Trusts & Equity
Fall Term 2023

Lecture Notes – No. 7

VI. 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 call upon the Trustee to distribute the trust property to them or to 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 personalty 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 CanLII 1730 (B.C.C.A.)

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?

46 The appellant says that Re Irving has been cited with approval and applied in: Kunater v. Royal Trust Corp. of Canada (1980), 1980 CanLII 697 (BC SC), 23 B.C.L.R. 287 (S.C.); Sandwell & Co. Ltd. v. Royal Trust Corp. of Canada (1985), 1985 CanLII 761 (BC CA), 17 D.L.R. (4th) 337 (B.C.C.A.); Re Assie Estate (1985), 1985 CanLII 2751 (SK QB), 45 Sask. R. 124, (sub nom. Canada Permanent Trust Co. v. Assie) reflex, 24 E.T.R. 278 (Q.B.); Salt v. Alberta (Public Trustee) (1986), 1986 CanLII 1695 (AB QB), 45 Alta. L.R. (2d) 331, 71 A.R. 161, 23 E.T.R. 225 (Q.B.); and Finnell, supra.

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; *Canada Trust Company v. Russell Browne*, 2012 ONCA 862 (Ont. C.A.); *Teichman v Teichman Estate* (1996), 134 DLR (4th) 155 (Man CA). Indeed all variations are contrary to the intention of the settler; the court has a jurisdiction to vary coupled with protection of vulnerable beneficiaries.

Re S. (N.) (Trustees of)
(2007), 36 E.T.R. (3d) 43 (N.S.S.C.)

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.

VII. CHARITABLE TRUSTS

Please note the following statutes:

Charities Accounting Act, RSO 1990, c.C.10:
Reporting requirements of trustees to the Public Guardian and Trustee

Charitable Gifts Act, RSO 1990, c.C.8:
Restrictions on ownership in profit-making ventures by charitable organizations

Charitable Institutions Act, RSO 1990, c.C.9:
Regulation of charitable residential institutions

Public Guardian and Trustee Act, RSO 1990, c.P.51, s.1
2: Public Guardian and Trustee may be a trustee of a charitable trust

Trustee Act, RSO 1990, c.T.23, ss. 14,15:
Jurisdiction of court to vest property in trustees

'Charity', 'Charitable' as Terms of Art

Preamble to 'The Statute of Elizabeth'
Charitable Uses Act 1601, 43 Elizabeth I, c.4

This Act was the first British charities legislation, and was passed to reform abuses in the application of property for charitable purposes. Its Preamble in particular is of relevance and has been looked to (perhaps more as a matter of form than substance at times) to guide courts in recognizing a trust as operating towards a charitable purpose. The Preamble identifies the objects of charity:

> ... the relief or aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poorer maids; supportation, aid and help of young tradesmen, handicraftsmen and persons deacyed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

The term 'charity' is not used in the conventional sense of the word but is generally considered to be a term of art; *National Anti-Vivisection Society* v *IRC* [1948] AC 31, 41 per Lord Wright. Thus, as held in another English case, 'no comprehensive definition of legal charity has been given either by the legislature or by judicial utterance;' *IRC* v *Baddeley* [1955] AC 572 per Viscount Simonds. Why? Social policy does not remain in concrete but develops continuously.

Across the Commonwealth countries, there is fairly wide acceptance of four traditional 'headings' of allowable charitable trusts as set out by Lord MacNaughten in *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531:

(a) relief of poverty;
(b) advancement of education;
(c) advancement of religion;
(d) other purposes beneficial to the community.

Note that the Charities Accounting Act, RSO 1990, c.C.10, s.7 states (for the purpose of the Act):

"charitable purpose" means,
(a) the relief of poverty,
(b) education,
(c) the advancement of religion, and
(d) any purpose beneficial to the community, not falling under clause (a), (b) or (c);

The fourth residual class will be dealt with below. Courts in many jurisdictions still look to the *Preamble to the Statute of Elizabeth* to decide whether the purpose of a specific trust is within 'the spirit and intendment' of the 1601 Act. Thus, the general equity of the Statute has developed to allow new purposes to be considered as charitable. Other jurisdictions take a much more mature approach and use some form of permanent quasi-legislative quasi-judicial 'charities commission' to determine these substantive points; you can see how the UK Charities Commission operates at its web-site:

https://www.gov.uk/government/organisations/charity-commission

Charitable Trusts Are Treated Deferentially
Amongst the advantages of charitable trusts are the following:

- objects rules**: such trusts are exempted from the beneficiary principle**, and can be properly settled for purposes and not people. However, the purpose must be 'charitable' and the funds used exclusively for that purpose;

- perpetuity rules: **the trust is exempt from the normal rules respecting alienability and remoteness of vesting**;

- consequences of failure: **cy-près operates to vary a charitable trust where such is desirable, and, to rescue a trust having failed** "initially" (i.e. before the property vests, but there must be a "general charitable intent") or "subsequently" (after the property vests) where an express trust in the same situation would be a resulting trust to S.