# SUPREME COURT OF NOVA SCOTIA

**Citation:** *The John Risley Family Trust 2009 (Re),* 2017 NSSC 318

**Date:** 2017-12-11
**Docket:** Hfx. No. 470716
**Registry:** Halifax

The John Risley Family Trust 2009 (Re)

*Applicant*

| | |
|---|---|
| **Judge:** | The Honourable Justice Peter P. Rosinski |
| **Heard:** | December 1, 2017, in Halifax, Nova Scotia |
| **Counsel:** | Peter Rogers, Q.C. and Jeffrey Blucher, for the Applicant |

**By the Court:**

## Introduction

[1] The trustees of The John Risley 2009 Family Trust ("the trust") have made an *ex parte* application for an order confirming an arrangement with respect to the terms of the trust indenture. Counsel argues that the arrangement is a "variation" of the trust as defined by s. 2 (a) of the *Variation of Trusts Act*, RSNS 1989 c. 486 as amended by 2011 SNS c. 42, s. 6.

## Background

[2] The settlor of the trust, Jim Cruickshank, and each of the trustees, John Risley, Brendan Paddick and Hugh Smith have filed affidavits indicating that they are in support of the proposed variation of the trust. Judith Risley filed an affidavit indicating that, she is in favour of the variation of the trust, and is a party to the agreement relating to the proposed variation of the trust. She has obtained independent legal advice with respect to this matter and her professional advisors have had significant involvement in settling the terms of the proposed variation and of the steps intended to occur if the proposed variation is approved by the court. She expressly agrees with the content of John Risley's affidavit.

[3] Mr. Risley states in his affidavit:

> 12 - The purpose of the addition of Judi's Holdings Limited ("Judith Newco") as a beneficiary of the trust is to enable a transfer of some of the shares of LPHL held by the trust to Judith Newco as part of the settlement of Judith Risley's rights arising out of the breakdown of our marriage. I have been advised by the trust's professional advisors, Jeff Blucher and Faye Shaw of McInnis Cooper, and verily believe that a distribution to Judith Risley directly would be less favourable to her and our children and other issue from a tax and estate planning perspective than a distribution of the same amount to Judith Newco, including for example…
>
> 13 - The purpose of revising the class of potential corporate beneficiaries is to create more flexibility in the class of corporate beneficiary to whom distributions of the income and capital of the trust may be made… I have been advised by the trust's professional advisors, Jeff Blucher and Fae Shaw of McInnis Cooper, and verily believe
>
> > A – That the existing clause in the trust indenture dealing with corporate beneficiaries is insufficiently flexible in the context of planning for beneficiaries who are not resident in Canada in light of the restriction referred to above in paragraph 10 of this affidavit and the California

> residency of Michael Risley and his family referred to above in paragraph 6 of this affidavit;
>
> B – that it would be most efficient for Michael Risley and his family if the existing provisions of the trust indenture permitted a distribution to a corporation owned by a trust for the benefit of Michael Risley and his family with provisions in such trust addressing US estate tax.

[4] Jim Cruickshank in his affidavit states that:

> I believe the proposed variation of the trust does not change the ultimate beneficiaries of the trust, and such variation is consistent with my intention in settling the trust. I am in support of the proposed variation of the trust.

## The key questions the court must answer

[5] The *Variation of Trusts Act*, RSNS 1989, c. 486, (as amended by 2011 SNS c. 42, s. 6) requires this court to consider the following questions.

### 1 Is the proposed Arrangement a variation of the trust? [It is]

[6] Section 2(a) of the *Act* defines "arrangement":

> means a variation, resettlement or revocation of a trust in relation to property or a variation, deletion or termination of, or in addition to, the powers of a trustee in relation to the management or administration of the property subject to the trust;

[7] The test to determine whether a proposed arrangement is a variation, as opposed to a revocation or resettlement of the trust, may be considered from the following perspective of excluding alternatives:

(a) *is the proposed arrangement a revocation of the trust?*

[8] Simply stated, it is not.

> A settlor cannot revoke his trust unless he has expressly reserved the power to do so. This is a cardinal rule, and it involves two important concepts. The first is that the trust is a mode of disposition, and once the instrument of creation of the trust has taken effect or a verbal declaration has been made of immediate disposition on trust, the settlor has alienated the property as much as if he had given it to the beneficiaries by an out- and- out gift. This almost self-evident proposition has to be reiterated because it is sometimes said that the trust is a mode of "restricted transfer". So indeed it is, but the restriction does not mean that by employing the trust the settlor inherently retains a right or power to intervene once the trust has

> taken effect, whether to set the trust aside, change the beneficiaries, name other beneficiaries, take back part of the trust property, or do anything else to amend or change the trust. By restriction is meant that he has transferred the property, but subject to restrictions upon who is to enjoy and to what degree. The mode of future enjoyment is regulated in the act of transferring, but the transfer remains a true transfer. The second concept which is involved is that a settlor may expressly reserve not only a power of revocation, but any power he likes provided that he does not contravene any principle of public policy. - *Waters Law of Trusts in Canada*, [4th edition, 2012, Thomson Carswell, Toronto, Ontario, Canada pages 383-4).

[9] Paragraph 35 of the trust indenture reads:

> This trust agreement is intended by the parties and is hereby declared to be irrevocable."

[10] Moreover, all the existing trustees of the trust intend that it be characterized by the court as a "variation", as does the settlor Jim Cruickshank.

(b) *Is the proposed Arrangement a resettlement of the trust?*

[11] I conclude that it is not, for the following reasons:

1. A resettlement occurs when there is, in effect, a creation of an entirely new trust - *Purves(Re)*, [1984] B.C.J. No 3059 (SC), per Meredith J. This determination will always be fact driven. It is permissible to view an arrangement not as a resettlement, but rather as a variation, "if an arrangement, while leaving this substratum [of the original trust] effectuates the purpose of the trust by other means… even though the means employed are wholly different, and even though the term is completely changed." – *Ball's Settlement (Re)*, [1968] All ER 438 (Ch.D.) per Megarry J; see also *Waters Law of Trusts in Canada*, (4th ed. 2012, Thomson Carswell, Toronto, Ontario, Canada) at page 1390;
2. It must be accepted that taxation considerations drive the creation and content of many express trusts. It is therefore significant that the Canada Revenue Agency's general position on whether a proposed a modification of the terms of a trust is in effect a "resettlement" was outlined in CRA Document No. 920965, July 22, 1992, "Window on Canadian Tax Commentary", wherein the Director of Manufacturing Industries, Partnerships and Trusts Division Rulings Directorate as:

> … The Department is not in a position to give you a definitive response as to the tax consequences regarding variations of trusts as this involves a thorough review of all governing documents and a finding of fact. However, we can offer you the following comments which may be of assistance.
>
> It is our opinion that, in general, a variance of a trust may have the consequence of causing the trust to be resettled *if the variance is of significant magnitude to cause a fundamental change in the terms of the trust*. If this occurs there would be an actual disposition of the trust's property from the "old" trust to the "resettled" trust.
>
> [Taken from 2014 CCH Canadian Limited]

3. As counsel for the applicants has stated in its brief:

> The Arrangement contemplates that all of the shares of Judith Newco will be owned directly or indirectly either by existing beneficiaries of the trust or by a family trust for the benefit of existing beneficiaries of the trust. The amendment of the class of potential corporate beneficiaries only modifies and improves the existing provisions dealing with corporate beneficiaries and is consistent with the original intent of such provisions. No existing beneficiary of the trust would cease to be a beneficiary as a result of the proposed variation of the trust. The trust herein is discretionary with respect to capital, and the interest of each existing beneficiary of the trust will be unaffected by the proposed Arrangement. All of the beneficiaries will have the same right to be considered for a distribution of capital as they presently enjoy at the discretion of the trustees.

## 2 Is the Arrangement detrimental to any beneficiary incapable of consenting? The proposed arrangement is not materially and demonstrably detrimental to any beneficiary incapable of consenting.

[12] Having concluded that the proposed arrangement is properly characterized as a variation of the trust, I turn to the next question.

[13] Subsections 3(2) and (3) of the *Act* read:

> The court may issue an order confirming the arrangement if
>
> a) all the beneficiaries of the trust having vested or contingent interests are of full age and capacity and consent to the arrangement; and
>
> b) the court determines it is appropriate to do so.
>
> Where one or more beneficiaries are incapable of consenting to the arrangement, the court may

a) approve the arrangement on behalf of those beneficiaries on any terms that the court considers appropriate, unless the arrangement is detrimental to the interests of any of the beneficiaries incapable of giving consent; and

b) issue an order confirming the arrangement if the court determines it is appropriate to do so.

[14] Before the amendments in 2011, ss. 2 and 3 of the *Act* read:

Variation or revocation of trust

2. Where property, real or personal, is held on trusts arising before or after the coming into force of this *Act* under any will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of

a) any person having, directly or indirectly, any interest, whether vested or contingent, under the trust who, by reason of infancy or other incapacity, is incapable of assenting;

b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts 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;

c) any person unborn;

d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of the managing or administering any of the property, subject to the trusts.

Condition for approval

3. The Court shall not approve an arrangement on behalf of any person coming within clause (a), (b) or (c) of section 2, unless the carrying out thereof appears to be for the benefit of that person.

[15] I accept that the present test – roughly stated as “approve unless detrimental” – is a lower threshold than previously imposed by the legislation: “no approval unless beneficial” – see also the comments in *S.D.(re),*2007 NSSC 288, per Smith ACJ. Therefore, approval should generally follow absent material and demonstrated detriment to such beneficiaries’ interests.

[16] Counsel for the applicant has provided examples of where arguably somewhat similar arrangements have been approved as "variations", since the new test has been in existence: see, *Jeha Family Trust(re)*, Order of Justice Arthur WD Pickup, June 12, 2012, in Hfx. No. 396002; and *Risley/MacDonald Children's Trust (re)*, Order of Justice Joshua M. Arnold, October 21, 2014, in Hfx. No. 432373.

[17] I conclude that the proposed arrangement is not "detrimental" to the interests of any of the beneficiaries incapable of providing consent. I say this because:

1. Under the trust, the beneficiaries incapable of providing consent include, the children of Michael and Elvina Risley (both aged eight years), Sarah Risley and her spouse Guy Barnett (children aged four and 11 years), and any further children they might conceive together, or legally adopt.
2. The addition of Judith Newco as a beneficiary will allow for the transfer of assets held by the trust to Judith Newco, which is owned by Judith Trust. Beneficiaries of Judith Trust include Michael and Sarah Risley and their respective issue. Therefore, their issue will benefit from the transfer;
3. The Arrangement is of additional benefit to Michael Risley's issue because it will allow him the opportunity to reduce his estate tax exposure in the United States in the future through conventional United States estate planning;
4. The Arrangement would allow assets to be distributed by the trust to a corporation owned by a trust [Judith Newco] for the benefit of Michael Risley and his family rather than to him personally, such that the value of the assets (shares of Lobster Point Holdings Limited - "LPHL") would not be included in his personal estate.
5. While generally a "disposition" of any of the beneficiaries' interests in the trust may be triggered by such proposed arrangements, in my opinion there is no material risk of that eventuality, because:
   (a) The court by its approval of this "variation" should effectively preclude a characterization of the arrangement as a resettlement;
   (b) The beneficiaries that are incapable of consenting, cannot be said to be party to, directly or indirectly, any document of conveyance in respect of their interests in the trust;
   (c) No consideration is received by those beneficiaries from the trust as a result of the proposed Arrangement- as Prof. Donovan Waters,

Q.C. wrote in his article "The Power in a Trust Instrument to add and delete Beneficiaries", vol. 31, ETPJ 173 at pg.194:

> Specifically, the power gives the donor the ability to widen or reduce the number of persons among whom the choice as to distribution can be made. It gives no property to anyone, and it takes no property from those whose names are deleted. Its popularity with those who frequently include the power is that, in extending yet further the discretion of the trustees, it allows room for future planning. At the same time there is nothing a dissatisfied beneficiary of a discretionary trust can do except challenge the integrity or objectivity of the trustees.… The central significant point about the power to add and delete is that no one gains property by being added to the discretionary trust list of beneficiaries, and those who are removed from the group lose nothing in the form of property that they otherwise had.

[18] Regarding whether the interests of those persons who in future would become beneficiaries of the trust, for example unborn issue or new spouses, I conclude that the Arrangement is not detrimental to their interests in any event. The addition of new beneficiaries to this discretionary trust does not diminish the existing rights of other beneficiaries in violation of the trust.

### 3 Is it otherwise appropriate to confirm the proposed Arrangement? [It is]

[19] Section 3(5) of the *Act* sets out the factors that should be considered when determining whether it is otherwise appropriate to confirm the Arrangement:

> In determining whether it is appropriate to confirm the Arrangement, the court shall have regard to:
>
> a) the intention of the settlor of the trust, if the settlor's intention is objectively discernible;
>
> b) the position of the trustees;
>
> c) the positions of the beneficiaries;
>
> d) the position of any person appearing before the court on the application.

[20] I accept the evidence of the Settlor, the Trustees, and Judith Risley, that they support the application for variation of the trust, and that their motivations are consistent with the original and continuing intention that the trust is to "make some provision for the welfare and benefit of certain persons as hereinafter set out".

**Conclusion**

[21] Bearing in mind that s. 3(3) of the *Act* gives the court significant discretion in deciding whether or not to approve such arrangements, I am satisfied that it is appropriate for the court to confirm the Arrangement,[1] which is properly characterized as a "variation" of the trust.

Rosinski, J.

[1] Attached hereto as Appendix "A", is the order as issued.