

Family Finance, Inheritance & ToLATA Team



Variation of settlements Old Law: New Dawn

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St John's Chambers

Variation of settlements



- Relatively unknown but very useful
- Applies to a broad range of factual scenarios
- Court has very wide discretion
- Potentially unlocks 'locked-in' assets
- Can have wide-ranging cost and procedural implications
- May benefit from 'higher' judicial hearing

Legal basis



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- **24 Property adjustment orders in connection with divorce proceedings, etc.**^{E+W}^{IBERS}
- (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of divorce or of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say—
- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (c) **an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage [F1, other than one in the form of a pension arrangement (within the meaning of section 25D below)];**

What?



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- Allows a variation order of a settlement...
- For benefit of parties or children
- Requires an ante- or post-nuptial settlement
- Settlement must be made on the parties to the marriage
- Section 24(1)(c) is a substantive claim in its own right
- Section 24(1)(c) claims can (*and should*) be specifically dismissed in a clean break order

Why?



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- Prevents marital settlements from being inviolable
- Potential to unlock assets or (proprietary) rights held within a settlement
- The 'locked-in' assets may otherwise be outside the court's control
- Enables a 'needs' case to be met
- Enables the contributor (or his/her family) to retain and contain 'contribution' arguments

Procedural pitfalls



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- Consider FPR 2010 9.13 in all cases
- Service of Form A on trustees, settlor and others
- Served parties may request Forms E
- Served parties may file a response statement
- Joinder or not of the trustees / settlor? FPR 2010, r 9.26B

Component 1: an ante- or post-nuptial settlement



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- Must not be narrowly or restrictively construed
- Is a disposition that makes some form of continuing (i.e. not one-off gift) provision for one or both of the parties to the marriage
- Includes, for example:
 - a. Trust (discretionary or otherwise)
 - b. Interests in succession
 - c. A shareholder's agreement
 - d. Composite trusts (involving 1 or more trusts)
BJ v MJ [2011]



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EXAMPLES

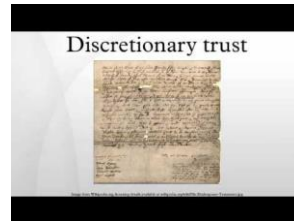
Settlements

Trusts



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- The 'classic' variation settlement
- Discretionary, fixed or reversionary
- Other 3rd party beneficiaries do not prevent the court making a variation order
- For example:
 - a. A farm trust
 - b. A will trust
 - c. A discretionary trust



Shareholders agreement



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Disclosure and evidence



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- All trust documents, codicils, amendments
- Details of all appointments
- Letters of wishes
- Trust accounts (at least 3 years)
- Valuations of trust property
- Internal communications with trust solicitors
- Notes from trustee meetings / resolutions
- 3+ years of disclosure as to income, loans and capital paid from the trust
- Identity of other beneficiaries (and perhaps any income, capital or loans from trust paid to them)

AB v CB [2014] (appealed in P v P [2015])



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- The settlor father's internal memo:

"Can I make progress on the above, if possible before the Christmas break, this concerns the transfer of the XX Farmhouse into trust to make provision for a home there for our younger son CB and his wife, something I have mentioned to you recently. This will make necessary the release of the house from the farm mortgage. Management of the housing development over the next few years will be a demanding full time occupation and CB will need to live close by and attend the office there most days and this is the only suitable house available. The point of putting the house into trust is to ensure that in the long term it remains available as a farm or estate asset. We are anticipating it may improve the planning case for the restoration of a disused building opposite for the use of a farm worker or manager. This would restore in the medium term any value to the secured land that might notionally be lost with the release of the farmhouse. The completion of this operation will enable me to carry through the long delayed transfer of the farm land to EB."

Ante- or post- nuptial



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- The settlement must have a nuptial character to it
- 'Nuptiality' is a question of fact for the court to decide
- The settlement must be settled on a party in the character of husband or wife (marriage celebrated or contemplated)
- A generic reference to a 'spouse' in a trust document – with no spouse on the horizon – may not create sufficient 'nuptiality' (K v K [2009] 2 FLR 936)
- *Prinsep v Prinsep [1929]. "Is it upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state."*

What property falls within the settlement?



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- This is a question of fact in each case.
- In *P v P [2015]*, for example, the whole farmhouse was held to fall within the settlement, rather than just the right to occupy the farmhouse. The critical piece of evidence was the right within the trust to appoint the farmhouse absolutely to the husband.

How to analyse the trust



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➤ Trust considerations

- a. Intention of settlor
- b. Purpose of the trust – dynastic or generational; one-off or akin to settled land?
- c. Does trust property revert elsewhere?
- d. Would W/H have benefited from trust property during the marriage?
- e. Could H/W have been added to the beneficiary class?
- f. A power of appointment does not amount to an entitlement to benefit from the trust
- g. To whom does property revert?
- h. Did trust allow for absolute appointment to one party?
- i. 3rd party interests
- j. Type and value of trust property

➤ Non-trust considerations

- a. W's (and children's) needs
- b. Section 25 MCA 1973 factors, in particular length of marriage, needs and contributions
- c. Can W's claim be satisfied by a life interest? (P v P)
- d. Does H have family money (other than in trust) to buy-out W's claim?

Trustees



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- Acting for trustees is a careful balancing exercise
- How much information to provide versus protecting the trust: are these mutually inconsistent issues?
- There can be evidential implications of providing limited information (BJ v MJ [2011])