislation.[79] Among other things, there is good sense and policy in giving coverage to foreign trusts which are administered or whose beneficiaries reside in this country. Their inclusion, moreover, seems perfectly sensible where variation is permissible under the foreign governing law on similar principles and it ought not to matter in which jurisdiction the variation is considered and approved. This much is uncontroversial from the case law.[80]

9.2 This case law might be thought sufficient affirmation, obviating any need for express provision in the legislation to the effect that foreign trusts should be as amenable to judicial variation as local trusts. However, we considered that express provision should be made so as to impose a condition by way of prerequisite that variation of a foreign trust should not be prohibited by the foreign governing law of the trust. Such qualification has not yet been affirmed in the case law. It is nonetheless an important prerequisite because it will minimise forum shopping for the purposes of judicial variation. The courts undoubtedly could deal with blatant forum shopping by recourse to the doctrine of *forum non conveniens*.[81] Nevertheless, an express provision that variation of foreign trusts will not be entertained in these circumstances gives more commensurate weight to considerations of comity of nations. It ensures that any judicial variation will not place trustees in a dilemma as to whether to comply and be sued for breach of trust in the country of the governing law, or not to comply and be in contempt of the forum court. It additionally helps to avoid defensive or retaliatory firewall legislation in the country of the governing law of the trust forbidding trustees to give effect to the judicial variation. **We therefore support imposition of the above-mentioned condition in relation to the variation of foreign trusts, and recommend that the High Court should have jurisdiction to vary a trust whatever the law**

79 See *Re Ker's Settlement Trusts* [1963] 1 Ch 553, HC (England & Wales).

80 Note, however, the difficulties in the more recent English case law over whether Art 8 of the Hague Trusts Convention (the Convention on the Law Applicable to Trusts and on Their Recognition, concluded 1 July 1985), which is part of English law, is a qualification on the unlimited jurisdiction under the 1958 Act. See *C v C* [2015] EWHC 2699 (Ch), HC (England & Wales).

81 See *Re Paget's Settlement* [1965] 1 WLR 1046, HC (England & Wales).

governing it might be but that there should be no jurisdiction to make any order that would be prohibited by the foreign governing law.

CHAPTER 10

NON-CONSENSUAL JUDICIAL VARIATION – AN EPILOGUE

10.1 The proposed jurisdiction will not authorise the courts to write a new will for the testator who has created a testamentary trust for the benefit of some but not all of his or her children. No more will it authorise a rewriting of any ante-nuptial or post-nuptial settlement deed as between divorcing spouses. However, in both areas of property division on divorce or separation and judicial provision of maintenance of disinherited children or dependents, the courts have already been empowered to intervene in respect of a spouse's or a testator's estate by making property adjustment or maintenance orders in relation to matrimonial assets or the estate, as the case may be. The question is whether these property adjustment or maintenance orders should include judicial variation of beneficial interests of divorcing spouses where the spousal assets are beneficial interests as well as where the testator's trust dispositions leave out dependents who are otherwise entitled to statutory provision of maintenance. If so, consequential amendments will be needed to the Inheritance (Family Provision) Act[82] and the Women's Charter.[83]

10.2 There appears to be considerable merit in clarifying that the court has jurisdiction to intervene with respect to the beneficial interests of spouses upon their separation or divorce.[84] Any such clarification that the divisible property on separation or divorce includes beneficial interests under ante-nuptial and post-nuptial settlements can only be helpful. This would not involve any alteration of the beneficial interest affecting other non-immediate beneficiaries since only a spouse's interest or that of the children of the marriage would be altered. The particular context of property division on divorce, moreover, implies that judicial variation imposed for the purposes of such property adjustments would be limited to the management and size of the beneficial interests in question.

10.3 As a matter of principle, it is wrong to leave out a spouse's beneficial interest when all other assets are subject to division under section 112 of the Women's Charter. In some cases, the inability to divide the beneficial interests of one spouse can be taken into account by giving the other spouse a greater share of the remaining assets. In other cases, this will not

82 Above, n 17.

83 Above, n 16.

84 See Hang Wu Tang, "Let's Call the Whole Thing Off: Divorce and Trusts in Singapore" (2011) 17 Trusts & Trustees 855. He writes at 858 that "whether the Singapore court will regard a trust as part of the matrimonial assets of the divorcing couple is an unresolved issue". At 860, he points out that there are no written laws that allow the court to vary a nuptial trust.

be possible where the beneficial interests are the only substantial assets that can be divided as between the spouses. To be sure, there are a few thorny issues to be resolved. If English precedents are followed, there will be no room for choice of law. Singapore law will be applied and foreign governing law ignored.[85] This disregard of governing law in the UK has provoked offshore trust jurisdictions to enact retaliatory (defensive) firewall legislation against foreign property adjustment orders.[86] So the question must be answered.

10.4 The case for judicial alterations of beneficial interests under a testamentary trust or a statutory trust on intestacy so as to provide relief for the disinherited or children or dependants is fairly similar, albeit less considerable on the merits. The Inheritance (Family Provision) Act allows the court to make lump sum transfers for the maintenance of disinherited children or dependants. This measure of relief is in theory unavailable where the bulk of the estate is settled on a trust created by the will of the testator. In practice, the court may deduct the sum to be transferred for maintenance from the sum an executor should transfer to the trustees. However, there are jurisprudential issues when the transfer on trust has taken effect as to whether the Act allows a clawback. There will also be instances where it may be more appropriate to include by way of judicial variation of the testamentary trust the disinherited children or dependants as beneficiaries. Where there are difficulties in predicting the amount of maintenance which will be needed over the years of minority, inclusion of the disinherited children under the trust will afford a much closer and more accurate approximation of the true maintenance needs and requirements which should be provided.

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85 See, *eg*, *Mubarak v Mubarik* [2009] 1 FLR 664, Royal Court (Jersey).

86 See, *eg*, the Trusts (Guernsey) Law 2007 (No III of 2008) (Guernsey).

APPENDIX

DRAFT VARIATION OF TRUSTS ACT

Variation of Trusts Act

Bill No. / .

Read the first time on .

ARRANGEMENT OF SECTIONS

Section

A BILL

i n t i t u l e d

An Act to extend the jurisdiction of the courts to vary trusts in the interests of beneficiaries and sanction dealings with trust property.

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act is the Variation of Trusts Act 2019 and comes into operation on a date that the Minister appoints by notification in the *Gazette*.

Jurisdiction of courts to vary trusts

2.—(1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve any arrangement mentioned in subsection (2) 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;

(*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;

(*c*) any person unborn;

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

(*e*) any person in respect of any discretionary interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the court.

(2) An arrangement for the purposes of subsection (1), is any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting to the arrangement) varying, resettling or revoking all or any of the trusts, or enlarging, adding to, restricting or terminating the powers of the trustees of managing or administering any of the property subject to the trusts.

(3) To avoid doubt, a person who may become entitled, directly or indirectly, to an interest under the trusts excludes a contingent beneficiary under a trust that would be invalid as infringing the rule against perpetuities (as applied to trusts by section 89 of the Trustees Act (Cap. 337)).

(4) Where the court's approval is sought for an arrangement mentioned in subsection (2) —

(*a*) which will affect the beneficial interests of any person mentioned in —

(i) subsection (1)(*a*), (*b*), (*c*) or (*d*), the court must not approve the arrangement, unless the carrying out of the arrangement would be for the benefit of that person; or

(ii) subsection (1)(*e*), the court must not approve the arrangement, where the carrying out of the arrangement would prejudice that person; or

(*b*) in any other case on behalf of any person mentioned in subsection (1) (*a*), (*b*), (*c*) or (*e*), the court must not approve the

arrangement unless the carrying out of the arrangement would be for the benefit of the whole class of persons to which that person belongs.

Explanation — Where the court does not approve an arrangement which is sought for, the court may consider and if it thinks fit propose any modified or alternative arrangement which would be for the benefit of persons on whose behalf the court's approval for the arrangement is sought.

(5) Subject to subsection (6), the jurisdiction conferred by subsection (1) is exercisable by the High Court and the High Court has such jurisdiction in relation to any trust if —

(*a*) any settlor or any beneficiary of the trust is –

(i) an individual who is a citizen of Singapore or resident in Singapore;

(ii) a body corporate which is incorporated or formed in Singapore; or

(iii) an unincorporated associated or a partnership which is formed or registered in Singapore;

(*b*) the trust is governed by the laws of Singapore; or

(*c*) any property subject to the trust is administered or managed in Singapore.

(6) The High Court must not exercise the jurisdiction to make an order under subsection (1) which would be prohibited by the law governing the trust.

(7) Nothing in this section limits the powers of the High Court or the Family Court under any written law.

(8) In this section, "discretionary interest" means an interest arising under the trust specified in section 35(1)(b) of the Trustees Act (Cap. 337) or any like trust.

Persons who may apply for variation

3. Any or any combination of the following persons may apply for, or appear and be heard at an application for, an order under section 2:

(*a*) any trustee under the will, settlement or other disposition;

(*b*) any beneficiary under the will, settlement or other disposition;

(*c*) such other person as the court thinks fit.

Trusts for charitable purposes and wakaf

4.—(1) The High Court must not exercise its jurisdiction under section 2 in relation to a trust established for charitable purposes as defined in section 2 of the Charities Act (Cap. 37) without considering the submission or representation, if any, of the Attorney-General or the Commissioner of Charities appointed under section 3 of that Act.

(2) To avoid doubt, nothing in section 2 applies to a wakaf as defined in section 2 of the Administration of Muslim Law Act (Cap. 3).

EXPLANATORY STATEMENT

This Bill implements the recommendations of the Law Reform Committee of the Singapore Academy of Law in its "Report on Introducing a Statutory Variation of Trusts Jurisdiction", 2019 ("Report"). The Bill seeks to extend the jurisdiction of courts of law to vary trusts in the interests of beneficiaries and sanction dealings with trust property. The absence currently of such legislation is a "significant gap" because the various practical and legal workarounds to this "gap" do not allow for the adjustment of beneficial interests in unforeseen circumstances. The Bill will equiparate the variation of both the domestic and offshore trust, and enable the High Court to facilitate changes in beneficial interests or administrative powers which are beneficial to all beneficiaries. This is especially when trusts of long duration have become unsuitable or inexpedient over time (see [4.7], Report). The Report recommended the adoption of the UK Variation of Trusts Act 1958 with certain variations (see [5.1], Report).

Clause 1 relates to the short title and commencement.

Clause 2(1) implements the recommendation that the Bill confer on the High Court the same wide scope for variation as the UK Act. (see [5.3], Report). The settlor will not be given the power to veto a proposed variation. The Court cannot override the refusal of a beneficiary to give his consent. The word "arrangement" is used in the widest possible sense (see [5.2], Report).

Clause 2(1)(a) provides that the High Court is authorised to approve a variation of trust on behalf of the category of persons unable to give consent by reason of legal incapacity.

Clause 2(1)(b) provides that the High Court is authorised to approve a variation of trust on behalf of the category of potential or contingent beneficiaries of a trust who may become entitled to an interest if a relevant future event occurs. This provision differs from the UK Act in that it does not exclude from the category of contingent beneficiaries, persons who are presumptively ascertained (i.e. in existence) at the date of the application to the Court. This implements the recommendation in [5.28] of the Report.

Clause 2(1)(c) provides that the High Court is authorised to approve a variation of trust on behalf of persons unable to give consent by reason of non-existence i.e. unborn beneficiaries.

Clause 2(1)(d) implements the recommendation that the category of persons unable to give consent be extended to cover missing persons and persons whose whereabouts cannot be ascertained (see [5.23], Report).

Clause 2(1)(e) implements the recommendation that judicial variation of statutory protective trusts be extended to other kinds of protective trusts (see [5.34], Report). The language is adopted from section 13(3)(d) of the Tasmania Variation of Trusts Act 1994.

Clause 2(2) implements the recommendation that the High Court's power to vary the turst includes resettlement (creation of a new trust for purposes which diverge from those of the original trust) (see [5.5], Report). Clause 2(2) also implements the recommendation that the Bill should clarify that variation includes restricting as well as deleting or terminating the powers (such as the powers to act in positions of conflict) conferred by the trust (see [5.6], Report).

Clause 2(3) implements the recommendation that contingent beneficiaries under trusts otherwise void at common law for perpetuities but which are not invalidated under the statutory principle of wait and see should not be regarded as contingent beneficiaries for the purposes of judicial variation. The High Court should not need to consider on their behalf whether a variation of the trust would be of benefit to them (see [5.29], Report).

Clause 2(4) implements the recommendation that the Bill adhere to the principle of benefit embodied in the UK Act with slight modifications (see [5.19], Report) and that the meaning of benefit should not be limited (see [5.21], Report).

Clause 2(4)(a)(i) implements the recommendation that the Bill clarify that the requirement of benefit in relation to a proposed variation of beneficial interests will be

deemed to be met if benefit will accrue to every member of the class where the beneficiaries form a class. There is no requirement that every member of the class must benefit in the same way (see [5.20], Report).

Clause 2(4)(a)(ii) implements the recommendation in relation to statutory protective trusts and other kinds of protective trusts that the Bill clarify the requirement of benefit in relation to a proposed variation of beneficial interests will be deemed to be met as long as the variation will not prejudice a future object of a future discretionary trust (see [5.30], Report).

Clause 2(4)(b) provides that in cases that will not affect beneficial interests such as the variation of administrative powers, the requirement of benefit will be deemed to be met if benefit will accrue to the class considered as a whole (see [5.18], Report).

The Explanation clarifies that the court's powers to approve the variation of beneficial interests and administrative powers are flexible despite the distinction between the requirements for the variation of beneficial interests and administrative powers (see [5.7], Report). If the court does not approve an arrangement for variation, it may consider and if it thinks fit approve any modified or alternative arrangement which would be for the benefit of the persons on whose behalf the court's approval is sought.

Clause 2(5) implements the recommendation that the jurisdiction must be exercised by the High Court (see [6.1], Report). and that the Bill should extend to foreign trusts (meaning trusts not governed by the *lex fori*). (see [8.1], [8.2], Report).

Clause 2(6) implements the recommendation that although the High Court should have jurisdiction to vary a trust whatever the law governing it might be, the Court will not have jurisdiction to make an order that would be prohibited by the foreign governing law (see [8.2], Report). The language is adopted from *Re Ker's Settlement Trusts* [1963] 1 Ch 553.

Clause 2(7) implements the recommendation that the statutory powers of the High Court under other legislation such as the Charities Act (Cap. 37) and the Women's Charter will not be limited by this Bill.

Clause 2(8) defines "discretionary interest". Section 35 of the Trustees Act is similar to section 33(1) of the UK Trustee Act 1925 s 33(1).

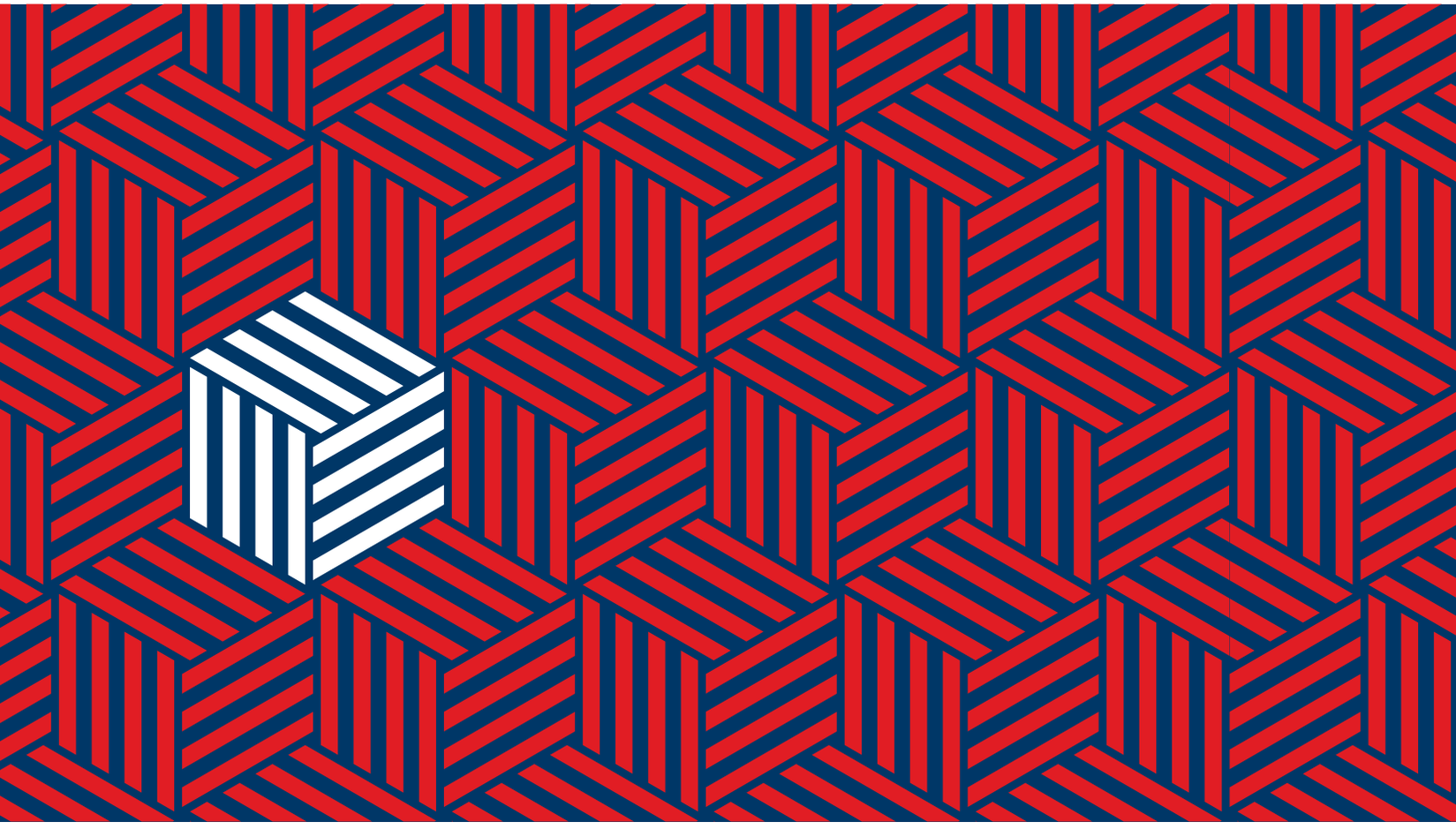
Clause 3 provides that the application for an order for variation may be made not only by a trustee or beneficiary but also by such other persons as the Court may think fit. A charitable trust for charitable purposes may not have any trustee or beneficiary.

Charitable trusts are subject to the High Court's inherent or general jurisdiction as enlarged by the statutory jurisdiction conferred by sections 21 and 22 of the Charities Act (Cap. 37). The Bill will confer concurrent jurisdiction to approve variations of charitable trusts (see [5.10], Report). Clause 4(1) implements the recommendation that where judicial variation of trusts is sought under the proposed reform and a charitable trust is implicated, the Attorney-General or the Commissioner of Charities should be served and heard as if an application had been brought for a scheme or cy-press (see [5.14], Report).

Clause 4(2) implements the recommendation that the Bill should not be extended to the wakaf under Muslim Law (see [5.16], Report).

EXPENDITURE OF PUBLIC MONEY

This Bill will not involve the Government in any extra financial expenditure.



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