VIII. ADMINISTRATION OF TRUSTS (II)

(f) Impartiality: The ‘Even-Hand’ Principle

The trustee must select investments prudently, but must also deal with the trust property fairly; that is to say, the trustee must accommodate the differing needs of different classes of beneficiaries. Key to fairness is

(i) inquiring into the differing interests of different classes of beneficiaries, including obtaining advice;

(ii) considering the effect of any proposed course of action on different classes of beneficiaries;

(iii) acting to maintain ‘an even hand’ and not favouring one class of beneficiaries over another. This is easier said than done, as the interests of these various parties may conflict and one must also keep in mind the intentions expressed by the settlor in respect of preference of interests (and the settlor should be encouraged to guide the trustee in the instrument).

Thus, such matters as diversification of investments raise questions respecting prudent investment but are difficult to review as a matter of ascertaining whether prudence requires diversification.

Re Smith
[1971] 1 OR 584 (HC); varied, 18 DLR (3d) 405 (Ont C.A.)

Here the father left shares in a trust for the son. The son created a trust of part of the shares’ income for his mother for life, remainder to the son (but if the son pre-deceased the mother, she would attain his share and vice-versa). The trustee refused to diversify the portfolio to increase income to the mother in preference to leaving the trust property as it was upon the original inheritance. The trustee was inordinately deferential to the remainderman at the expense of his mother and was replaced.

Apportionment Between Capital and Income as Between Beneficiaries

Where the trust property is stock dividends and other corporate-income related assets, they are normally treated in the absence of directions in the settlement as capital (to be used to the benefit of life tenants and remaindermen both) rather than income (for the benefit of life tenants alone); see Re Waters [1956] SCR 889.
Lottman v Stanford  
[1980] 1 SCR 1605

Background: ‘The Rule in Howe v Lord Dartmouth’ (1802), 32 ER 56 (Ch)

There are actually two rules from this case:

(a) where a testator gives his or her residuary personal estate in trust for persons in succession without imposing a sale of the assets of the trust, and the trust property is comprised of wasting or unauthorized investments, then those assets must be converted into authorized investments unless the testator intended that the assets were to remain unsold;

(b) Where such investments as should have been sold are not so sold, the investments are treated as if they had been sold – that is, the life tenant is entitled to a fair equivalent of the income that he or she would attained if the investments had been sold.

Thus, where there is a testamentary trust in respect of personality with a reversionary interest to successive beneficiaries, the trustee should normally convert unauthorized investments (eg. high income but risky securities) into authorized investments (eg. a diversified portfolio balancing the needs of the life tenant for income and the remainderman for preservation of the capital) unless the life tenant can show that the testator intended otherwise. Until the property is sold, the life tenant is entitled to a share of income (unless the settlement provides otherwise). Thereafter, the proceeds of the sale are apportioned between capital and income accounts.

In Lottman v Stanford the extension of the rule to real property was refused. Per McIntyre J.:

The question then arises whether new ground should be broken here and whether the operation of the rule in Howe v. Lord Dartmouth should be extended to real property. Wilson J.A.’s views are expressed in her judgment and reproduced above. I am not, however persuaded that we should on this point venture into the field of judicial legislation so boldly. To begin with, the restriction of the rule in Howe v. Lord Dartmouth to personal property is itself a rule of long standing. It must be presumed that those engaged in the preparation of wills and the settlement of trusts under wills know and understand, and have known and understood, its operation and effect and have planned and set in motion many trusts under wills upon the premise that the rule will continue to apply in relation to personal estate but not real estate. Great inconvenience could be caused to many existing trust arrangements by a sudden extension and, in my view, this is not a step which should be taken in this fashion. This is not to say that old rules may never be changed, but rules dealing with estate administration of this nature should not be changed unless there is a positive reason for so doing. In such case, it should be done by the legislature which at the same
time has the power to enact the necessary transition and protective provisions to avoid interference with existing trusts and with rights and obligations acquired and undertaken upon the reasonable expectation that there would be some degree of certainty in the law.

Furthermore, it should be borne in mind that we are here dealing with equitable rules relating to estate administration and not with dependents' relief legislation which enables a court to alter testamentary provisions in order to do justice between the testator and members of his family. Other legislative provisions deal with such matters and in Ontario may be found in the Succession Law Reform Act, S.O. 1977, c. 40, particularly ss. 64 to 88.

Courts must not twist rules such as that expressed in the case of Howe v. Lord Dartmouth to interfere with testamentary dispositions for the purpose of remedying supposed injustice. I would not extend the rule beyond its present limits. Such a step should be left to the legislature when and if it should consider it advisable.

The point here is to allow the settlor to plan based on advice (especially in respect of a testamentary disposition) and not to bend the rules when other remedies are available.

Canada Trust Company v. Russell Browne
2012 ONCA 862 (Ont. C.A.)

The issue respecting whether the trustee of a family trust breached the duty to maintain an even hand presented itself somewhat atypically in this case. The trust was settled in 1980 by the settlor who created a trust in favour of his grandchildren and great-grandchildren as part of an estate freeze. In essence, the capital of the trust would be reserved for the great-grandchildren and the income for their parents. In 1984, the settlor died. The trust was varied in 1988, on consent, to allow the income beneficiaries access to capital to assist their children in planning their lives before inheriting large sums through a power of encroachment exercisable in favour of the various family units. The trust continued to grow and was varied again in 1997. Through a complicated formula, the trust became a unit-trust under which the ‘income beneficiaries’ (grandchildren) would receive a minimum income from the trust but without explicit provisions in the settlement allowing the trustees to encroach on capital to make the minimum payments should present income be insufficient. As it happens, the market dropped and a dispute arose as to whether the capital beneficiaries’ interests (that is, the great-grandchildren) were susceptible to ‘obliteration’ (as they argued) depending on continuing market conditions that effectively required a continuing encroachment on capital. At the end of the day, the variation of the trust and its conversion from a conventional family trust to a unit trust was decisive in allowing the trustee to invest with few restrictions.

Feldman J.A.:

[101] The appellant submits that the application judge erred in his interpretation of the Trust Deed as Varied by failing to recognize and give effect to the duty of the trustee to maintain an even hand between the interests of the income and capital beneficiaries. The obligation of a trustee to treat different classes of beneficiaries fairly and impartially can only be displaced, contends the appellant, by an express intention to the contrary in the trust deed. In the
appellant’s submission, the 1997 variation did not displace the duty to maintain an even hand in managing distributions.

[102] It is trite law that executors and trustees have a duty to maintain an even hand between the interests of the income and the capital beneficiaries, unless that duty is ousted explicitly or implicitly by the words of the instrument. Justice Middleton described this duty in the following way in Armstrong (Re), [1924] O.L.R. 639 (C.A.), at p. 8:

[I]t must be borne in mind by trustees that they are trustees not for the remaindermen alone in disregard of the rights of the life-tenant, nor for the life-tenant disregarding the interests of the remaindermen. Trustees must preserve an even hand as between these two conflicting interests. The duty towards the capital is to preserve it intact. The duty towards the tenant for life is to obtain as large a yield as is consistent with safety and the observance of the law under the instrument of trust as to the class of investment made; and, furthermore, so to adjust the investments that the life-tenant will receive annually his due proportion.

[103] However, in a percentage trust, the trustee’s duty is not to obtain a large income yield while preserving the capital but, instead, to increase the size of the entire trust for the benefit of both classes of beneficiaries. This includes increasing the capital rather than preserving it, and therefore involves an investment strategy that may include more risk. Because in a percentage trust the trustee is investing to increase the entire value of the trust to benefit all, the issue is not whether the trustee’s even hand duty is ousted in respect of the management of the trust’s investments. What is disputed is whether the duty has been ousted in respect of the obligation of the trustee to make distributions to the beneficiaries.

[104] The role of the even hand duty in the administration of a percentage trust was addressed in the Law Reform Commission’s Report on the Law of Trusts. That Report recommends that when trustees administer a percentage trust, they continue to maintain an even hand in the periodic valuation of the trust and when making the distributions. Specifically, the Report states at p. 303:

We therefore recommend that the revised [Trustee] Act should contain a provision to the effect that, where trustees are expressly directed by the trust instrument to hold trust assets “on percentage trusts”, they shall value the assets periodically and, instead of any income arising from the assets, pay to the person who would otherwise be the income beneficiary a percentage of that valuation in each year of the valuation period. In so doing, trustees should be required to maintain an even hand between income and capital beneficiaries.

This recommendation has not been incorporated into the Trustee Act, R.S.O. 1990, c. T.23

[105] There is no clear explanation as to what the Commission means when it says that the trustees should maintain an even hand when valuing the assets and making the annual percentage payment to the income beneficiaries. My
interpretation is that the Commission contemplates a periodic review and, if necessary, a re-set of the percentage payable to income beneficiaries, based on the value of the trust assets and on the even hand rule.

[106] The problem here is that in the Trust Deed as Varied, the percentage payable to the income beneficiaries is based on a fixed formula for determining the “Applicable Percentage” and the amount to be paid can never go below the highest amount previously paid in a year. That is why the trustee continues to be obliged to cause the Holding Company to sell assets, if necessary, to meet the obligation to the income beneficiaries, despite the effect on the Trust corpus.

[107] To the extent the Trust Deed as Varied sets forth a minimum annual payment to the income beneficiaries, the even hand duty on the trustee has been ousted, implicitly, by the words and intended operation of the Trust Deed as Varied. The application judge made no error in making that finding.

(g) The Duty to Account and Inform

It is important to distinguish between two words, “accounts” and “an accounting”. Conventionally, “accounts” (or perhaps more properly “Statements of Account”) refer to the creation and development of standard accounting statements. Typical “trustee accounts” include the following statements: Statements of Original Assets, Capital Receipts and Capital Disbursements, Revenue Receipts and Revenue Disbursements, Investment Account, Schedules of Current Assets, Liabilities, and Investment; Schedule of Compensation. An “accounting” conventionally refers to a type of proceeding; that is, the application by the trustee or a beneficiary to have the Court approve the trustee’s accounts as accurate. The proceeding is called a “Passing of Accounts” and is conventional litigation (although usually in the way of a summary trial) with the full application of the costs rules. A “Passing of Accounts” usually arises after the trustee presents his or her statements of account to the beneficiaries together with a “Release” whereby the beneficiaries agree that the accounts are accurate (particularly with respect to the trustee’s actual or claimed indemnification for proper trust expenses) and release the trustee from liability for taking his or her compensation for the relevant period. Where the beneficiaries disagree with the accounts, the matter must be brought into Court for decision. In terms of process, the trustee will usually serve a Notice of Application to pass the accounts, the parties in disagreement will serve and file Objections, and the judge will decide whether each objection is valid. Such a proceeding can be expensive and trustees and beneficiaries alike strive to avoid this sort of litigation.

A trustee must maintain accounts of the trust property and all actions taken in relation to that property. Upon reasonable notice and as far as practicable (in the sense of maintaining the reasons for the trustees acting as they chose to do as confidential), the beneficiaries have a right to inspect the accounts. Not all information needs to be disclosed and the trend is for the courts to consider carefully the nature of the documents held by trustees that are sought by persons interested in the trust on matters such as confidentiality.
Sandford v Porter
(1889), 16 O.A.R. 565 (Ont. C.A.)

MacLennan JA:

It seems to have been thought by the solicitors of the plaintiffs that it was the duty of a trustee, upon demand for an account, to lay aside everything else, and to sit down and make out an account for them, at the peril of a suit for an account and costs. But the law is not so unreasonable.

The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required; but as a general rule he is not obliged to prepare copies of his accounts for the parties interested. Cases may be imagined where it would be reasonable to require, and when it might be the duty of the trustee to furnish, statements of account, as, for example, when the cestui que trust or the principal lives at a distance from where the trust affairs are being carried on, or in a foreign country. In such a case it would be the duty of a trustee to give all reasonable information and explanation's by letter; and even, if requested, but of course at the expense of the cestui que trust, to prepare and transmit accounts and statements. But every case must depend on its own circumstances, and must be governed by reason and common sense...

The true rule, as I understand it, is laid down by Mr. Lewin, Law of Trusts, 8th ed., p. 691, where he says: 'The cestui que trust has a right to call upon the trustee for accurate information as to the state of the trust. Thus in a trust for sale and payment of debts, the party entitled subject to the trust may say to the trustees, What estates have you sold? What is the amount of the moneys raised? What debts have been paid? etc. It is, therefore, the bounden duty of the trustee to keep clear and distinct accounts of the property he administers and he exposes himself to great risks by the omission. It is the first duty of an accounting party ... to be constantly ready with his accounts.'

[Thus the beneficiaries may obtain information respecting the existence of the trust, the accounts, but generally have no rights to the decision-making memoranda of the trustees (except where breach of trust is alleged).]

The Ontario statute is representative of the statutory obligation of the trustee to account:

Trustee Act, R.S.O. 1990, c.T.23, ss. 23, 23.1:

23. (1) A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court.
Despite the formal process of a judicial audit of trustee accounts through a “Passing of Accounts” such proceedings are relatively uncommon. Most administrations will feature the presentation of informal accounts and reasonable adjustments being made based upon queries and objections. Often, the Passing of Accounts proceedings are not really about a conventional accounting but rather as a timely and efficient manner to bring into Court complaints about trustee misconduct, and the application for accounts to be passed may be brought together with an application to remove and replace trustees and a claim against the trustees for breach of trust and breach of fiduciary duty.

**Duty To Inform**

In most cases, trustees do their utmost to keep beneficiaries apprised of the developments in the management of the trust particularly as relates to investment and distribution of trust property. In this way, beneficiary complaints are kept to a minimum and trustees may do a better job of administering the trust. At other times, requests for information and documents can be rather more burdensome.

A trustee who administers a trust is sometimes in the unenviable position of having to satisfy beneficiaries who would rather be trustees. In such cases, it seems unfair to the trustee and costly to other beneficiaries for the trustee to constantly face demands for information from a beneficiary seeking ammunition to apply to have the trustee removed. At other times, a trustee has been provided with the discretion to appoint property or encroach on capital and the settlor has provided a non-compulsory “letter of wishes” that he or she wished to be treated as confidential and not have provided to the beneficiaries. In the past, the jurisprudence has been most unhelpful looking at such technical issues as which beneficiaries are entitled to which assets. In *Schmidt v Rosewood Trust Inc.*, a new more principle approach was outlined.

**Schmidt v Rosewood Trust Inc.**

[2003] AC 709 (Privy Council)

An application for disclosure was brought relating to two settlements of which the applicant’s father had been a co-settlor and under which the applicant claimed discretionary interests both personally and as the administrator of his father's estate. The trustees opposed disclosure on the ground that the petitioner was not a beneficiary under the settlements, and that his father was never more than an object of a power under the settlements and as such had no entitlement to trust documents or information. The Privy Council held that the nature of the right to disclosure of information was not strictly a proprietary interest in the subject-matter of the trust, but rather the inherent jurisdiction of the court to control administration of the trust. Merely by asserting a claim of breach of trust, the beneficiary could not have unrestricted access to documents; similarly, the lack of a proprietary interest in one particular aspect of the trust will not prevent access to information where the interests of justice dictate.

Lord Walker:
Their Lordships have already indicated their view that a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts. There is therefore in their Lordships’ view no reason to draw any bright dividing line either between transmissible and non-transmissible (that is, discretionary) interests, or between the rights of an object of a discretionary trust and those of the object of a mere power (of a fiduciary character). The differences in this context between trusts and powers are (as Lord Wilberforce demonstrated in In re Baden [1971] AC 424, 448-449) a good deal less significant than the similarities. The tide of Commonwealth authority, although not entirely uniform, appears to be flowing in that direction.

However, the recent cases also confirm (as had been stated as long ago as In re Cowin 33 Ch D 179 in 1886) that no beneficiary (and least of all a discretionary object) has any entitlement as of right to disclosure of anything which can plausibly be described as a trust document. Especially when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place. Evaluation of the claims of a beneficiary (and especially of a discretionary object) may be an important part of the balancing exercise which the court has to perform on the materials placed before it. In many cases the court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought not to be granted any relief.

(h) The General Duty Of Care

The trustee has many obligations to fulfil and powers that he or she can exercise in fulfilling those obligations. The trustee may act honestly and in the best interests of the beneficiaries; that is the nature of his or her fiduciary duty. However, one should not regard the fiduciary principle as the sole means to control the administration of the trust as it really is more about the conduct of the trustee in acting where there is quite serious misconduct. The trustee is also liable in respect of breaches of his or her general duty of care – but the standard of conduct is a familiar one, reasonable performance ('ordinary prudence' is the traditional test). As we will see, there are limits – for example delegation of powers by the trustee.

A trustee should have errors & omissions insurance if at all possible, and a person approached to act as trustee may be wise to agree only on the condition that such insurance is purchased and maintained using trust funds.

Fales v Canada Permanent Trust Company
[1977] 2 S.C.R. 302

The residue of the testator’s estate went to his wife for life, remainder to children. There were two trustees, the wife and a trust company. There was an obligation to sell the
assets held on death and convert them to other assets, with a power to postpone the
sale. Half the assets were sold and shares purchased – the purchased shares were
inappropriate investments and eventually were worth nothing. The children sued the
trust company; the trust company brought a contribution action against the wife.

At trial, held for the children. The trial judge held that the professional trustee failed to
advise the non-professional trustee and failed to sell the shares when they ought to have
and calculated damages based on the average price at that time.

At first appeal, the damages were reduced and the wife was held liable in breach of
trust. The BCCA re-calculated the sale price as an average during the period
commencing when the shares should have been sold until the time the shares were de-
listed by the stock exchange. The wife was held liable to make a contribution and her
claim for damages for lost income was dismissed.

On further appeal to the SCC, the trial judge’s assessment of damages was restored and
the wife excused for breach of trust. She had acted honestly and reasonably while the
professional trustee had not; as such, she had no obligation to contribute to the
damages award.

Per Dickson J.:

Traditionally, the standard of care and diligence required of a trustee in
administering a trust is that of a man of ordinary prudence in
managing his own affairs (Learoyd v. Whiteley [(1887), 12 App. Cas.
727.], at p. 733; Underhill’s Law of Trusts and Trustees, 12th ed., art. 49;
Restatement of the Law on Trusts, 2nd ed., para. 174) and traditionally
the standard has applied equally to professional and non-professional
trustees. The standard has been of general application and objective
though, at times, rigorous. There has been discussion of the question
whether a corporation which holds itself out, expressly or impliedly, as
possessing greater competence and ability than the man of ordinary
prudence should not be held to a higher standard of conduct than the
individual trustee. It has been said by some that a higher standard of
diligence and knowledge is expected from paid trustees: Underhill’s Law of
Trusts and Trustees, art. 49, relying upon obiter of Harman J. in Re
Waterman’s Will Trusts; Lloyds Bank, Ltd. v. Sutton [ [1952] 2 All E.R.
1054.], at p. 1055, and upon dicta found in National Trustees Co. of
Australasia v. General Finance Co. of Australasia [(1905) A.C. 373 (P.C.).],
a case which did not turn upon the imposition of a greater or lesser duty but
upon the relief to which a corporate trustee might be entitled under the
counterpart of s. 98 of the Trustee Act of British Columbia, to which I have
earlier referred.

In the case at bar the trial judge held that the law required a higher
standard of care from a trustee who charged a fee for his professional
services than from one who acted gratuitously. Mr. Justice Bull, delivering
the judgment of the Court of Appeal, was not prepared to find, and held it
unnecessary to find that a professional trustee, by virtue of that character
and consequential expertise, had a greater duty to a cestui-que trust than a
lay trustee.
The weight of authority to the present, save in the granting of relief under remedial legislation such as s. 98 of the Trustee Act, has been against making a distinction between a widow, acting as trustee of her husband’s estate, and a trust company performing the same role. Receipt of fees has not served to ground, nor to increase exposure to, liability. Every trustee has been expected to act as the person of ordinary prudence would act. This standard, of course, may be relaxed or modified up to a point by the terms of a will and, in the present case, there can be no doubt that the co-trustees were given wide latitude. But however wide the discretionary powers contained in the will, a trustee's primary duty is preservation of the trust assets, and the enlargement of recognized powers does not relieve him of the duty of using ordinary skill and prudence, nor from the application of common sense.

... Applying the foregoing principles to the facts of this case, I do not think it can be doubted that Canada Permanent breached the duty which it owed the residuary beneficiaries of the Wohlleben estate. It is not necessary to decide whether a higher standard of diligence should be applied to the paid professional trustee, for Canada Permanent failed by any test. No one in that organization would seem to have brought his mind to bear upon the relative merits, and dangers, of retention and disposition of the shares with which we are concerned. It is not with the prescience of hindsight that one may conclude that the Inspiration shares should have been sold during the period of two and one-half years following acquisition. Notwithstanding recognition by Canada Permanent during the negotiations antedating the exchange that the Inspiration shares would be speculative and that it would be desirable to extract an undertaking from Pembertons to take them off the hands of the shareholders of Boyles Bros. who received them, the trust officers in Vancouver sat idly by and allowed the shares progressively to decline in worth until they became valueless. Despite gathering storm clouds and successive presages of disaster, no attempt was made to market the shares. The vigilance, prudence and sagacity which the law expects of trustees was never apparent. After the acquisition, the Vancouver trust officers charged with supervision of the account, initially Mr. Donnelly and later Mr. Jakeway, would seem never to have consulted a senior officer of the company concerning the shares of Inspiration. There was no communication between Vancouver and Toronto as to retention or sale. The Vancouver advisory committee, the head office management, the head office investment committee, the board of directors were available but never consulted. Internal procedures proved inadequate and sterile. Apart from the annual review of the Vancouver investment committee which produced cryptic, handwritten, practically illegible notations, there would appear to have been no meetings at which sale was considered. No minutes are in evidence.

Order to issue accordingly.
VARIATION OF TRUSTS

Termination:

Where all beneficiaries are sui juris, and account for all absolute and contingent interests in the trust property, the beneficiaries can apply to the court to resettle the property without condition (that is, to require transfer to beneficiaries absolutely). This is known as the Rule in *Saunders v Vautier*, (1841), 49 ER 282.

Variation:

*Chapman v Chapman*: Sir Robert and Lady Chapman settled a trust. In 1950, Lady Chapman alone settled two more trusts. Each of the three trusts were to benefit the three children of Robert Macgowan Chapman, the only child of Sir Robert and Lady Chapman. In 1952, the combined value of the three trusts was approximately £80,000 (about $2.5 million in 2013 Canadian dollars). The only difficulty was that advice revealed a potential estate duty chargeable to the minor beneficiaries (regardless of the order in which the settlors would die) in the range of £30,000. Hence the need to vary the trust to avoid the tax liability if at all possible. An ‘arrangement’ (for such is the term for a proposed variation) was put to the Court in 1953 that would cure the problem by, essentially, collapsing three trusts into a single trust, eliminating some discretionary powers, and transferring property to the beneficiaries. As was the custom of the time, the matter was put before the Court dressed up as a dispute so that the Court might] exercise its ‘compromise jurisdiction’ and vary the trust on behalf of the minor grandchildren. Harman J. sitting as the court of first instance refused to consider the arrangement on the merits holding that the Court had no jurisdiction to vary the trust at all in these circumstances. An appeal was filed and heard in the Court of Appeal together with two other similar matters that year and dismissed (Lord Denning dissenting); [1953] 1 Ch. 218 (Eng. C.A.). A further, and unsuccessful, appeal was taken to the House of Lords; [1954] A.C. 429 (H.L.).

The result of *Chapman v Chapman* was to end the practice of varying trusts in a Chambers proceeding through an artifice that had been relied upon in Chancery practice for some time. It also maintained a somewhat artificial distinction between trusts of land (which could be varied to cure defects under statute) and trusts of personality in respect of variation. Following the House of Lords’ decision, the exercise of the Court’s inherent jurisdiction to vary a trust was restricted to very specific situations such as variation to preserve the trust assets *in extremis*. The Court’s inherent jurisdiction to vary a trust was thus both restricted and exceptional, rather than flexible and conventional as had been supposed. This was a surprising result with the potential to seriously disturb existing settlements and make the drafting of family trusts rather more complex. The law as stated in the House of Lords was accepted in Ontario that same year.

Reform: The reaction to *Chapman v Chapman* echoed the pragmatic view of Lord Denning in the Court of Appeal: ‘[I]t is not right to unsettle the jurisdiction of the court on these matters unless some high principle demands it, and I see none.’ The Law Reform Committee was asked to study the issue and published a Report in 1957
which recommended changes to the law to extend the jurisdiction in statutory form. The British Parliament acted swiftly and enacted the Variation of Trusts Act 1958. Appropriately enough the first case decided under the new statute allowed the arrangement in the Chapman case; Re Chapman’s S.T. (No. 2), [1959] 1 W.L.R. 372 (Eng. Ch). In essence, Parliament followed the path predicted by Lord Denning in the Court of Appeal - '[i]t is noteworthy that whenever the court has, of its own motion, placed limitations on its own jurisdiction - as it did on a few occasions in the second half of the nineteenth century - the legislature has intervened to remove those limitations.' Such was certainly the case in the aftermath of the Chapman litigation. As the English law changed in 1958 so did the law in Ontario and other common law provinces and jurisdictions. The Ontario statute – the Variation of Trusts Act, 1959 - was enacted based on its English counterpart and expanded the restricted inherent jurisdiction to vary trusts in Ontario:

Variation of Trusts Act, RSO 1990, c.V.1:

1. (1) Where any property is held on trusts arising under any will, settlement or other disposition, the Ontario Court (General Division) may, if it thinks fit, by order approve on behalf of,

(a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts 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; or

(d) any person in respect of any interest of the person 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 managing or administering any of the property subject to the trusts.

(2) The court shall not approve an arrangement on behalf of any person coming within clause (1) (a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.
Is the settlor’s original intention relevant in varying a trust?

Re Irving
(1975), 11 OR (2d) 443 (Ont. H.C.J.)

Per Pennell J:

The form of words used in s. 1 of the Act makes it clear that the Court’s power is an extremely broad one. It has the power to “vary or revoke all or any trusts or enlarge the powers of the trustee”. It may do this for “any arrangement by whomsoever proposed and whether or not there is any other person beneficially interested”. The Court is to be governed throughout by “what it thinks fit” and its only other direction is that it “shall not approve an arrangement … unless the carrying out thereof appears to be for the benefit of that person”. The thrust of s-s. (2) seems to be that the status quo should be upheld under any trust unless positive factors are shown to be in favour of the variation or revocation of the trust on a rather general principle of it being for the benefit of the person on whose behalf the Court is approving the variation.

What is or is not included in the expression “for the benefit of the person”? Few precedents under the Ontario Act have been fitted to these words. On the other hand, decisions are manifold in England and sister Provinces under legislation not dissimilar. These judgments have been brought together for my guidance through the industry of counsel. The search in all these cases was to find the intention of the founder of the trust and then to decide whether the proposed arrangement remains within the ambit of the intention. The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flouted arbitrarily. It can never be pretended that the Court has the power to make a new will in the guise of approving an arrangement under the Variation of Trusts Act.

... 

The Court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the Variation of Trusts Act, approval is to be measured, inter alia, by reference to these considerations: First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting
such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

Russ v BC (Public Trustee)  
(1994), 3 ETR (2d) 170; 1994 CanLII 1730 (BCCA)

Finch J.A.

44 The relevant provisions of the Act are set out in paragraph 3 above. Section 1 empowers the Court to approve a proposed variation "...if it thinks fit...". Section 2 mandates that approval not be given, unless the proposed arrangement "appears to be for the benefit" of those for whom approval is required.

45 The appellant says that in exercising his discretion in this case, the learned chambers judge erred in failing to take account, sufficiently or at all, of the settlor's intention. The appellant relies upon this passage from the Ontario case of Re Irving (1975), 1975 CanLII 714 (ON SC), 11 O.R. (2d) 443, 66 D.L.R. (3d) 387 at 394 (Ont. H.C.):

The Court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the Variation of Trusts Act, approval is to be measured, inter alia, by reference to these considerations: First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?


47 The authority referred to which interprets our legislation and which is binding upon us is Sandwell, supra. There, Carrothers J.A., giving the judgment of the Court, said this at 342-43:
To say that these existing provisions are binding and unalterable is to deny the very purpose and intent of the Trust Variation Act, which is to approve, if the court sees fit, an amendment even though it offends the original terms of the trust. At common law, the rule that a trust may be varied by all beneficiaries of the trust, actual and contingent, provided they are sui juris and consent, was established by Saunders v. Vautier (1841), Cr. & Ph. 240, reflex, 41 E.R. 482. In this case some of the deferred beneficiaries are not located and some of the contingent beneficiaries are not identified, perhaps not even born, and are not of full legal capacity. Hence the Trust Variation Act extends the common law rule and empowers the court in its discretion to approve the amendment of the trust on behalf of such persons, in this case the deferred participants and the contingent beneficiaries. The only impediment or fetter on the court's discretion is contained in the above-quoted s. 2 to the effect that the court shall not approve an arrangement on behalf of such persons unless the carrying out of that arrangement appears to be for the benefit of those persons.

The weight of the evidence is that all pension benefits are to be enhanced under the new plan. The learned chambers judge found that the new plan would result in greater benefits to all participants and beneficiaries than provided by the old plan. The prohibition of s. 2 does not apply in this case.

I would apply the third test enunciated by Pennell J. in the case of Re Irving (1975), 1975 CanLII 714 (ON SC), 66 D.L.R. (3d) 387, 11 O.R. (2d) 443, and cited with approval by Ruttan J. in Kunater et al. v. Royal Trust Corp. of Canada (1980), 1980 CanLII 697 (BC SC), 23 B.C.L.R. 287 at p. 289. I would ask: "Is the benefit to be obtained on behalf of those for whom the court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?" In this case I would answer that test in the affirmative and allow the appeal.

48 It is apparent that the Court there did not consider the discretion afforded by the Act to be limited by all of the factors referred to in Re Irving, supra. In particular, the Court was clear to say that the only limitation upon the discretion conferred by s. 1 was the requirement of s. 2 that the proposed variation be for the benefit of those for whom the Court's approval is required.

49 The language of s. 1, which authorizes the Court to vary or revoke any trust, is inconsistent with the suggestion that the settlor's
intention is a consideration at all, much less a consideration of first importance. The Act says nothing concerning the settlor's intention, or of any obligation upon the Court to weigh that intention along with other factors in deciding whether to approve a proposed variation.

50 In my respectful view, the Court need not consider whether the basic intention of the settlor is preserved. The Court is not charged under the Act with protecting the interests of the settlor. If the proposition put forward by the appellant were correct, the Court would not be able to approve any arrangement that was not such as to keep alive the basic intention of the settlor, in spite of great benefits that might be created for infants and unborn persons.

51 Many variations to a trust are at odds with the intention of the settlor. If, as argued by the appellant, the wishes of the settlor may not be thwarted, notwithstanding benefits to the infants and unborn, then the powers afforded by the Act would be meaningless.

52 In my respectful view, the learned chambers judge did not err in his appreciation of the discretion afforded by the Act. I would not give effect to this ground of appeal.

The fact that the settlor's intentions are at variance with the variation is not fatal; *Teichman v Teichman Estate* (1996), 134 DLR (4th) 155 (Man CA). Indeed all variations are contrary to the intention of the settlor; the court has a jurisdiction to vary coupled with protection of vulnerable beneficiaries.

**Re S. (N.) (Trustees of)**

Here there was a large family trust. Two minor beneficiaries were entitled to income for education and maintenance until age 19 (and the trustee had a power to encroach), and thereafter the capital was to be conveyed to them. The trustee sought to vary to delay the capital conveyance until the beneficiaries were age 25.

Per DK Smith ACJ:

20 After considering the matter, I am fully satisfied that delaying the capital distribution of each of these trusts until each child attains the age of 25 years is for the benefit of both A.J. and N.S.

21 These trust funds, which are presently valued in excess of one million dollars each, should appreciate significantly in value between now and the date that each child attains the age of majority. Under
the proposed variation, each beneficiary will become a co-trustee of his or her respective trust upon attaining the age of 19. Delaying the capital distribution of each fund for six years will afford each beneficiary an opportunity, once they have become an adult, to learn and acquire the skills that are necessary to manage an inheritance of this magnitude. This, in my view, is very much to their benefit.

22 Between the ages of 19 and 25 years each beneficiary will continue to receive the income from the investment of the trust funds and, in addition, the trustees will be able to provide each beneficiary such sums of the principal as the trustees in their discretion consider necessary or desirable for the support, maintenance or education of each beneficiary.

23 I appreciate that by delaying the capital distribution there is a possibility of disadvantage to the beneficiaries. For example, the market may change significantly during these six years with the result that the value of each trust fund could decline. I refer in this regard to the comments of Russell, J. in *Druce’s Settlement Trusts, Re*, [1962] 1 All E.R. 563 (Eng. Ch. Div.) where it is stated at p. 565:

........Any arrangement is capable of being regarded as beneficial under the Variation of Trusts Act, 1958, if it can, on balancing probabilities, be regarded as a good bargain, and the fact that in improbable circumstances, no benefit, or even some loss is possible, does not necessarily deprive the arrangement of that quality........

24 I am satisfied that in the circumstances of this case the advantages of the proposed arrangement far outweigh any possible disadvantages that may exist.

25 Referring back to the considerations set out in *Irving, Re, supra*, I am further satisfied that the basic intention of the testator is maintained with the proposed arrangement. In particular, each beneficiary will still receive 32.5% of the residue of W.H.D.’s estate; nothing in this decision will alter the vested interest that each child has in the estate; each beneficiary is still entitled to receive the annual income arising from the investment of the trust funds and the trustees will continue to have a power of encroachment upon the capital of the trust for the support, maintenance or education of each child.

26 Finally, I am satisfied that the benefit to be obtained as a result of the proposed variation is one that a prudent adult, motivated by intelligent self-interest and sustained consideration of the expectancies and risks of the proposal made, would be likely to accept.
27 The issue of whether it is proper for the court to approve a variation which will defer the receipt of an inheritance beyond the date when a beneficiary reaches the age of majority has been considered previously, by a number of courts, with differing results.

... 

[After reviewing the authorities on variation applications of this sort]

35 I am of the view that when dealing with an application pursuant to the Variation of Trusts Act, the court can approve any arrangement that the testator could have put in place him or herself, provided that the arrangement is fit and for the benefit of the person for whom approval is required. In the case at Bar, the testator could have arranged the trusts so that the capital was distributed to each beneficiary at the age of 25. Despite the comments in Purves, Re, supra, I am satisfied that the court can delay the distribution of the capital of each of these trust funds beyond the age of majority.

36 That takes me to the issue of the rule in Saunders v. Vautier [1835-42] All E.R. 58 and the question of whether that decision precludes the granting of this application. In Buschau v. Rogers Communications Inc., [2006] 1 S.C.R. 973 (S.C.C.) the Supreme Court of Canada (at ¶ 21) described the rule in Saunders v. Vautier, supra, as follows:

21 The common law rule in Saunders v. Vautier can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property. More formally, the rule is stated as follows in Underhill and Hayton Law Relating to Trusts and Trustees (14th ed. 1987), at p. 628:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively) and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees.

According to D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., Waters’ Law of Trusts in Canada (3rd ed. 2005), at p. 1175, the rule was developed in the 19th century and originated as an implicit understanding of Chancery judges that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a
trust would eventually receive the property, they should decide how they intended to enjoy it.

37 The issue is raised as to whether the court should grant this application in light of the fact that based on the rule in *Saunders v. Vautier,* supra, at the age of 19 either of these beneficiaries, assuming that they are not under any disability, can require their trust to be terminated and the trust funds paid out to him or her without regard to the terms of the trust or the wishes of the trustees.

38 Nothing in this decision will alter the rule in *Saunders v. Vautier,* supra. In addition, in my view, nothing in the rule in *Saunders v. Vautier,* supra, prevents the court from approving the proposed variation.

39 The effect of this arrangement is that the trustees will not be obliged to *automatically* distribute the capital of the trusts to A.J. and N.S. once each child attains the age of majority. However, the right of each child to seek relief based on the rule in *Saunders v. Vautier,* supra, or in any other manner provided by law, will not be altered. In order to insure that there is no confusion in this regard, the Order that will issue as a result of this decision will specifically state this. In addition, the Order will include a provision which will require the trustees to serve on each beneficiary, at the age of majority, a true copy of the Will of the late W.H.D. as well as a certified copy of my Order.

40 In conclusion, I am satisfied that the proposed variation is for the benefit of both A.J. and N.S. and I am further satisfied that there is nothing that prevents the court from granting the relief requested. An Order will issue accordingly.

*Question: why allow this at all?*