



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCS:EEsh1638085

21 February 2019

The Hon. Mark Speakman SC MP
Attorney General of NSW
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney,

Amendments to the Trustee Act 1925

Issues have been raised with the Law Society about the powers provided to trustees pursuant to the *Trustee Act 1925* (NSW) (“Trustee Act”):

- s 43 – regarding the power to apply trust income towards the maintenance, education and benefit of beneficiaries;
- s 44 – regarding the power to advance capital money for purposes where the trust property or any share thereof amounts to up to \$4000; and
- s 81 – regarding the power to vary a trust.

We have detailed these concerns and our recommendations below. We submit that consideration be given to including amendments as recommended to the Trustee Act in a future Justice Legislation Miscellaneous Amendments Bill.

1. Section 43

The Trustee Act was drafted at a time when it was generally assumed a child would attain financial independence by the age of eighteen. Today, it is more common for a child to rely on a parent or guardian for financial guidance and assistance with living, housing and education expenses well into the child’s early twenties.

With this in mind, parents now commonly provide in their wills that property will be held on trust for their child until the child reaches its mid-twenties: for example: “I leave property to A if A attains 25 years of age and if A does not attain the age of 25 years of age to B.”

Problems can arise if the will does not also clearly direct the trustee to apply trust income for the purpose of the child’s maintenance or benefit for the duration of the trust. In that event, the trustee’s powers regarding trust income are prescribed by s 43 of the Trustee Act. Section 43 only permits the application of trust income towards the “maintenance education or benefit” of a beneficiary aged up to 18 years.

43 Maintenance and accumulation—instruments that came into operation on or after 1 March 1926

- (1) Where any property is held in trust for a person who is for the time being an infant for any interest whatsoever, whether vested or contingent, and whether absolute or liable

to be divested, the trustee may at the trustee's sole discretion pay to the parent or guardian, if any, of the infant, or to the person with whom the infant is for the time being residing, or otherwise apply to the whole or any part of the income of the property, for or towards the maintenance education or benefit of the infant.

(1A) The power conferred by subsection (1) extends to the payment, after the commencement of the *Minors (Property and Contracts) Act 1970*, of income to an infant who has reached the age of eighteen years, but this subsection does not limit the generality of subsection (1).

The limited application of s 43 means that a trustee's ability to make financial provision for an adult beneficiary depends entirely on the terms of the will. It would be preferable that s 43 be extended to confer in all cases the power to provide for an adult trustee's "maintenance education benefit or advancement".

By way of example, equivalent provisions in other jurisdictions that permit such payments include:

- *Trustee Act 1973* (Qld) s 61(3);
- *Trustee Act 1958* (Vic) s 37(1)(b);
- *Trustee Act 1936* (SA) s 33(1)(c)(ii);
- *Trustee Act 1962* (WA) s 58(1)(b).

2. Section 44

Where a trust is established for the benefit of an infant beneficiary, in certain circumstances the trust income alone may be inadequate to serve this purpose and the trustee may need to draw on the trust capital. For example, a trust which is intended to provide private school education expenses may contain \$500,000, which if invested at 3.44% will return \$17,200 per annum — an amount insufficient to pay school fees.

In these circumstances s 44 of the Trustee Act gives a trustee the power to draw up to 50% of the value of the trust property or share. However under s 44(1A) the power may not be exercised in the case of an infant beneficiary if the value of the trust property or share exceeds \$4,000.

44 Advancement

(1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee may from time to time pay or apply any capital money subject to the trust, not exceeding altogether in amount one-half of the value of the property or share, for the advancement or benefit of such person or where such person is an infant, for the maintenance, education, advancement or benefit of such person in such manner as the trustee shall in the trustee's absolute discretion think fit.

(1A) The power conferred by this section to pay or apply any capital money subject to the trust for the maintenance or education of a person who is an infant shall not be exercised in any case where the trust property or the share thereof to which the infant is entitled exceeds four thousand dollars.

The limit of \$4,000 in s 43(1A) has not been indexed or updated for several decades. Given that in practice trust property usually values more than \$4,000, in most cases involving an infant beneficiary subsection (1A) renders subsection (1) inoperative and the trustee has no power to draw on trust capital.

The Law Society recommends removing the restriction imposed by s 44(1A), for example by repealing the subsection.

3. Section 81

From time to time a trustee may seek to modify the terms of a trust in order to discharge their duty to a beneficiary. For example a trustee may need to extend the vesting date of the trust so as to avoid financial liabilities that would otherwise accrue.

Section 81(1) of the Trustee Act provides:

81 Advantageous dealings

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:
 - (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
 - (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

A line of authority in the NSW Court of Appeal confirms that although s 81 confers on the Court a power to make orders enabling the trustee to conduct certain transactions which are not authorised by the trust instrument, it does not confer a broader power to make orders varying a trust deed, or a power to authorise a trustee to vary the terms of a trust.

In the case of *Re Dion Investments* (2014) 87 NSWLR 753; [2014] NSWCA 367 ("*Dion Investments*") the trustee of the Dion Family Trust, Dion Investments Pty Ltd, wished to secure greater flexibility in administering the trust in order to secure tax benefits for the beneficiaries. The trustee sought an order empowering it to revoke, add to or vary the trust, terms and conditions of the deed and to declare, revoke and vary new trusts concerning the trust fund or any part of it.

The Court of Appeal (per Barrett JA) declined to make the order, distinguishing the power of a trustee to amend a trust deed from the power to conduct a "transaction" relating to the trust. His Honour said:

98. If the power to be given to the trustee is not a specific power with respect to a particular dealing (or dealings of a particular kind), but, rather, a wide discretionary power to alter the terms of the trust as the trustee thinks fit, the case is not within s 81(1).

His Honour clarified (at [109]) that s 81(1) does not confer on the Court a power to amend the trust instrument, although it does confer powers "which supplement and, as necessary, override the provisions of the trust instrument".

The case of *Cisera v Cisera Holdings Pty Ltd* [2018] NSWCA 286 ("*Cisera*") also concerned a trustee's powers to manage the trust so as to secure tax benefits for the beneficiaries. The applicants were directors of the trustee Cisera Holdings Pty Ltd and also members of a class of beneficiaries. They were concerned that the second applicant's children, who would become beneficiaries should the second applicant predecease them before the vesting date, would incur a substantial capital gains tax liability at the likely vesting date. The applicants sought an order under s 81

extending the vesting date or authorising the trustee to extend the vesting date, so as to postpone the anticipated tax liability.

At the primary hearing Parker J dismissed the application. Relying on the decision in *Dion Investments* he held that s 81 did not provide the power to extend the vesting date of a trust and that the orders sought were not “expedient”.

The Court of Appeal agreed with Parker J. White JA (Bathurst CJ and Beazley P agreeing) confirmed that the Court of Appeal in *Dion Investments* had been correct and went on to say:

68. ...[T]his Court disapproved of decisions which had found in s 81 an authority to alter the trusts on which trust property was held which would have been beneficial to the interests of the beneficiaries, or to the fulfilment of the trust purpose, but which were not concerned with the management or administration of the trust assets.

White JA called for legislative amendment:

69. Austin J in *Arakella v Paton* at [102] ... and Young AJ in *Re Dion* (at [58]) said that s 81 cannot be construed so broadly as to provide a substitute for variation of trusts legislation that the United Kingdom and other Australian States introduced following the decision in *Re Chapman*.¹ For whatever reason, or perhaps for no reason except pressure of other Parliamentary business, New South Wales did not adopt the *Variation of Trusts Act 1958* (UK) that substantially broadened the jurisdiction of courts to vary trusts, although such legislation was passed in most other Australian States and New Zealand (s 63A *Trustee (Variation of Trusts) Act 1962* (Vic); s 95 *Trusts Act 1973* (Qld); s 59C *Trustee Act 1936* (SA); ss 13 and 14 *Variation of Trusts Act 1993* (Tas); s 90 *Trustees Act 1962* (WA); s 64A *Trustee Act 1956* (NZ)).

70. P M Wood in his article *Variation of Trusts in New South Wales* (1990) 13(2) *UNSW Law Journal* 359 stated at 368-369:

The position therefore is that whilst s 81 may be invoked to vary, in effect, the provisions of a trust in terms of the facultative powers for management or administration it cannot be availed of to produce substantive changes to the provisions of or beneficial interests under the trusts ...

For reasons which are not entirely obvious the New South Wales legislature has not followed the examples of the United Kingdom and the other States on the powers to vary trusts. This has left New South Wales courts with limited jurisdiction and has left trustees in that State, who have legitimate reasons to seek a variation to the terms of trusts, with a poorly defined path to a solution.

...

72. The introduction of legislation in other jurisdictions to address the issues demonstrates that this is a matter for Parliament. The number of unsuccessful applications in this State for what might be beneficial changes to the terms of the trusts following *Re Dion Investments* indicate that the issue is ripe for Parliamentary consideration.

The Law Society recommends an amendment to s 81 that permits the Court to approve modifications to the terms of a trust that are in the interests of a beneficiary. We note that in *Cisera* White JA cited s 63A of the *Trustee Act 1958* (Vic) by way of example. Other examples include:


- *Trustee Act 1936* (SA) s 59C;
- *Variation of Trusts Act 1994* (Tas) ss 13–14;
- *Trustees Act 1962* (WA) s 90;
- *Variation of Trusts Act 1958* (UK) s 1; and

¹ *Chapman v Chapman* [1954] AC 429.

- *Trustee Act 1956* (NZ) s 64A.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President