

Variations of Private Trusts

This treatment is concerned with variation private trusts – not charitable / public ones. That could be the subject of an entire separate treatment. I shall touch on it here only in relation to a relatively rare category of case where you find provisions conferring private benefit embedded in charitable /public ones, so that part of what you are doing is varying private trusts.

What is a Trust Variation?

Its effect is like that of an agreement of every interested beneficiary that the trust should be terminated or varied. The difference is that s. 1 of the Trusts (Scotland) Act 1961 (“the 1961 Act”) provides the means by which the Court can supply consents for some beneficiaries. It:-

- (1) **approves** the arrangement: supplies consents to the arrangement for the variation of trust purposes on behalf of:
 - (a) any of the beneficiaries who by reason of nonage or other incapacity is incapable of assenting (s.1(1)(a))

- s. 1(6) defines “beneficiary” as including “any person having, directly or indirectly, an interest, whether vested or contingent under the trust”

or

(b) ‘any person (whether ascertained or not) who may become one of the beneficiaries as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who is capable of assenting and would be of that description or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the presentation of the petition to the court’ (s. 1(1)(b)).

- There is authority that this provision enables the court to supply consent only for those who enjoy a claim e.g. *spes successionis* which would not entitle them to take if one assumes the events on which their entitlement turns to have occurred. An example might be a case in which they are entitled as next-of-kin of a living beneficiary and other nearer next of kin are alive. They have an entitlement, but it is not an “interest” for the purposes of s. 1(6) until next of kin are ascertained. By contrast, persons with contingent interests are s. 1(1)(a) “beneficiaries”, since the s. 1(6) definition includes those entitled to contingent interests.

The fiction that the event has happened at the date of presentation for the purposes of judging those in respect of whom the Court’s consent is required – though arbitrary – will tend to limit the situations in which

consent is required from those prospectively entitled e.g. as members of a class.

(c) on behalf of the unborn: In terms of the proviso to subsection (1) the Court is enjoined not to approve an arrangement “unless it is of the opinion that (the arrangement) would not be prejudicial” to such persons. The Court could not be of that opinion unless the interests of persons on behalf of whom its approval is sought were protected.

(2) **authorises** the renunciation of an alimentary liferent. In terms of subsection (4) the Court is enjoined not to authorise an arrangement unless:-

- (a) “it considers that the carrying out of the arrangement is reasonable having regard to the income of the alimentary beneficiary from all sources and such other factors, if any, as the court considers material”
- (b) “the arrangement is approved by the alimentary beneficiary” or the Court **approves** the arrangement (by reason of the liferenter’s incapacity)

Who is sui juris?

Despite the changes made by the Age of Legal Capacity (Scotland) Act 1991 – the fact that children have power to administer property at 16 s. 1(1) and the fact that S. 2 affords testamentary capacity at 12 – s.1(2) of the 1961 Act still deems those between 16 and 18 incapable of assenting to a variation. S. 1(3)(f)(iii) of the 1991 Act expressly preserves the right of the Court to appoint a *curator ad litem* who will instruct separate

Counsel. It will be necessary to invite the Court to supply approval on behalf of those who are not *sui juris*.

Jurisdiction

So far as concerns jurisdiction, the procedure is available in relation to Scottish trusts. The s. 6 definition of “trust” for the purposes of the Trusts (Scotland) Act 1961 is imported from the Trusts (Scotland) Act 1921 (see s. 2). The definition suggests that it applies to Scottish trusts alone; it is said to include “(b) the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise”. As that Act is concerned, e.g., to confer powers on trustees, it seems unlikely that it is apt to apply to foreign trusts.

Jurisdiction is not governed by the Civil Jurisdiction and Judgments Act 1982. It does not involve any person “being sued” or a decree being sought against any person (C.J.J.A. Sch 1 and 3C, Art. 1; ss. 17(1) and 21(1)(a)). One is thus thrown back on the common law; *Clarke’s Trs. Petrs.* 1966 S.L.T. 249 at 251. Consideration of what is a Scottish trust is beyond the scope of this treatment. This is dealt with in the current edition of Wilson & Duncan, *Trusts, Trustees and Executors* and in the annotated Rules of the Court of Session (“RCS”), para. 63.3.2.

At RCS 62.3.2 it is suggested that the Court has an auxiliary jurisdiction in relation to non-Scottish trusts where the remedy is in conformity with the law of the trust. I would question whether this is correct. For this proposition the annotators cite *Allan’s Trs., Petrs.* (1897) 24R.238 & 718; *Lipton’s Trs., Petrs.* 1943 S.C. 521 and *Bateman’s Trs. Petrs.* 1972 SLT (Notes) 78. The proposition is not borne out by those cases. In so far as they point to an auxiliary jurisdiction residing in the Court, they are all examples of an inherent jurisdiction being invoked for purposes auxiliary to a non-Scottish trust.

In *Allan's Trs., Petrs.*, a petition sought authority under the Trusts (Scotland) Act 1867 to sell Scots heritable subjects affected by an English trust. The power sought was refused on the view that the statute was concerned with Scottish trusts. It was subsequently granted, (1897) 24R.718, in a non-statutory (*nobile officium?*) application. *Lipton's Trs., Petrs.* per Lord Justice-Clerk Cooper at 527 was a case in which the Chancery Division of the High Court of Justice in England in 1937 had, on the application of English trustees of a trust affecting Scotland, pronounced an order that the trustees be at liberty to apply to the Court of Session to settle a scheme for the regulation and management of the charity created by the truster in reference to his residuary estate and to carry into effect any scheme so settled and the trustees sought an auxiliary order settling a scheme (of the nature of a *cy pres* scheme) in Scotland. The court granted the order. *Bateman's Trs. Petrs.* was a regimental merger *cy pres* case in which the merged regiment was Scottish and in which the Charity Commissioners had sanctioned the presentation of the petition in Scotland in relation to trusts subject to its jurisdiction or that of the English court – where it would be approved of by the courts of the law of the trust.

In *Lipton's Trs.* there are indications that the auxiliary jurisdiction is an aspect of the *nobile officium* as also, of course, is the *cy pres* jurisdiction. *Bateman* is a case of that sort. If that is the so, one wonders how, if at all, such an auxiliary jurisdiction extends to foreign trusts a statutory jurisdiction which does not itself extend to non-Scottish trusts. *Allan's Trs.* offers little encouragement for the view that a statutory jurisdiction may be extended on auxiliary jurisdiction principles; quite the reverse. The petitioners failed under the Trusts (Scotland) Act 1867 because it was not thought applicable to English trusts; they succeeded only when they invoked the auxiliary jurisdiction and the more

general power to authorise the sale of trust estate. The *cy pres* cases are examples of the same thing; an inherent jurisdiction invoked to provide an ancillary remedy.

In the later report of *Allan's Trs.* at (1897) 24R. 718 it is clear from the opinion of Lord McLaren that the Division considered that before the Trusts (Scotland) Act 1867 the Court had an inherent jurisdiction (exercised sparingly) to authorise the sale of trust estate.

Where one is concerned with varying non-Scottish trusts the problem is that there is no inherent jurisdiction in the Court to vary Scottish – never mind foreign – trusts unless they are public/charitable trusts. There is only a statutory jurisdiction to vary – one which is impliedly restricted to Scottish trusts. The Trusts (Scotland) Act 1867 is of a similar character to the Trusts (Scotland) Act 1921 – concerned with powers etc. of trustees. For just the reasons given in the earlier report of *Allan's Trustees* its application is almost certainly confined to Scottish trusts. For such reasons I doubt the correctness of the views of the annotators.

The Petition and Arrangement

Petitions for variation and authorisation are presented and heard in the Inner House. Interlocutory applications (for first orders, appointment of curators etc) are generally heard in Single Bills. The granting of the prayer approving the Arrangement is dealt with on the Summar Roll.

The Petition tells the story, rehearses relevant fact (and sometimes law) and presents the case for the variation proposed. It explains what the trust does, how the arrangement changes that and the reasons for the changes. The arrangement is the

operative document and effectively rewrites the deed. The Arrangement may vary or revoke any of the trust purposes or enlarge any of the trustees’ powers for the management or administration of the estate (s. 1(1)). It can be recorded in the appropriate books.

If the reasons for the variation involve tax considerations the Petition will usually rehearse in general terms what those tax considerations are. At the stage of moving for approval and (if appropriate) authorisation, Counsel will be in a position to provide more detail should the Court require it.

Where is Judicial Variation necessary? Where is it unnecessary?

Judicial variation is unnecessary (and incompetent) where the Trust can be terminated/ varied by Agreement.

Variation by agreement cannot be done where there is a party with an interest who is disabled from consenting or there is an alimentary liferent the renunciation of which needs to be authorised. So far as concerns approval, non-age is the usual disability. A person under the age of 18 but aged 16 or more can enter into any transaction (s.1(1) of the Age of Legal Capacity (Scotland) Act 1991). Unless, however, judicial ratification is obtained as provided for in s. 4 of the 1991 Act a person transacting between the age of 16 and 18 will be able until he is 21 to apply to the court under section 3 to have the transaction set aside as “prejudicial”. S.1(2) of the 1961 Act deems a person under the age of 18 to be incapable of assenting to judicial variation. So the interposition of the Court’s approval is in practice needed.

If (a) all the beneficiaries are above the age of 18 years, (b) there are no unborn beneficiaries, (c) there are no beneficiaries who are entitled to remoter interests from which a vested interest might emerge and (d) there is no need to renounce a *subsisting* alimentary liferent, the trustees can be compelled to comply with the agreement of the beneficiaries. If consent can be got from the beneficiaries, the trust can be terminated without a court order; *Gray v. Gray's Trustees* (1877) 4R. 378, Lord Gifford at 383:-

“When in a private trust every possible beneficiary desires and consents to a particular course being adopted – all the beneficiaries being of full age and *sui juris* and none of them being placed under any restraint or disability by the trust deed itself – then no-one has any right or interest to object and the court will not interfere to prevent the sole and unlimited proprietors doing what they like with their own.”

(in England, this is referred to as the Rule in *Saunders v. Vautier*). The trust estate may therefore be resettled on different terms.

Where is Agreement Precluded?

A number of situations may be a barrier to agreement. I begin by considering a few of these.

Alimentary liferents in expectancy / not entered upon can be renounced. If there is an alimentary liferent enjoyed in possession it is not capable of renunciation (e.g. *Smith v. Campbell* (1873) 11M. 639). A purported renunciation would be a nullity. Thus the Inland Revenue could contend that the trust continued to subsist (at least in so far as its termination turned on an effectual renunciation). Wilson & Duncan, Trusts, Trustees and

Executors speculate that it might be open to the Revenue to contend that since the income following upon such invalid renunciation would not be payable to the alimentary liferenter, it would simply revert to the estate of the settlor (in intestacy / on a resulting trust?).

Even where a liferent is capable of being renounced, it does not follow that its consensual renunciation will accelerate the vesting of fee. In short, it may not achieve what is wanted. It is a question of construction of the trust deed whether the truster intended that the fee should vest only on the coming to an end of a liferent with the death of the liferenter or upon termination by whatever means. The latter conclusion might be open where e.g. “termination” occurred in the deed as an alternative to death (*Hurll’s Trs. v. Hurll* 1964 S.C. 12 and cases in Wilson & Duncan, chapter 12). In other cases the consent of ulterior interests in fee (if *sui juris*) or the interposition of the Court’s order would be needed if the liferent is to be terminated with a corresponding vesting in fee.

Generally a liferenter with a vested interest in fee may demand a denuding; *Miller’s Trs. v Miller* (1890) 18R. 301. There is some qualification to this rule where the estate in fee is subject to a direction that the trustees hold for behoof of the fiar. Such a protective interest may present an obstacle to consensual termination. It ought not to be insurmountable; the liferenter may not be able to demand a denuding, but he can renounce liferent and fee and substitute interests be agreed. For more detailed discussion of vested interests in fee qualified to so as to preclude demanding a denuding, see Wilson & Duncan, Chapter 12.

A discretionary object has no assignable or transmissible interest any more than the object of a mere power. Even so, the existence of a discretionary *spes* will preclude

termination on agreement though other interests agree; *Schmidt v. Rosewood* [2003] 2 A.C. 709 at per Lord Walker of Gestingthorpe 726 para 41. The exceptions seem to be (i) where all members of a closed class of discretionary objects concur (ii) where the deed affords the trustees express right to release the power / void the discretion. The presence of discretionary objects might not be an obstacle to judicial variation, but either that or a fiduciary dispositive power has the potential ‘to block a family arrangement or similar transaction proposed to be effected under the rule in *Saunders v. Vautier* (1841) 4 Beav 115 (unless in the case of a power the trustees are specially authorised to release, that is to say extinguish, it)’; see *Schmidt v. Rosewood Trust Ltd* cit supra at paras. 40 and 41. As is observed in the current edition of Wilson and Duncan on Trusts Trustees and Executors, p. 188 13-44, it is difficult to see how the mere possibility of benefit under a power (or discretion) which has been released by the person in whom it is vest as party to an arrangement could ever give rise to a subsequent right of action.

Denuding in Breach of Trust – an alternative to Judicial Variation?

Where agreement of the beneficiaries was not possible e.g. for the reasons discussed, particularly before the passing of the 1961 Act, trustees were sometimes prepared to denude against indemnities or insurance cover. Since the passing of the 1961 Act and the passing of Contingent Assurances, this course is much less likely to be followed. But sometimes it still is. It is not to be recommended. Even in cases where there is no alimentary liferent involved, there is a theoretical risk that the Revenue might seek to make assessments as though the trust had subsisted. For example, on the death of a liferenter who, before the consensual partition, enjoyed a pre 22nd March 2006 liferent or a TSI, it might seek to assess the liferent as part of the liferenter’s estate.

In Scots law, the beneficiaries enjoy rights *in personam* as against the trustees. Because of this, the first edition of Wilson & Duncan gave the view that it would not be open to the Revenue to contend that, after a denuding, the trust continued notionally to subsist. This view proceeded on the theory that the breach of trust would simply sound in damages. One difficulty (not the only one) is that there is a body of authority which recognises a continuing obligation upon the trustees to pay the right person having paid the wrong; see e.g. *Lamond's Tr. v. Croom* (1871) 9M. 662 where Lord Kinloch said at 671; “I consider it to be a settled principle of our law that trustees, in distributing the trust-estate, are bound to pay it away to the party in right to receive it, and are liable if they pay it away to any other. There is no hardship to trustees in so holding, for if the matter is one of difficulty, they can always have recourse to judicial authority and refrain from paying without the warrant of a Court. I do not hold it of any moment what the precise blunder is ... In all such cases it is the rule of law that the wrong-paying trustee is responsible.”

There are also decisions such as *Huisman v. Soepboer* 1994 SLT 682, Lord Coulsfield, in which fiduciary obligations of delinquent trustees and accessories to breach are recognised. AB&C were partners; A took title to property in name of company of which A was sole director, giving rise to a constructive trust so that joint and several decree could be taken against A and the company; the company being fixed with knowledge of the trust; *Soar v Ashwell* 1893 2QB 390 followed. The director was liable just as a partner who hands over property is liable jointly and severally with the third party recipient; *Soar v Ashwell*. Lord Coulsfield expressly footed his decision on constructive trust. Might not the trustee who denudes in breach be liable on similar principles, but not for “damages”? All of this comes very close to treating the delinquent trustees as remaining seized of the trust subjects or their equivalent.

A further concern is the fact that those who take funds through a denuding in breach of trust are likely to be the knowing recipients of trust funds made over in breach and bound to disgorge them to those rightly entitled; *Redfearn v. Somervail* 1813 1 Dow 50. The funds may be traceable into their hands; *Southern Cross Commodities Property Ltd. v. Martin* 1991 SLT 83.

The current edition of Wilson & Duncan is less sanguine than the earlier; rightly so, in my view. In chapter 13 at 13-16 the view is given that the Revenue’s position is ambiguous and has never been tested and that; “The proper course is nowadays an application under (the 1961 Act)”.

The Techniques of Variation

Actuarial Valuation and satisfaction of Interests

In the course of restructuring a trust the central obstacle which the petitioners usually have to surmount is that of satisfying the Court in terms of the proviso to s. 1(1); “provided that the court shall not approve the arrangement on behalf of any person unless it is of the opinion that the carrying out thereof would not be prejudicial to that person”.

In practical terms, the effect of this provision is that, in so far as an interest is given up by one whose consent the Court must be asked to supply, a replacement interest of at least equal value needs to be substituted or a fund of such value placed at the disposal of the person entitled.

Where you are dealing with the postponement of a vesting of fee in a liferenter (the example above) consideration has to be given to the position of those who would have taken the fee in the event that the liferenter predeceased the vesting age. As the chances of the liferenter's not qualifying to take the fee will be increased, you would expect that if the destination in fee remains, the value of the fiars' interests would be augmented. If, on the other hand, the intention was to accelerate vesting in the liferenter, the contingent fiars' interest will presumably be diminished in value. There are at least two ways of ensuring that a minor contingent fiar is not prejudiced. (1) The interest in fee can be valued before and after the acceleration of the vesting date and an amount representing the difference paid to/ placed on trusts for behoof of the minor. (2) Term assurance policies can be effected for the value of the interest (escalating at, say, 6% per annum) against the risk that the liferenter should die in the period intervening between the accelerated vesting date and the vesting date under the unvaried deed. These can be settled on trusts ensuring payment of the sum assured to the fiar(s). If single premium policies are available, that is ideal. Otherwise, it is necessary to establish a dedicated feeder-fund trust.

Contingent Policies

At one time it used to be possible to insure. It used to be the case that single premium contingent assurances were used where the obstacle to varying a trust was the existence of a contingent interest. This might occur where e.g. C has a contingent interest which he will take in the event of A (a liferenter) dying predeceased by B (who has the interest in fee). The policy might then be written on a life and counter-life basis, providing a sum assured in the event that A should die predeceased by B and survived by C.

The risk can obviously be a lot less than the life office would bear if A’s life were insured under a single premium whole of life policy. The premium should be less. Typically, such policies were settled on IIP trusts approved by the Court and the policies lodged as a condition of approval. It is understood that for several years there have been no life offices prepared to write such things.

The current edition of Wilson & Duncan at 13-43 reflects some cosily nostalgic happy fantasy world in which contingency and issue risk insurances are available.

Term/ Whole of Life Policies

In some situations, a term or whole of life policy might achieve at reasonable cost what is wanted. Take the example of a situation in which a liferenter age 25 is entitled to the fee at the age thirty. In the event of the liferenter predeceasing the vesting age, contingent fiars take. It is desired to vary the trust so that the fee passes elsewhere. Policies (rather term than whole of life policies) might be used to ward against the risk of the liferenter dying prior to 30.

The devices which can be used to satisfy the statutory test are as various as the situations which trusts are capable of generating.

What is needed by way of materials/ vouching?

The list below looks to what might typically be needed by the time the matter comes on to be heard on a motion to grant the prayer of the petition. At the stage of instructing Counsel, as much of this as can practically be provided is wanted.

- (1) A full paper trail; Trust Deed, any Deeds affecting the beneficial interests under the trusts, vouching of any appointments of additional trustees, vouching of the identity of the current Trustees and the dates and circumstances of their appointment/ assumption.
- (2) A Family Tree.
- (3) If any persons enjoying vested interests under the trust to be varied have died, information is required as to the identity of the persons entitled in succession to them.
- (4) Unless the case is one in which Counsel is being asked to undertake Inheritance Tax/ C.G.T planning, instructions as to what it is that those who are potentially Petitioners are seeking to achieve. Even where Counsel is to undertake a planning function, it is unlikely that he will have *carte blanche* from the beneficiaries. In such a case some indication of what is sought to be achieved and is likely to be acceptable, having regard to the likely availability of necessary consents, is needed.
- (5) If it is intended to seek approval on behalf of persons whose consent needs to be supplied by the Court, some indication is needed of how it is to be demonstrated that the arrangement is not prejudicial to them. This may come with the patch, because the proposed variation simply does not affect their interests, but if it does affect their interests, provisional detail of how the interests are to be protected is needed. If, for example, the appointment of an interest in fee in favour of the existing liferenter cuts across the interest of a fiar who would otherwise take upon the death of the liferenter below a stipulated age, survived by him, thought needs to be given and instructions provided as to whether
 - you value the interest foregone and allocate a sum to the fiar
 - you effect term or whole of life assurance on the liferenter for the projected value.

- (6) If the termination of an alimentary liferent is to be authorised, vouching of the alimentary liferenter’s income from all other sources and capital. This need not be pleaded in detail, but vouching will be required so that the Court can be satisfied as it needs to be. *Robertson Petr.* 1962 S.C. 196 at 203 per Lord President Clyde.
- (7) A stockbroker’s/ valuation surveyor’s valuation of the assets (to be brought down to date as at the Summar Roll hearing for the grant of the Prayer).
- (8) If it is proposed to apply funds in satisfaction of or to provide substitute interests in replacement for the value of existing interests of beneficiaries, an actuarial report will be needed.
- (9) If the case is one in which inheritance tax saving (at any rate an immediate saving) is the objective the following will usually be needed:-
- Solicitor’s (or Accountant’s/ CTA’s) computation of IHT on the unvaried trusts;
 - Solicitor’s (or Accountant’s/ CTA’s) computation of IHT on the trusts as varied;
 - Actuarial apportionment of the saving by value of the respective interests.
- (10) If insurance policies are to be used to provide funds to be held for the purposes of replicating some interest, **draft policy wording** needs to be lodged together with vouching that the insurance company will write the relevant risk upon payment of a stipulate premium. The policy trusts will usually be provided for in the Arrangement, but if they are not, **draft policy trusts** must be lodged. It is probably best to define the “Appointed Day” so that the Interlocutor varying the trusts will not take effect until the mechanics of effecting the settled policies are completed and these lodged in process.

Uses: Why would you want judicially to vary?

This is a “how long is a piece of string?” sort of question. The reasons for seeking to vary are as various as the different sorts of trusts, interests and aims. They range from the sort of case where it is desired – for whatever reason – simply to partition the assets according to the value of the respective interests to those in which forward tax planning is being attempted. Thus it is impossible to list reasons for judicial variation. The most that can be said safely is that the circumstances in which a judicial variation will be required are effectively the obverse side of the obstacles to termination by agreement discussed. Where such obstacles are present and variation is wanted, it will need to be achieved judicially. I would propose only to give a few examples of circumstances in which judicial variation may be sought.

Where it is desired to postpone vesting in fee; TSIs

The most topical instance of this relates to the position of those who have been holding off taking steps to create a TSI/other IIP for a pre-22 March 2006 life tenant, because of questionmarks over the likely tax treatment of the substitute interest.

Prior to the Budget changes, since September 2007 CIOT’s website recorded that HMRC had written to a number of firms regarding a possible IHT charge in that event. The suggestion was that if a s. 49C TSI was created before the original **6th April deadline**, an immediately chargeable transfer would occur on that occasion, so that relief under IHTA 1984 section 53(2) is not available. CIOT and STEP considered that, if that view were right, other successor IIP’s in favour of the pre 22nd March 2006 liferenter would also involve such a charge. The issue turned on whether IHTA 1984 section 53(2A) applied s. 53(2) to the effect of excluding a chargeable event where the liferenter became entitled to a substitute TSI in the same property. You would have expected that it ought to have, since otherwise the tax treatment of the pre-22nd March

2006 IIP's termination and substitution differs according as it occurs pre and post-Budget (2006).

HMRC also seems to have expected that it ought to have. It now takes the position that there was an error in the drafting of the Finance Act 2006. We need not explore what that error was, as the Finance Bill will ensure that the pre 22nd March 2006 liferenter's getting a successor TSI or other IIP will not give rise to an immediately chargeable transfer. It will be taxed under the old regime – one IIP substituted for another. **The deadline for the creation of new s. 49C TSI's has been extended to 6th October 2008.**

The issue matters, because a fairly typical type of trust variation nowadays involves the postponement of vesting in fee.

The original Question 6 of STEP /CIOT's Questions and HMRC's Answers makes it clear that where a power is used to defer the vesting of fee in a pre-22nd March 2006 liferenter, a new substitute interest will be taken from the point of exercise of the power – rather than from the point at which the original vesting date has been passed. So if vesting of fee in a liferenter is postponed from 30 to 45, a new interest is taken not at 30 but immediately.

In appropriate cases, there is the opportunity of creating new s. 49C TSIs prior to October. In an appropriate case, the fee in remainder to an existing liferent may be deferred and the liferent will continue to be treated as part of the estate of the liferenter. There will be no chargeable event on the substitution of the new for the old interest. If the substitution were left over until after October, the liferented property would pass over the relevant property regime.

If there are no express powers enabling the postponement of vesting, consideration may require to be given to judicial variation. No doubt there will be cases in which there are minor contingent beneficiaries interested in fee upon death of the liferenter prior to vesting.

Where it is desired to substitute a younger Liferenter

The particular provisions (s.49D & E) which operate on the coming to an end of an interest in possession after 6th October 2008 require that the interest then ending terminates on death. It may make sense before 6th October 2008 – while s. 49C TSI treatment on *inter vivos* termination remains available – to replace an existing liferenter with a younger, fitter life in order to postpone IHT on death.

Where, for example, an IIP subsisting as at 22nd March 2006 is enjoyed by a father, it may make sense to terminate the interest in favour of his son. The father would be treated as having made a transfer of value (s.52) which is a PET. The son would then be treated as enjoying a pre 22nd March 2006 IIP. This may require judicial variation.

Current Cases

In 41 of the STEP/CIOT Questions and Answers it is confirmed that where a testator had died post 22nd March 2006, subject to appropriate trusts, it is possible to establish IPDI's, 18-to-25 trusts and bereaved minors trusts by way of s. 142 variation. 18-to-25 trusts and bereaved minors trusts can still be created by a variation read back into a will taking effect on or after 22nd March 2006, but before 6th April 2008. If the variation is effected within two years of the will's taking effect and the other conditions are

satisfied, the Act is said to apply “as if the variation had been effected by the deceased or, as the case may be, the disclaimed benefit had never been conferred.”

S. 144 (distributions out of estate) allows of the creation of substitute interests (IPDIs, BMTs and 18-to-25 Trusts) treated as taking effect at the date of the death of the testator. Where the testator dies on or after 22nd March 2006 and no immediate post death interest or disabled person’s interest has intervened and an event occurs on or after 22nd March 2006 but before 6th April 2008 and within two years of death causing the property to be held on trusts which would have given rise to a Bereaved Minor’s Trust or 18-to-25 Trust, these will be treated as if they had occurred in the will – s. 114 (3) & (4).

Thus it may be possible in current cases in relation to deaths during a period of two years beginning on a date within the period from 22nd March 2006 to 5th April 2008 to create BMTs and 18-to-25 Trusts retrospectively.

Whether resort can be had to these provisions depends on the sort of considerations which determine whether or not variation is required. Also, is there power in the deed to do the necessary acts? If on general principles variation by agreement cannot be achieved or there is no power enabling what needs to be done, judicial variation may be required.

Class Closing

As I have mentioned, there may still be some current cases in which an attempt can be made to restructure an A&M Trust as a BMT or 18-to-25 Trust using ss. 142 or 144 of the IHTA. Where a BMT or 18-to-25 Trust is written back into the will of a testator who

died post 22nd March 2006 but before 6th April 2008, the qualifying conditions can be satisfied – so long as an intermediate interest (e.g. an IPDI) has not intervened. Immediately after property ceased to qualify under s. 71, it must qualify under s. 71 D (see s. 71D(3)(b)).

It is clear from Q&A 21A that HMRC take the view that where there is an A&M Trust favouring a class (e.g. of children attaining twenty five) and it is converted to a s. 71D age 18-to-25 Trust it is essential that the class be closed.

This is because if persons unborn or not could qualify to take a share, it could not be said – as it must be for the s. 71D(6) tests to be satisfied – that the beneficiaries for the time being would in due course become entitled to the settled property and that no income will be applied for any other person in the meantime.

S. 71(7) of the IHTA expressly permitted an A&M settlement favouring persons including unborn persons.

Where one is dealing with s. 71A & 71D will trusts, that is a logical/ physiological impossibility. The only possible case is a child *in utero/ en ventre* whose father has died - *nasciturus* fiction.

The BMT/ 18-to-25 beneficiaries require at all times to be within the definition of “bereaved minor”/ “B”. Just as HMRC consider that “bereaved minor”/ “B” cannot include a beneficiary who has been excluded from benefit, so it is considered that it cannot include one who is unborn – other than a child *in utero*.

Where an A&M settlement favours a class (e.g. children of A in life and who shall be alive as at the eldest child’s attaining twenty five upon their each attaining twenty five,

expressly or impliedly including afterborn children) it is likely to present a substantial obstacle to attaining compliance.

- Assume that B1 and B2 aged 8 and 9 are the grandchildren of a settlor and the sole living beneficiaries
- If B1 and B2's parent has a further child, that child **must not be capable of benefiting** (save in the event of the death of B1 or B2 before their being absolutely entitled – from which point the affected portion of the trust will fall within the relevant property regime).
- The terms of the trust require to be amended to exclude the unborn
- Similarly, any power to appoint shares must be exercisable only between all or some of the beneficiaries under 25 who are alive as at the date of conversion to s. 71D status (this is said to follow from s.71D(1)(a), (3)(b)(i) and (6)(a))
- In cases with **a class opening to the unborn** or **a non-compliant power of appointment** it would almost certainly be necessary to seek the Court's approval.

Judicial Variations

S. 1(1)(c) of the Trusts (Scotland) Act 1961 enjoins the Court not to approve an arrangement “unless it is of the opinion that (the arrangement) would not be prejudicial” to such persons. The Court could not be of that opinion unless the interests of afterborn children were protected.

How do you solve this problem?

Generally, issue-risk is not insurable. Where all of the beneficiaries in life were above the age of 16 (s. 1(1) of the Age of Legal Capacity (Scotland) Act 1991) might they be

able to subject their presumptive interest as closed class beneficiaries to trusts for afterborn children. S. 2 affords testamentary capacity at 12. In context, could this be a challengeable prejudicial transaction for the purposes of s. 3 of the Age of Legal Capacity (Scotland) Act 1991? The exercise of testamentary capacity is excluded from challenge under s. 3 – but would the disapplication extend to that exercise if it were part of some overarching transaction? Perhaps not: I would not advocate it.

In some cases, the presumption in *G’s Trustees v. G.* 1936 S.C. 837 that a woman of 53 is above child-bearing age might assist in satisfying the test. Where, for example, the bequest favours children of a particular marriage, it may be possible to establish as a fact that further children will not be born to the parties concerned.

In other cases it is difficult to see how the Court could form the necessary opinion short of there being established a separate parallel trust fund conferring on the unborn prospective interests of identical value to those which would have been available through the working out of the purposes of the unvaried A&M Settlement.

One approach – really a device of desperation – which might be worth considering is for a child’s legal representative to subject the presumptive interest of a minor closed class beneficiary to trusts for afterborn children.

- S.10(1)(b) of the Children (Scotland) Act 1995 provides in relation to a person acting as a child’s legal representative in relation to the administration of the child’s property that “subject to any order made under section 11 of this Act (he) shall be entitled to do anything which the child, if of full age and capacity, could do in relation to the property”.
- A s. 11 & 14 order authorising that may be obtainable in the Court of Session. The writer is not aware of that ever having been attempted. He is

aware anecdotally of this having been done in a consensual partition – without any such order.

Each case where a class needs to be closed to attain compliance with s. 71A or 71D will need to be considered on its terms and facts. There may be cases where attaining compliance is a practical impossibility.

Where it is desired to afford the Trustees the opportunity to assume and resign in favour of trustees in another jurisdiction

Ommanney Petr. 1966 SLT (Notes) 13 is authority for the proposition that power to assume new trustees may be included in an arrangement provided it is suitable having regard to the nature of the trust. If you want to export the trust and there is no power in the trust deed, applications are sometimes made to write in the requisite power.

It is necessary to seek the power in a form which confines its use to the appointment of trustees in a jurisdiction jurisdictions which recognise Scots trusts and will give effect to them *mutatis mutandis* as would a Scottish Court. Exceptional circumstances justifying the power need to be pleaded. See *Baroness Lloyd & Ors. Petrs.* 1963 SC 37, a case in which the arrangement involved the revocation of a Scottish marriage settlement and the payment of the funds to an English marriage settlement of the same parties. Similar principles would apply to a power to appoint a majority of foreign trustees.

Where it is desired to widen Investment Powers

S. 4(1)(ea) of the of the Trusts (Scotland) Act 1921 introduced by the Charities and Trustee Investment (Scotland) Act 2005 gives the trustees power “to make any kind of investment of the trust estate (including an investment in heritable property)”

- S4(1A) makes the power subject to restriction in the trust instrument;
- The power is not restricted or excluded by any restriction of trustees’ powers in a deed executed before 3rd August 1961; s. 4(1C);
- No provision restricting the trustees’ power of investment to such as are provided in the 1961 Act is to be treated as restricting the s. 4(1)(ea) power; s. 4(1D);
- It does not apply to pension trustees, unit trust trustees or “trustees under any other trust who are entitled by or under any other enactment to make investments of the trust estate”.

Thus there will still be situations in which trustees may wish to apply to the Court for powers wide enough to enable them to invest as if beneficially entitled (subject to advice etc.).

Procedure

Parties & Representation

The traditional view (see *Robertson Petrs.* 1962 S.C. 196 per Lord President Clyde at 203) is that Solicitors acting for the Petitioners may act for all the other parties subject to there being separate representation where interests diverge and subject also to appointment of curators *ad litem* to those who are not *sui juris*. Usually, Counsel will advise as to what representation is needed.

Petitioners

The Petitioners may be ‘the trustees or any of the beneficiaries’. Generally speaking, it is tidy to have as many of the beneficiaries as possible petition. It is, however, necessary to consider whether their interests diverge. If they do, it is probably best that some with coinciding interests petition, whilst divergent interests will require to be separately called and represented by Counsel who will ultimately lodge a Minute of Consent on their behalf. They should be included as respondents in the Schedule for Service.

For these purposes “beneficiary” includes all who have a vested or contingent interest. S. 1(6) of the 1961 Act provides; ‘In this section the expression “beneficiary” in relation to a trust includes any person having, directly **or indirectly**, an interest, whether vested or contingent under a trust.’ It includes the beneficiary under a trust set up by the beneficiary of the trust, the purposes of which are sought to be varied. In *Countess of Lauderdale, Petr.* 1962 S.C. 302, where A died leaving a vested right in fee under a trust (“B’s Trust”) to C, C was held to have an indirect interest in B’s Trust.

Whether or not they are strictly “beneficiaries”, persons who would be immediately entitled to take on the happening of an event on which a *spes successionis* turns (e.g. members of an open class, such as next of kin, which closes on death) must consent and so require to be served: see s. 1(1)(b). In *Knocker v. Youle* [1986] 2 All ER 914 at 917 per Warner J., it was said that wording of an English provision almost identical to s. 1(1)(b) of the 1961 Act precluded the court’s approving an arrangement where there was a class of beneficiaries under a destination over because the beneficiary was not “a person ... who may become entitled to an interest under the trust as being at a future date or on the happening of a future event a member of any specified class of

persons ...”. Such a person has an interest, since the s. 1(6) definition of “beneficiary” includes indirect or contingent interests. Such an interest, Warner J. suggested, is to be contrasted with a mere expectation of the nature of a *spes successionis* which, for example, prospective next-of-kin enjoy (this under reference to *re Moncrieff’s Settlement Trusts* [1962] 1WLR 1344 and *re Suffert’s Settlement* [1961] 1Ch. 1).

On the basis of *Knocker v. Youle* it is said by the annotators of RCS that s. 1(1)(b) is concerned to allow the Court to supply the consent of those who are more than one contingency away from being direct beneficiaries. *Moncrieff’s Settlement Trusts* which was cited with approval was a case in which the succession opened to presumptive next-of-kin of a living person. As Warner J. observed in *Knocker v. Youle*, next-of-kin of a living person enjoy only a *spes successionis* rather than an interest. Those remarks were made in a case in which the life tenant had a testamentary power of appointment of the remainder, in default of which there was a life tenancy in favour of the settlor’s widow and an ultimate trust in favour of the settlor’s four sisters failing whom such of their issue as attained 21 years *per stirpes*.

In *Buchan Petr.* 1964 SLT 51 the First Division followed *Knocker v. Youle*. *Buchan Petr.* was a case in which a living life tenant enjoyed a life interest. On the death of the life tenant “the testator made provisions regarding the fee in favour of a series of persons whom all failing the estate was to be held for his own nearest heirs and assignees whomsoever”. As the Court crucially observed “The precise members of the class cannot be known until it is ascertained who survives and who predeceases the date or the event when the right vests in each.” At the date of the presentation of the petition the testator’s nearest heir of more than 21 years of age was his grandson. The court went on to say

“Under this trust these ultimate disponees could only be ascertained at the date of Lady Olivia’s death. She is still alive. For the purpose of ascertaining who falls into the latter part of section 1 (1) (b) (and on whose behalf, therefore, the court does not grant approval) we must assume Lady Olivia to have died on the date of presentation of the petition and see who are then the testator’s nearest heirs and assignees whomsoever, and who are (*sui juris*).”

Properly understood, s. 1(1)(b) about *spes successionis* and interests in a class not yet closed. Consent is required of those who would take if the events on which their taking turns had occurred as at the date of presentation of the petition and they are capable of consenting. The Court can supply the consent of others.

Persons who have an “interest” for the purposes of s. 1(6) – however contingent – need to be served if the trust is to be effectually varied in a question with them. It would be astonishing – and not ECHR compliant – if s.1(1)(b) allowed the Court to cut across property rights (“interests”) without the right to a hearing: that is not what it does.

Trustees as Petitioners

Since the trustees’ duties comprise seeing to the working out of the existing purposes, a beneficiaries’ petition is generally more appropriate where those purposes are to be changed. In certain types of case – for example, where it is likely that the petitioners may need to seek approval disregarding remote interests – the trustees may experience a conflict between their interest to be protected against claims and the need to vary the trust; also in issues as to expenses. The trustees are the persons who

might naturally represent the interests of the unborn. If they petition, a question is raised (below) as to how those interests might best be represented.

Whoever petitions, choice of Petitioners should be the purest matter of form. In any case it should be established – really before the Petition is presented, but with the benefit of separate advice for differing interests – that all of those who are *sui juris* and whose interests are affected by the proposed arrangement either actively support or will assent to it. It should be clear that none of those who are capable of assenting will take issue with what is proposed. The arrangement ought to have been the subject of negotiation amongst the principal beneficiaries.

As curators *ad litem* are appointed by the Court, the Petitioners and their Counsel cannot know with certainty that further difficulties will not be identified after presentation. That simply comes with the territory.

Beneficiaries

Every non-petitioning beneficiary other than those with remote/ negligible interests must be called as a respondent.

The Court may be prepared to vary the trust disregarding such remote interests, but it does not follow that the trust will be varied in a question with such interests in the event that they should come to fruition. The issue is discussed in more detail below. The only safe advice is that unless there is some major practical obstacle to calling persons having remote interests they should all be served.

Separate Counsel should be instructed to advise each category of interest. What do I mean by each “category of interest”? To revert to an earlier example, suppose a liferenter had an interest in fee on survivance to age 30 under the unvaried deed. It is proposed to postpone the vesting date of the fee to age 45. There are 3 fiars entitled to the fee in the event that the liferenter should predecease the vesting age survived by them. The fee is to be divided into quarters; two of the fiars are to take one quarter each; the third is to take two quarters. Two Counsel will be required; one to represent the liferenter, the other to represent the contingent fiars. All other things being equal, there would appear to be no reason why single counsel should not represent all the contingent fiars. Despite the numerical disproportion of the shares, there is no qualitative difference in their respective interests. So long as the numerical disproportion in the unvaried trust is respected in the arrangement, there is no adversity of interest.

Those who are the objects of a mere discretionary *spes* are not “beneficiaries” for the purposes of the legislation and need not be served.

By contrast, those who are entitled to an interest defeasible by, e.g. the exercise of a power of appointment, are beneficiaries; *Schmidt v Rosewood*. That was the position of the class members in *Knocker v. Youle*. Their interests cannot be disregarded. Having regard to the power of appointment, they may however be capable of being bought off for little cost.

Excluding Beneficiaries by exercise of a Power of Appointment?

In some instances, it may be possible for trustees or beneficiaries to put an end to an interest which is an obstacle to variation by the exercise of such a power as a

preliminary to variation. This needs to be approached with caution where the aim is to accelerate vesting of fee in remainder to a liferent. For reasons already discussed the Court will require to consider whether exercise of the power was intended to accelerate vesting of the fee – an issue of construction.

There may also be an issue as to whether using a special power of appointment to clear the way for a variation is a fraud on the power. If the exercise of the power were fraudulent it would be vitiated and the beneficiaries would remain in a position to sue the trustees as if there had been no exercise of the power. There is a fraud upon a power if it is not exercised for the benefit of the party in whose favour it is conceived, but for the particular benefit of the appointer, even as part of an arrangement affecting parties generally. If it is plain on the facts that there was no particular benefit to the appointer, that may suffice.

Pelham Burn & Ors. 1964 S.C. 3 is an example of a case in which an appointer took the actuarial value of the liferent vest in her, appointing to her children the residual capital liferented, but did not take a proportion of prospective estate duty savings for the estate. The trustees lodged answers drawing to the attention of the Court a possible fraud on the power. Lord President Clyde held under reference to dicta of Romilly, M.R. in *re Huish's Charity* (1870) L.R. 10 Eq. 5 that the whole transaction showed that the real object and intention of the appointer had been to benefit the objects of the power who would secure a larger sum of money from the trust as a result of the estate duty saving. The “benefit”, if the liferentrix’s getting the capitalised value of the liferent could be so regarded (the court reserved its opinion on this), was purely incidental. This was in contrast to *Wyndham's Petition* 1964 S.L.T. 290 (which related to the same trusts) in which the liferentrix who had exercised a special power of appointment was intended under the proposed arrangement to take part of the estate duty saving. Approval of the

arrangement was refused and the arrangement required to be amended so that the liferentrix / appointer did not get a proportion of the estate duty saving. *Pelham Burn* has been applied in *re Wallace’s Settlements* [1968] 1 WLR 711, Megarry, J.

Persons incapable of assenting: Appointment of Curators

Before the Petition is presented, it is important to identify all the beneficiaries on behalf of whom the Court’s consent must be sought. The Petition should pray for the appointment of *curators ad litem* to them and an order appointing *curators* should be sought at the first order for intimation and service stage. Where there are several minor beneficiaries with convergent interests (e.g. all have interests in fee on the occurrence of the same event and the proposed arrangement does not treat them in a way which discriminates amongst them) they may be represented by a single *curator*, see the example above. The interests of the unborn are generally represented by the trustees and their counsel. This is a sound practical reason why petitions by trustees are to be avoided, though the annotators to RCS 63.3.10 suggest that unborn interests can be represented by a curator.

It is the duty of a curator to decide whether to lodge a minute of consent to the application or to instruct counsel to oppose it. For these purposes, he will have the legal advice of his own counsel. Often issues are resolved at a level of negotiation between the curator / his counsel and counsel for the petitioners.

Remote / Negligible Interests & Disregarding Them

Some persons with an interest need neither petition nor consent to variation. There is authority to the effect that “beneficiary” does not include those whose interest is

negligible; *Philips & Ors.* 1964 S.C. 141; *Morris, Petr.* 1985 S.L.T. 252. Whilst the rightness of that view may be open to question (see the s. 1(6) definition of “beneficiary”) there is no doubt that the Court considers that it (a) may dispense with service upon person with very remote/ negligible interests (b) has a jurisdiction to pronounce an order varying the trusts but disregarding the very remote/ negligible interests of such persons. The s. 1 jurisdiction to approve an arrangement includes doing that “whether or not there is any other person beneficially interested who is capable of assenting thereto”.

Philips & Ors. was a case in which the truster was survived by three daughters and one son. One daughter subsequently died. The son died survived by a grandson. The children were entitled to liferents. On the death of any of the children their issue took liferents *per stirpes* until the death of the last of the children. On the death of all of the children, the fee was to be paid in certain proportions to the issue of the children. In the event of all the children dying without issue, the fee was to be paid half to remoter relatives of the testator and certain institutions; half to his brothers and sisters and their issue *per stirpes*. In the event of the brothers and sisters having died without issue, this second half share was to be dealt with in the same way as the first. The son died, survived by a son, who enjoyed a liferent of the property liferented by his father. The entitlement of the remoter interests thus turned upon the death of both daughters and the grandson without issue and the truster’s brothers and sisters and their issue.

In those circumstances service on the remoter interests was dispensed with excepting in relation to those incapable of consenting. The court varied the trusts disregarding the non-compearing remoter interests. Lord President Clyde observed that “If parties choose to make an arrangement outside the scheme for the protection of this group of

persons, they are of course free to do so, but, in our view, article 2 of the arrangement should not be included in the arrangement which the Court approves.”

One should be wary of taking advantage of this discretion on the part of the Court to disregard interests. The effect of approval of an arrangement which alters dispositions in favour of non-compearing parties leaves the trust unvaried in a question with them. Even the authorisation of renunciation of an alimentary liferent will not affect the interests of non-consenting parties. In this approval/ authorisations differs from a cy pres variation, the very essence of which will tend to be to cut across the property interests in a resulting trust which would otherwise emerge on a failure of purposes. That a private trust variation leaves the trust unvaried between con-compearing/ non-consenting parties follows from the nature of the procedure – the parties consenting where possible and the Court supplying consents where individual beneficiaries cannot. The very fact that Lord President Clyde observed that insurance might be effected points to there being a continuing liability of the trustees to the remoter interests; and see *re Suffert's Settlement* [1961] Ch. 1, where the court gave its consent to a variation, but left the trustees to protect themselves by getting the consents of remoter interests.

Non-consenting parties will have a right of action against the trustees personally. They may also have a claim against those beneficiaries who were the knowing recipients of property representing the trust subjects; *Redfean v. Somervail* 1813 1 Dow 50. Trust property may be traced into the hands of a person other than a *bona fide* purchaser for value; *Hastie's Judicial Factor v. Morham* 1951 S.C. 668 at 676; *Southern Cross Commodities v. Martin* 1991 SLT 83.

A contrary view that the trust is varied in a question with non-consenting parties is discussed – but not endorsed – in Wilson & Duncan, chapter 13. The contrary view is simply wrong.

A remote contingent interest may have a tiny actuarial value as at the date of petitioning, but may represent a substantial claim if the contingency is purified and the entitlement to the subject of it emerges. It may not be easy or even possible to insure for it. If it is possible actuarially to value the interest and to buy it off in a variation, that will often be the better course.

I raise the matter in the context of representation, because that is where it first presents as an issue. Does one serve on remote / negligible interests? Unless there are major practical difficulties in identifying the persons concerned or establishing their whereabouts, there is little to be said for jumping the gun by inviting the Court to dispense with service on remote beneficiaries. On the other hand, if there are such difficulties or consents seem unlikely to be forthcoming, it is as well to address the problem at the earliest possible juncture by moving to dispense with service.

Service

The Schedule for service should include all of the consenting beneficiaries, the parents or guardians of any child to whom a curator is appointed and persons with a s. 1(1)(b) spes who would be immediately entitled if the relevant event had occurred at presentation .

The extent to which service is required on persons coming within s. 1(1)(b) may be limited because the court can refrain from ordering service on individuals on the ground that they would not be members of the relevant class or of the requisite description if

the date had fallen or event had happened as at the date of presentation of the petition to the court.

Where the deed which the petition seeks to vary is registered in the Books of Council and Session (or Sasines) or in the books of a Sheriffdom, service should be sought upon the keeper / Sheriff Clerk of the respective registers / records; RCS 63.3.

Service may be required upon the “trustee or settlor or any person who has contributed or is liable to contribute to the trust estate which may be affected by the petition”.

Procedure

After the 21 day notice period has expired, the lodging of the execution copy of the petition, the lodging of the minutes consent and any answers, the petitioner should enrol to have the cause appointed to the Summar Roll.

Enquiry

Enquiry is by way of remit to a reporter. A proof is competent (according to the annotators of the RCS 63.3.10) but remits and proofs are virtually unknown. If a state of fact cannot be agreed / represented one has to ask whether the parties should be in such procedure at all.

After the Granting of the Prayer

The arrangement should be registered in the Books of Council and Session. The steps for doing this are set out at 63.3.15 of RCS. An amendment to the interlocutor or

arrangement is incompetent other than to reflect a mistake, clerical error or omission; *Bailey & Anor. Petrs.* 1969 SLT (Notes) 70. In particular, if an insurance is to be effected by a given date and that is not done, a new petition is required; *Hutchison Petrs.* 1965 S.C. 240. This problem can be circumvented in the drafting by defining the “appointed day” for the coming into effect of the arrangement in such a way as to postpone it until the policies are lodged.

Mixed Private & Public Purposes

There is a category of case in which it is possible to identify a public purpose for a trust which nevertheless gives rise to private benefit which is not purely incidental to the public purpose. There are, for example, clubs/associations established for members and former members of regiments, pupils and former pupils of schools and persons at university which may be social but have as their underlying object the furtherance of a charitable purpose – perhaps by the promotion of esprit *de corps*. The means to that end may be social.

Case law such as *I.R.C. v. McMullen* [1981] A.C. 1, *Clutterbuck & Anor. Petrs.* 1961 SLT 427 and *London Hospital Medical College v. I.R.C.* [1976] 1 W.L.R. 1596 suggests that the fact that there is a social means to the end would not preclude its being viewed as a public and charitable trust.

What might preclude charitable treatment is a non-incidental private purpose which has that result. If members of a club are intended to get benefits qua members which are not merely “the unsought consequences of the pursuit of the public purpose”; *Glasgow Police Athletic Association* (1953) S.C. (H.L.) 13) that will preclude charitable treatment under the Taxes Acts.

How do you vary such a trust; e.g. to render part Charitable, part Private?

Cunningham & Ors. – Viscountess Ossington’s Trustees, Petrs. 1965 SC 410 concerned a petition under s. 5 of the Trusts (Scotland) Act 1921 for power to sell heritage of a trust having “charitable” (sic) purposes which was presented in the Outer House (at a time when the nobile officium in relation to public trusts was exercised only by the Inner House) and heard by the First Division on report by the Lord Ordinary (Cameron). Some of the *dicta* of Lord President Clyde at 415 where, under reference to *Myles* 1953 SC 51, he said that “In that case the Second Division, after consulting the judges of the First Division, held that all petitions in charitable trusts must be presented to the Inner House. In our view that decision applies equally to trusts which are exclusively charitable in character and to these which contain, *inter alia*, charitable purposes as well as other purposes which are non-charitable in character. A trust is none the less charitable although it contains other purposes which are not.” need to be approached with caution. They are inconsistent with House of Lords authority calling for charitable trusts to have exclusively charitable purposes, including *Glasgow Police Athletic Association* – unless “charitable” is to be understood in its wider Scottish rather than revenue law sense. I think that they should be understood in that way. They are also *obiter*, since the Lord President (whilst observing that the purposes of trust with which he was concerned were “at very least partly charitable”) considered that the non-charitable purposes were “ancillary to its main charitable purpose” (*ibid*). The (strictly *obiter*) dicta in the case did, however, decide that as matters then stood (prior to the present RCS 63) petitions affecting trusts which disclosed mixed charitable and private purposes required to be presented in the Inner House. This was apparently so despite the fact that s. 26 of the 1921 Act enjoined presentation before a Lord Ordinary.