USING & AMENDING TRUSTS

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EXERCISING DISPOSITIVE POWERS
What are they?

- Trusts normally have 2 separate but overlapping powers:
  - appointment,
  - advancement.

- In addition they normally have a power to appropriate which can be regarded as semi-dispositive.
Power of Appointment

• Allows terms of trust to be modified, for example:
  – to give a right to income,
  – to change age contingency.

• If drafted sufficiently widely, it allows the trustees to appoint the property out of the original trust completely on new trusts (a power in the wide form).
Appointment on new trusts

• Exercising a power in the wide form to transfer to a new settlements will be a disposal for CGT.

• Usually undesirable.
To avoid creating new trust

• Helpful if trust is drafted with both wide and narrow powers.

• Trustees should indicate how they are exercising their powers: ‘by way of resettlement’ or ‘in modification of the existing trusts’.
Comply with any formalities

• Failure to do so makes exercise of power void.

• See *Pitt v Holt; Futter v HMRC*
When exercising power

Eg to give a beneficiary a right to income.

• Express appointment to be for fixed term or until trustees revoke.

• Otherwise it is irrevocable.
Power of Advancement

• Allows capital to be applied for advancement/benefit of beneficiaries.
• Usually used to give beneficiary an absolute entitlement, but increasingly used to make settled advances.
• No specific formalities required.
• Important to have clear evidence of date of advance – use declaration of trust
Advancement or benefit?

- **Advancement**
  Establishing beneficiary in life.

- **Benefit**
  Much wider - anything which improves beneficiary’s material situation,
  - extends to discharge of moral or social obligations.
Appropriation

- Often administratively convenient to have separate trusts within fund so trust should include a power to appropriate.
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- Useful to reserve right to undo the appropriation.
Funds remain under single trust ‘umbrella’
Sub-Fund Election possible

- But there will be CGT and income tax consequences.
AMENDING TRUSTS
Options

• Check Trust Instrument
  – power to add administrative powers?

• Application to court
  – Trustee Act 1925, s57
  – Variation of Trusts Act 1958
Trustee Act 1925, s57

- Only allows court to grant management and administrative powers.
- Relatively cheap. Beneficiaries do not have to consent.
- BUT court cannot assist if effect is to vary beneficial interests.
Trustee Act 1925, s57

- Does partitioning a trust affect beneficial interests?
- Yes according to *Re Freeston’s Charity*.

A partition into 2 separate trusts was held to have been ineffective.

“an interest in half a fund is different to a half interest in the whole”
Sutton v England – partition does not always affect beneficial interests
Variation of Trusts Act 1958

• *Saunders v Vautier*: beneficiaries can vary trusts if of full age and capacity and between them entitled to whole beneficial interest.

• VTA allows court to consent on behalf of minor, unborn and unascertained beneficiaries.

• Adults must consent for themselves.
Variation of Trusts Act 1958

- Applications normally made in open court.
- $V \times T$: reporting restrictions possible.
- Separate representation required.
- Possible to temporarily exclude beneficiaries: $A \times Band$.
- The existing trusts must be varied not replaced by completely new trusts.
Power to add/exclude beneficiaries

- Useful.

- *Spouse* does not include civil partner.

- *Issue* normally means biological and adopted descendants - it does not include step-children.
Adopted Children

• In post-1949 dispositions adopted children included, unless excluded.

• But the 1950 and 1976 statutes do not apply to deaths and dispositions before they came into effect.

• *Hand v George*

  HRA 1998 requires 1976 Adoption Act to be amended so that adopted children are not disadvantaged.
IHTA 1984, s144
Where property is settled on death,

- events occurring within 2 years of death (and before an interest in possession has arisen),

- are automatically read back into will.
NRB sum
Discret Trust

Residue

Spouse
Estate now benefits from spouse exemption and NRB is transferred to survivor.
Grandma

Estate

To grandchildren on IPDI Trusts

RNRB now available
S144 cannot be used after an IIP

- Fred leaves his residence to Susan on IPDI trusts, then on discretionary trusts for his children and grandchildren.
- Susan dies within 2 years.
- RNRB not available against trust property as her lineal descendants are not beneficially entitled.
- S144 no help.
Who takes action?

• Beneficiaries of a trust can only vary under *Saunders v Vautier*.

• In the case of a discretionary trust there are normally unborn and minor beneficiaries.

• Instead *Trustees* should make an appointment under s144.
Time limits

• Reading back automatic.
• But only for events occurring within 2 years of death.
• *Frankland* trap removed for deaths on or after 10 December 2014 so reading back occurs within first three months following death.
Form

• No formalities required by section.
• Use powers set out in trust instrument,
  - express power of appointment, or
  - express/statutory power of advancement,
  - keep records.
• No need for IHT 100.
CGT

• No statutory reading back for CGT.
• BUT HMRC accepts that no trust arises where trustees appoint before assets vested in them.
Estate left:

NRB

Discretionary Trust

Residue to spouse

Surviving spouse

PRs transfer assets

TRUSTEES

DEEMED DISPOSAL