

FINANCIAL TIMES

[Your Questions Inheritance](#)

Can we vary the terms of our family trust?

We would like to extend it beyond its current period of 70 years



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[Lucy Warwick-Ching](#) 4 HOURS AGO

I am the trustee of a family trust set up by my grandfather 50 years ago. The other trustees have said that they may like to vary the trust and extend it beyond its current period of 70 years. What are the considerations in extending a trust?

James Austen, partner at Collyer Bristow, says that when your grandfather set up this [family trust](#) in 1969, English law trusts had a maximum duration of 80 years, although many trusts, including this one, had shorter durations. Additionally, trustees of discretionary trusts created between 1964 and 2010 could only retain income (rather than having to distribute it immediately to beneficiaries) for a maximum of 21 years.

Those restrictions changed in 2009. English law trusts now last for 125 years, and the trustees of discretionary trusts may retain the income throughout the whole of that period. However, the new rules only apply automatically to trusts created on or after April 6 2010.

Trustees and beneficiaries of older trusts who want to take advantage of the new rules — often to postpone a [capital gains tax](#) (CGT) event and/or to keep the terms of the trust relevant for current and future generations — may wish to vary their trusts. Among other effects, a trust variation has the effect of applying this new regime to older trusts.

There are two methods of varying trusts. First, if all the beneficiaries are able to, they may jointly agree to vary the trust on whatever terms they agree. However, this option is available to relatively few trusts and is rarely used. Its tax consequences are also less than certain.

The alternative, and preferable, option is for someone — typically either the settlor (if still living) or a suitable adult beneficiary — to apply to the High Court for an order varying the trust. This is now commonplace and uncontroversial. The court only has power to make such an order if there are one or more beneficiaries who are either under the age of 18 or not yet born; and/or otherwise unable to consent on their own behalf, for example because they have lost mental capacity. If a trust does not meet this criterion, it is sometimes still possible to use existing trust powers to bring it within the scope of the court's jurisdiction.

Varying a trust in this way helps ensure that it remains a useful vehicle for family wealth for at least another 125 years. It can also prevent an untimely tax charge from arising and trustees should therefore be alert to the possibility. However, the trust law and — especially — the tax law aspects of trust variations are complex and include a number of subtleties. Detailed legal advice from a suitably-qualified lawyer with relevant experience is imperative. The trustees will need information on costs, timings and practicalities at the outset.

James Bacon, partner at Payne Hicks Beach, says he has two questions for you. Are all possible beneficiaries of the trust known, adult and of full capacity? Second, will this change be for the benefit of all beneficiaries?

As long as the answer to the second question is yes, it should be possible to extend the life of the trust.

Ordinarily, a trust may not last longer than the period which, at the outset, was the maximum allowed it by



James Bacon, partner at Payne Hicks Beach © Glever Amaral

law. However, trusts created by an instrument made after the Perpetuities and Accumulations Act 2009 came into force may last for 125 years from the date of the instrument. It may be possible to extend the life of the trust.

However, the fully-informed consent of all adult beneficiaries with capacity will be required. The court cannot speak for them. Having persuaded the adult beneficiaries, then the court must be convinced to exercise its jurisdiction on behalf of those under 18 and others without capacity and those not yet ascertained or not yet born. The court will need to see that the proposed variation is for the benefit of those persons.

Assuming it is possible, the variation application is a non-contentious piece of litigation heard, usually in open court, either by a Chancery Master or by a judge, after the consents of those who can consent have been obtained.

Who applies to court? It is interesting that you say it is your co-trustees who want to pursue this. That is not unusual but, at a formal level, the trustees' duty is to administer the trust according to its terms. Therefore, it will be easier if a primary beneficiary, who is not subject to that constraint, agrees to promote this. In a formal sense, the trustees and all live beneficiaries, adult and minor, will be defendants.

With the consent of those who can consent, and the approval of the court for those who cannot consent themselves, an extension of the life of the trust is possible.

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