

1. Should the courts allow beneficiaries to avoid tax?

Suggested Answer

See Introduction, 13.5.2 and the whole chapter.

Improved tax planning is often the main reason for seeking a variation of trust. It is unusual for the courts to object to this in principle, except in rare cases such as *Chapman v Chapman* [1954] AC 429 and *Re Weston* [1969] 1 Ch 223. Usually the courts are only concerned whether the proposed scheme is likely to work and is likely to save tax for the beneficiaries for whom they are consenting: *Re Cohen* [1965] 1 WLR 1229. They do not see their role as maximising revenue for the government. Instead, the general attitude is that every individual is allowed to organise their affairs to reduce tax if they wish to do so. If Parliament really disapproved of this approach, then presumably it would never have passed the Variation of Trusts Act 1958 in the first place.

The Inheritance Tax threshold is currently £325,000, but a married couple can double it up and leave £650,000, tax free. The threshold is even higher, £425,000, doubled up to £850,000, for married couples wanting to leave their main residence to their children. Inheritance Tax is unpopular with the general public, which helps to support the courts' general attitude. On the other hand, the government needs to raise tax revenue, so the standard Inheritance Tax threshold has remained at £325,00 for some time and not been raised in line with inflation.

2. Does subsection 1(1) (b) have any identifiable meaning?

Suggested Answer

See 13.4 and 13.4.1.

This subsection seems to have been aimed at the problem that might arise in a trust, where possible beneficiaries could not be identified at the time the trust variation was sought. It was thought at one time that it would cover remote beneficiaries (those unlikely to inherit), or beneficiaries who could not be found. Then the court could consent on their behalf. An example would be the case of *In re Bristol's Settled Estates* [1965] 1 WLR 469, where the subsection was used to consent for the numerous beneficiaries under a discretionary trust, some of whom were living abroad and hard to contact.

Unfortunately for the convenience of the court and those seeking a variation, the literal meaning of the subsection does not allow this. It says that the court may consent for those who "may become entitled". In *Knocker v Youle* [1986] 1 WLR 934 there was an attempt to use subsection 1(1) (b) to consent on behalf of seventeen cousins of the family living in Australia. It was most unlikely that they would ever inherit, but as they had contingent interests under the trust, they were "already entitled". Their actual consent had to be sought, which is the normal principle for an adult, mentally competent beneficiary.

The proviso of the subsection says that it cannot be used if the beneficiary could be identified were the contingency to happen. Therefore subsection (b) could not be used in *Re Suffert's Settlement* [1961] Ch 1. Her next of kin were beneficiaries. It would be possible to identify Miss Suffert's next of kin when she died, so the court had to

imagine that she was dead at the date of application to the court. She had some cousins, who were her next of kin. The court could not consent on their behalf, but had to obtain their actual consent.

It seems that the subsection is confined to the situation of the 'spectral spouse', someone an existing beneficiary might marry: *Re Steed's Will Trusts* [1960] Ch 407 and *Re Suffert* again. Future spouses are often included as beneficiaries in trusts. It is not possible to identify such a person so the court needs to be able to consent on their behalf.

FURTHER READING: [1987] Conv 144 J Riddall, 'Does it or doesn't it? Contingent interests and the Variation of Trusts Act 1958'.

3. Is the requirement of benefit too vague?

Suggested Answer

See 13.5. There is no definition in the Act, so the court must simply be satisfied that, on balance, the proposed variation will benefit the beneficiaries for whom they are consenting. Usually it is a straightforward financial calculation, a bargain that an adult might make, as explained in *Re Cohen* [1965] 1 WLR 1229. Other factors such as the personal welfare of the beneficiaries can come into the court's decision such as whether it is good to live abroad (*Re Weston* [1969] 1 Ch 223), whether the child can be trusted with money as in *Re T* [1964] Ch 158 and *Wright v Gater* [2011] EWHC 2881 (Ch), or even whether it is better to live in a happy family but have less money (*In Re Remnant's* [1970] 1 Ch 560 and *Pemberton v Pemberton* [2016] EWHC 2345 (Ch)). The court will look at evidence, but inevitably some of the decisions might be regarded as somewhat subjective.

FURTHER READING: (1971) 34 MLR 98 R Cotterill, 'The requirement of benefit under the Variation of Trusts Act 1958'.