Trusts & Equity – Law 463
Fall Term 2024

Lecture Notes No. 8

V. THE BENEFICIARY PRINCIPLE AND PRIVATE PURPOSE TRUSTS

A general formulation of the 'beneficiary principle' is as follows:

> **For there to be a valid trust there must be beneficiary (corporate or human) in whose favour performance of the trust may be decreed unless the trust falls within a group of exceptional anomalous cases when it is valid but unenforceable so that the trustee may perform it if they wish.**

Non-compliance with the beneficiary principle will generally invalidate a trust obligation. **However, in Ontario, the court enjoys a statutory jurisdiction to recognize the failed trust as a power (and thus the trustee may utilize the power free from fear of liability for breach of trust) where the disposition is conceptually certain and specific enough to fall within the statute.**

Illustrations:

Re Astor's Settlement Trusts
[1952] Ch 534 ((Ch); cb, p.531

Here the settlor settled shares in the company which publishes The Observer newspaper, income to be used for protection of newspapers from combine control, preservation of journalistic integrity, etc. The trust failed as it was neither charitable nor did it have human beneficiaries. It was for general purposes, not people, and thus uncontrollable by the court as too nebulous.

Per Roxburgh J:

> Let me, then, sum up the position so far. On the one side, there are LORD PARKER'S two propositions with which I began. These were not new, but merely re-echoed what SIR WILLIAM GRANT, M.R., had said in Morice v. Bishop of Durham as long ago as 1804: "There must be somebody, in whose favour the court can decree performance". The position was recently re-stated by HARMAN, J., in Re Wood where he said ([1949] 1 All ER 1101): "a gift on trust must have a cestui que trust", and this seems to be in accord with principle. On the other side is a group of cases relating to horses and dogs, graves and monuments—matters arising under wills and intimately connected with the deceased—in which the courts have found means of escape from these general propositions, and also Re Thompson and Re Price which I have endeavoured to explain. Re Price belongs to another field. The rest may, I think, properly be regarded as anomalous and exceptional and in no way destructive of the proposition which traces descent from or through SIR WILLIAM GRANT, M.R., through LORD PARKER OF WADDINGTON, to HARMAN, J. Perhaps the late SIR ARTHUR UNDERHILL was right in suggesting that they may be concessions to human weakness or sentiment: see UNDERHILL'S LAW OF TRUSTS AND TRUSTEES, 8th ed., p. 79. **They cannot, in my judgment, of**

> **themselves (and no other justification has been suggested to me) justify the conclusion that a court of equity will recognise as an equitable obligation affecting the income of large funds in the hands of trustees a direction to apply it in furtherance of enumerated non-charitable purposes in a manner which no court or department can control or enforce. I hold that the trusts here in question are void** on the first of the grounds submitted by counsel for the trustees of the settlement of 1951 and counsel for the Attorney-General.

'Apparent Purpose Trusts'

Sometimes the beneficial class is set out in the instrument in a manner that seems an invalid purpose trust, but can be construed in a manner so as to reveal a certain class of beneficiaries.

Re Denley
[1969] 1 Ch 373 (Ch); cb, p.555

Here land was to be maintained and used for the purposes of a recreation or sports ground primarily for the benefit of "the employees of the company" and, secondarily, for the benefit of "such other person or persons, if any, as the trustees may allow to use the same"; and if at any time the number of employees subscribing should be "less than seventy-five per cent of the total number of employees at any given time" or if the land should at any time cease to be required or to be used by the employees as a sports ground, it was to be conveyed to the general hospital at Cheltenham.

It was held, distinguishing *Astor*, that this was not an invalid purpose trust but a valid trust - where a trust, though expressed as a trust for a purpose that was not in law a charitable purpose, was directly or indirectly for the benefit of individuals, it was not invalid for the absence of certainty of objects where the class of beneficiaries ("the employees of the company") was sufficiently ascertainable. The trustees held a trust obligation together with a valid power to extend the beneficial class (persons other than "the employees of the company").

<u>Statutory Conversion of Specific Purpose Trusts into Simple Powers</u>

Under provincial legislation many of the problems are avoided by converting a specific purpose trust into a simple power, which then would be applied by the donee of the power in accordance with the standard rules respecting certainty of objects.

The Perpetuities Act, RSO 1990, c.P.9
s.16(1); cb., p.537

> Specific non-charitable trusts
> 16.--(1) A trust **for a specific non-charitable purpose** that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or the trustee's successor, within a period of twenty-one years, despite the fact that the limitation creating the trust manifested an intention, either expressly or

> by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

Re Russell Estate
[1977] 6 WWR 273 (Alta. SCTD)); cb., p.538

Per Stevenson J.:

> It is interesting to note that in Re Shaw, [1957] 1 All E.R. 745, Harman, J., faced with a purpose trust, which was within the perpetuity, expressed the wish that he could treat George Bernard Shaw's trust for the creation of a new alphabet as a power citing the Restatement of Trusts. Indeed, in that case, by a compromise this result was achieved with the concurrence of all parties (In Re Shaw, [1958] 1 All E.R. 245).
>
> **The legislation appears to me to equate "specific purpose trusts" with other recognized anomalous purpose trusts which have been permitted to operate as powers.**
>
> Does this gift come within the remedial section? An obvious difficulty is in the use of the term "specific". Two choices appear to be open; to define the term as being the opposite of "general" or to define it as "precise or certain". While the former interpretation may be applicable, there is nothing in the section which does away with the recognized requirement that the objects of a power must be certain. **A gift in order to be protected by the section must be certain. In the case of a charitable trust the Court is able to supply certainty by its scheme making power. No authority was suggested to me which would enable the Court to settle a scheme for a power. I am also mindful of the fact that the term "specific" is ordinarily to be found defined as "made definite" or "precise"; see, e.g., 39A Words and Phrases 398. I note in discussing purpose trusts that Scott sees a requirement that it be definite. (2 Scott on Trusts, Third Edition, p. 937).**

Here the purposes of the power were held insufficiently specific given the various goals of the Society. It seems a rather harsh application of the test which muddies specificity of intent with conceptual certainty of a class of objects.

‘GIFTS TO UNINCORPORATED ASSOCIATIONS’

An unincorporated association has no legal personality; it cannot hold property. Can it be the beneficiary of a trust where a trustee is given money for its use or benefit?

In **Conservative Central Office v Burrell [1980] 3 All ER 42 (Ch); cb., p.558** it was held that an “unincorporated association” is one which cannot itself own property as it has no

legal personality (thus its money is controlled by leading members who hold it on bare trust for all members), but has the following features:

(i) 2 or more persons joined together for a common purpose;
(ii) mutual rights and duties arising from a contract between members;
(iii) rules determine who controls (and on what terms) the association and its money;
(iv) members can join or leave the association at will.

Who is the beneficiary of the gift – the association or its past and/or present members?

The basic rule was given in *Re Recher's Will Trusts* [1972] Ch 526; *National Westminster Bank Ltd. v National Anti-Vivisection Society Ltd*, [1972] Ch 526, 539 per Brightman J:

> In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject-matter of the contract which the members have made inter se.

Thus, the contract will govern and only those that are subject to the contract (i.e. current members) are affected.

What is the nature of the gift?

In *Re Denley* [1969] 1 Ch 373 Goff J held:

> … where, then, the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals, it seems to me that it is in general outside the mischief of the beneficiary principle.
>
> There are 4 possibilities in construing the facts:
>
> there is an absolute gift to the members of the association (Leahy), and any member may claim his share provided that this is what the donor intended.
>
> A trust exists for present members, either jointly or separately;
>
> A trust exists for present and future members (thus an endowment);
>
> **No endowment trust but rather a gift to the present members beneficially as an accretion to the association's property to be dealt with according to the rules of the association by which the members are contractually bound; Re Lipinski [1976] Ch 235.**

The fourth option above is the modern approach.

What happens when the association is wound up or otherwise dissolves?

The old rule was to divide the assets on dissolution amongst the membership according to their subscriptions or contributions; that approach is no longer followed. Now the matter is primarily on one of contract.

Hanchett-Stamford v AG
[2008] EWHC 330 (Ch); cb, p.560

The plaintiff was the sole surviving member of the *Performing and Captive Animals Defence League* and as such entitled to the league's assets.

Per Lewison J:

> 28 Unincorporated associations do not have separate legal personalities. Almost all the myriad legal problems to which they give rise stem from this…
>
> 29 … In *In re Recher's Will Trusts* [1972] Ch 526 Brightman J adopted this three-fold classification; as did Lawrence Collins J in *Hunt v McLaren* [2006] WTLR 1817. In *Recher's* case Brightman J also pointed out that it would be absurd to suppose that a donor or testator intended that, as soon as a gift to such an unincorporated association had been made, any member of the association became entitled as of right to demand an aliquot share of the gift. I respectfully agree. In my judgment under normal circumstances a gift to an unincorporated association will fall into the second of Cross J's categories. It is, in Brightman J's words [1972] Ch 526, 539:
>
> "an accretion to the funds which are the subject matter of the contract which such members have made inter se, and falls to be dealt with in precisely the same way as the funds which the members themselves have subscribed."
>
> He added, at p 539, that in the absence of words which purport to impose a trust:
>
> "the legacy is a gift to the members beneficially, not as joint tenants or as tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject matter of the contract which the members have made inter se."
>
> 30 In *In re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936, 941 Walton J characteristically described this as "quite elementary".
>
> 31 **It follows, in my judgment, that the members for the time being of an unincorporated association are beneficially entitled to "its" assets, subject to the contractual arrangements between them. This was also Lawrence Collins J's conclusion in *Hunt v McLaren* [2006] WTLR 1817, para 113. It is important to stress that this is a form of beneficial ownership; that is to say that in some sense the property belongs to the members. *Megarry & Wade, The Law of Real Property*,6th ed (2000), para 9-095 accuses the**

courts of having developed "a new form of property holding by unincorporated associations" in order to escape from technical difficulties of the classic models of joint tenancies and tenancies in common. I do not think that the courts have purported to do so, and in view of the proviso to section 4(1) of the Law of Property Act 1925 it is difficult to see how they lawfully could, at least in relation to land. So the "ownership" of assets by an unincorporated association must, somehow, fit into accepted structures of property ownership.

32 In *In re Recher's Will Trusts* [1972] Ch 526, 539 Brightman J pointed out:

"Just as the two parties to a bi-partite bargain can vary or terminate their contract by mutual assent, so it must follow that the life members, ordinary members and associate members of the London & Provincial society could, at any moment of time, by unanimous agreement (or by majority vote, if the rules so prescribe), vary or terminate their multi-partite contract. There would be no limit to the type of variation or termination to which all might agree. There is no private trust or trust for charitable purposes or other trust to hinder the process. It follows that if all members agreed, they could decide to wind up the London & Provincial society and divide the net assets among themselves beneficially. No one would have any locus standi to stop them so doing. The contract is the same as any other contract and concerns only those who are parties to it, that is to say, the members of the society."

33 It follows, therefore, that in the case of a society with two or more members, the members could, by agreement, divide the society's assets between them.

34 In *In re Bucks Constabulary Widows' and Orphans' Fund Friendly Society (No 2)* [1979] 1 WLR 936, 943 Walton J elaborated on the ownership of assets as follows:

"Before I turn to a consideration of the authorities, it is I think pertinent to observe that all unincorporated societies rest in contract to this extent, but there is an implied contract between all of the members inter se governed by the rules of the society. In default of any rule to the contrary- and it will seldom, if ever, be that there is such a rule- when a member ceases to be a member of the association he ipso facto ceases to have any interest in its funds As membership always ceases on death, past members or the estates of deceased members therefore have no interest in the assets. Further, unless expressly so provided by the rules, unincorporated societies are not really tontine societies intended to provide benefits for the longest liver of the members. Therefore, although it is difficult to say in any given case precisely when a society becomes moribund, it is quite clear that if a society is reduced to a single member neither he, nor still less his personal representatives on his behalf, can say he is or was the society and therefore entitled solely to its fund. It may be that it will be sufficient for the society's continued existence if there are two members, but if there is only one the society as such must cease to exist. There is no association, since one can hardly associate with oneself or enjoy one's own society. And so indeed the assets have become ownerless."

…

47 The thread that runs through all these cases is that the property of an unincorporated association is the property of its members, but that they are contractually precluded from severing their share except in accordance with the rules of the association; and that, on its dissolution, those who are members at the time are entitled to the assets free from any such contractual restrictions. It is true that this is not a joint tenancy according to the classical model; but since any collective ownership of property must be a species of joint tenancy or tenancy in common, this kind of collective ownership must, in my judgment, be a subspecies of joint tenancy, albeit taking effect subject to any contractual restrictions applicable as between members. In some cases (such as *Cunnack v Edwards* [1895] 1 Ch 489; [1896] 2 Ch 679) those contractual restrictions may be such as to exclude any possibility of a future claim. In others they may not. The cases are united in saying that on a dissolution the members of a dissolved association have a beneficial interest in its assets, and Lord Denning MR goes as far as to say that it is a "beneficial equitable joint tenancy". I cannot see why the legal principle should be any different if the reason for the dissolution is the permanent cessation of the association's activities or the fall in its membership to below two. The same principle ought also to hold if the contractual restrictions are abrogated or varied by agreement of the members. I do not find in the authorities considered by Walton J anything that binds me to hold that where there is one identifiable and living member of an unincorporated association that has ceased to exist, the assets formerly held by or for that association pass to the Crown as bona vacantia. In addition, article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees the peaceful enjoyment of possessions. It says:

"No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law "

48 On the face of it for one of two members of an unincorporated association to be deprived of his share in the assets of the association by reason of the death of the other of them, and without any compensation, appears to be a breach of this article. It is also difficult to see what public interest is served by the appropriation by the state of that member's share in the association's assets. This, in my judgment, provides another reason why the conclusion that a sole surviving member of an unincorporated association, while still alive, cannot claim its assets is unacceptable.

49 **I therefore respectfully decline to follow Walton J's obiter dictum that a sole surviving member of an unincorporated association cannot claim the assets of the association, and that they vest in the Crown as bona vacantia. I might add that the Attorney General suggested in argument, without arguing in favour of one outcome, that there were three possible outcomes: first, that the last surviving member is entitled to the assets; secondly, that the assets are held jointly between the last surviving member and the estate of the member whose death caused the dissolution; thirdly, that the assets**

were ownerless or bona vacantia. For the reasons I have given, I conclude the first outcome is correct and I reject the second and third.

50 Ms Maclennan did suggest that the league might have spontaneously dissolved before Mr Hanchett-Stamford's death. However, although his activities on the league's behalf had dwindled before his death they did not stop completely. In my judgment the league did not dissolve spontaneously before his death. I consider that the league ceased to exist upon his death in January 2006, when its membership fell below two. Since Mrs Hanchett-Stamford is the sole surviving member of the league, she is, in my judgment, entitled to its assets. She is therefore entitled to be registered as proprietor of Sid Abbey and as shareholder of the shares now held in the league's name. Her entitlement is free from any restrictions imposed by the rules of the league, which must have ceased to bind on the death of her husband. It follows that she is free, if she so chooses, to give all the former assets of the league to the Born Free Foundation.

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; cb, p.331**.

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; cb, p.347

> **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.); cb, p.356

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.); cb, p.356

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.) ; cb, p.365

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.