MANITOBA

LAW REFORM COMMISSION
COMMISSION DE RÉFORME DU DROIT

# REPORT

# ON

# THE RULE IN *SAUNDERS V. VAUTIER*

Report #18

January 8, 1975

The Manitoba Law Reform Commission was established by "*The Law Reform Commission Act*" in 1970 and began functioning in 1971.

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## TABLE OF CONTENTS

## FOREWORD

This study of "The Rule in *Saunders v. Vautier*" was undertaken by us on reference from the Attorney-General, received by us on March 1st, 1972. The reference itself did not direct us to accord priority to the study, and indeed, in stating: "While there may be no urgency, could I have your comments in due course . . .", the letter of reference seemed to indicate that the Commission was not being requested to devote its full time and attention to the study until it was completed.

The Commission does not regard this study as one of high social priority. It does however point out certain deficiencies of the law, which do from time to time affect the lives and fortunes of a small number of people, and its worth resides in that.

In carrying out this study, as will be seen, we researched the Manitoba jurisprudence in particular. Some of our research efforts do not surface in the within Report, even though they had to be undertaken in our opinion. For examples, the tax consequences of the Rule, and the statutory provisions of other jurisdictions are deliberately omitted from the Report in accordance with decisions taken in the course of our deliberations, and in view of our ultimate recommendations.

We must respectfully acknowledge the work of the Alberta Institute of Law Research and Reform which has been our main source of material. This Report basically examines the Institute's report No. 9 (which deals with the same subject) in the context of Manitoba statute law and jurisprudence.

Finally, it is precisely because of the review of jurisprudence and the extent of the recommended amendments that we decided to present this study as a formal report for publication rather than an informal report conveying recommendations by simple letter to the Attorney-General.

## INTRODUCTION

In the case of *Saunders v. Vautier*[1] a testator, by his will, bequeathed certain East India stock to his executors and trustees on trust that they should accumulate the interest and dividends to the benefit of his great nephew, Daniel Vautier, who upon attaining the age of twenty-five years, should be entitled to receive absolutely as his own property, the principal of such stock plus the accumulated interest and dividends. The testator died in 1832, and in 1841 Daniel Vautier turned twenty-one, the age of majority, whereupon he petitioned to have the trustees transfer the stock to him immediately as being his own property, arguing that he was about to be married and needed money to set himself up in business. It was held by Lord Cottenham, L.C., that the gift vested upon the testator's death and not when Daniel Vautier reached age twenty-five and that consequently since the latter was now *sui juris* he was entitled to call for immediate possession of the stock and the accumulated income as his own property absolutely. Thus, in spite of the direction in the will that he was not to receive the corpus of the gift until age twenty-five, Daniel Vautier was successful in terminating the trust to accumulate, and he acquired the stock four years sooner than the testator had intended.

This abrupt violation of the seemingly obvious intentions of a testator has since been immortalized as the "Rule in *Saunders v. Vautier*", although the legal reasoning behind it was already well established at the time *Saunders v. Vautier* was decided. The rule in its narrow form is expressed as follows in *Theobald on Wills:*

> Where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee.[2]

This description is accurate insofar as the actual circumstances of *Saunders v. Vautier* are concerned, but it is only one expression of a principle that has since acquired a much wider scope. The learned editors of *Underhill's Law Relating to Trusts and Trustees* summarize the rule as follows:

> 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.[3]

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1 (1841) 41 E.R. 482.

2 Stephen Cretney and Gerald Dworkin, 13th ed. 1971, paragraph 1554.

3 C. Montgomery White and M.M. Wells, 11th ed., 1959, Article 68.

In other words, the beneficiaries of a trust, if they are all *sui juris* and not under any disability, may collectively and at any moment, depose the trustee, and distribute the property between themselves as they may think fit, although they cannot control the exercise by the trustees of their fiduciary powers without putting an end to the trust altogether. There is some question as to whether all the beneficiaries, if *sui juris* and absolutely entitled, could combine to *vary* their trust instead of simply revoking it, but the wording of s. 61 of *"The Trustee Act"* of Manitoba *(infra)* which allows the court to approve or disapprove, on behalf of beneficiaries who are unable legally to do so themselves, of an arrangement ". . . varying or revoking all or any of the trusts. . ." would imply that this is feasible. It could also be argued that if the rule allows beneficiaries to terminate a trust and resettle the property, it would be ridiculous to deny them a direct power of variation.

It is always, of course, open to the trustees to voluntarily accept the collective directions of the beneficiaries and to act upon them without requiring the trusts to be brought to an end, but they cannot be forced to act contrary to the directions of the settlor.

## NATURE OF A TRUST

Although an accurate definition is elusive, a trust may be characterized as a division of the control/management and enjoyment of property. "Legal" ownership vests in the trustee while the "beneficial" ownership vests either immediately or at some later date in the *cestui que trust*, or beneficiary. Note, that once a trust becomes operational the settlor or testator has no further interest in the property unless such an interest is specifically reserved. The editors of *Underhill on the Law of Trusts and Trustees*, explain it this way:

> For the trust is the equitable equivalent, of a common law gift and, when once declared, the settlor, like the donor of a gift, has no further rights over the property unless he be also one of the beneficiaries or has reserved to himself a power of appointment.[4]

Although the donor himself may have no further interest in the property and thus the trustee owes no duty towards him, as *donor*, the terms and conditions outlined in the deed of settlement are enforceable in equity by the beneficiaries as duties resting on the conscience of the legal owner or trustee. To turn again to *Underhill on the Law of Trusts and Trustees*, we read at page 3, that the trust itself is the ". . . equitable obligation, binding a person (the trustee) to deal with the property over which he has control (which is called the trust property) for the benefit of persons (the beneficiaries) of whom he may himself be one, and any one of whom may enforce the obligation". Thus although the trustee is the "legal" owner, his

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4 *Ibid.*, Art. 68, p. 444.

ownership is merely a device for accomplishing the intentions of the settlor, and his control over the property is strictly subject to the limitations contained in the deed of settlement. It is the beneficiaries who are, collectively, the real "owners" of the trust property, the ones who must ultimately benefit from it. The trustee is simply a caretaker who looks after the property and accepts responsibility for it as legal owner, but who has no general right to its actual use and enjoyment; he is not the recipient of the gift, only its custodian, and this is so no matter how onerous the duties imposed upon him.

There is one further aspect of the trust that should be explored at this time and that is the distinction between "simple" and "special" trusts. A simply trust is described in *Lewin on Trusts*, as being ". . . where property is vested in one person upon trust for another, and the nature of the trust, not being prescribed by the settlor, is left to the construction of the law",[5] i.e. where property is left to A in trust for B with no further directions as to how or when B is to take the property, etc. The trustee in such cases is little more than a mere name, a "front" for the beneficiary, who, as the absolute owner, has, what is known technically as *jus habendi*, or the right to be put into actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as the beneficiary directs. In other words as *de facto* owner, the beneficiary can demand that the trustee convey to him the legal title, which would then make him the *de jure* owner as well.

The "special" trust is

> . . . where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not, as before a mere passive depositary of the estate, but is called upon to exert himself actively in the execution of the settlor's intention as in the ordinary case of a trustee holding property on the express trusts of a settlement or of a will, or where a conveyance is made to trustees upon trust to sell for payment of debts.[6]

*Saunders v. Vautier* involved a "special" trust in which the trustees had active duties to perform, that is, they had to accumulate income from the corpus, and were directed to pay over the entire gift at a particular time.

## THE BENEFICIARIES' RIGHTS

It was remarked above that the beneficiary of a simple trust has the right to possession of the trust property and the right to call for a conveyance to himself of the legal title to that property. The reasoning behind this is that since the beneficiary has the entire beneficial estate vested in him, he is in effect the real owner of the property, and the trustee merely

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5 16th ed., 1964, p. 6.

6 *Ibid.*, p. 6.

the holder of the legal shell of ownership. Under a special trust the beneficiary's primary right is the right to enforce in equity the specific execution of the settlor's intention to the extent of his own particular interest. In other words if the settlor put into the trust instrument an instruction to the effect that income earned from the corpus of a gift be paid to the beneficiary in monthly instalments, the beneficiary can enforce this direction on the trustees. What happens in a *Saunders v. Vautier* situation is that the trustee's duties under the special trust are rendered superfluous because of a premature vesting of the beneficiary's equitable estate thus converting the special trust into a simple trust.

Vesting and the time at which it occurs are the keys to this development, the court's decisions in this regard being based on the intentions of the testator or settlor as discerned on a "true construction" of the will or deed of settlement. Thus, if it is apparent from the true construction of a gift provision that the testator intended the beneficiary to have an absolute interest in the property gifted, and has in effect, given such an interest, this will be deemed by the court to be the testator's primary intention, and any other directions which detract in any way from the beneficiary's absolute interest will be disregarded as being logically and politically indefensible. After all, how can an "absolute" interest be absolute, if there be conditions attached to it?

In *Saunders v. Vautier*, the gift to Daniel Vautier was held to be an absolute gift. There was no gift over to anyone else in the event that he should not survive until his twenty-fifth birthday, no-one else was to receive the income from the stock in the meantime, and the stock itself was a defined item of property, distinct from the rest of the testator's estate. In short, the property belonged to Daniel Vautier, no-one else could protest his claim to be solely and beneficially entitled. Why then should he be denied one of the most important incidents of ownership, the use and enjoyment of that which belonged to him? The Lord Chancellor could see no good reason why, and consequently awarded Daniel Vautier the stock outright. The court's policy in situations such as this was given expression by Sir W. Page-Wood, V.C., in the later case of *Gosling v. Gosling*,

> The principles of this Court has always been to recognize the right of all persons who attain the age of twenty-one to enter upon the absolute use and enjoyment of the property given to them by a will, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age — unless, during the interval, the property is given for the benefit of another. If the property is once theirs, it is useless for the testator to attempt to impose any fetter upon their enjoyment of it in full so soon as they attain twenty-one. And upon that principle, unless there is in the will, or in some codicil to it, a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property he has devised to them until they attain twenty-five, but that some other person is to have that enjoyment — or unless the property is so clearly taken away from the devisees up to the time of their attaining twenty-five as to

induce the Court to hold that, as to the previous rents and profits, there has been an intestacy — the Court does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.[7]

From the above reasoning it is but a short step to the larger principle that if all the possible *sui juris* beneficiaries of a trust concur, they may collectively terminate the trust since between them they must hold the entire beneficial interest. In this situation there is no need to determine the testator's intention in regard to vesting since everyone with even a remote interest will have to consent to terminating the trust.

The drawback to this expanded version of the Rule is that the beneficiaries must all be *sui juris* and must all consent. If there are any children involved, or unascertained beneficiaries, or if just one of the adult beneficiaries decides to be recalcitrant, then the rule, *prima facie*, cannot be applied. It was thought for a while that the Courts might have an inherent jurisdiction to sanction a departure from the terms of a trust, but it has now been clearly established that such jurisdiction applies only to the management or administration of the trust and not to any rearrangement of the rights of beneficiaries to the beneficial interests themselves. The basic common law rule is that the Courts have no power to authorize any variation of the terms of a trust even though this be approved by all adult beneficiaries and would be clearly beneficial to infants and other beneficiaries not capable of assenting on their own behalf to any changes.

It had been the practice for a while, in England, to achieve some measure of trust variation through the guise of a "compromise" between income and capital beneficiaries, and it had even been held that the word "compromise" could be applied to any arrangement between tenant for life and remainderman, and not just those involving disputed rights. This position, however, was flatly rejected by the House of Lords in the case of *Chapman v. Chapman*,[8] with the result that it ". . . became fashionable to scrutinise settlements with a view to finding a provision of sufficient ambiguity or uncertainty in its effect to form a peg on which to hang a compromise of a 'genuine' dispute".[9] This highly unsatisfactory state of affairs could not be allowed to continue for very long, and in 1957, the Law Reform Committee was asked to review the question of variation of trusts. They reported in November of that year, that the existing law was anomalous and unsatisfactory, and that the courts should be given increased powers to approve trust variations. Since the major obstacle to the courts' exercising such a jurisdiction was their inability to consent on behalf of, and bind, infant, unborn and unascertained beneficiaries, it was recommended that they should be empowered to approve arrangements on behalf of such individuals, if it was for their benefit. "To deny this power to the court not only prejudiced these beneficiaries but it also operated to the disadvantage

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7 (1859) 70 E.R. at 423.

8 [1954] A.C. 429.

9 Parker, D.B., and Mellows, A.R., *The Modern Law of Trusts*, London, 1966, p. 315.

of adult beneficiaries who were interested in the same trust and who, but for the presence or lack of presence of the infants, the unborn and the unascertained, could have altered the terms of the trust at will".[10] As a result of the Law Reform Committee's Report, the *Variation of Trusts Act* was passed in 1958, and since that time similar legislation has been adopted by a number of Canadian provinces, including Manitoba, which chose to incorporate the new provisions into *"The Trustee Act"*, rather than create a new statute. The section in question reads as follows:

> **Jurisdiction of court to vary trusts.**
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> **61(1)** Where property, real or personal, is held on trust heretofore or hereafter arising under any instrument, the court may, if it thinks fit, by order, approve on behalf of
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> (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; or
>
> (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 member of any special class of persons; or
>
> (c) any person unborn; or
>
> (d) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined;
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> 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.
>
> **Benefit must accrue.**
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> **61(2)** The court shall not approve an arrangement on behalf of any person coming under clause (a), (b), or (c), of subsection (1), unless the carrying out thereof appears to be for the benefit of that person.
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> **Effect on sec. 60.**
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> **61(3)** Nothing in this section affects the powers and authority of the court under section 60.
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> En. S.M., 1964, (1st Sess.), c. 56, s. 2.[11]

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[10] McClean, A.J., "Variation of Trusts in England and Canada", (1965) 43 C.B.R. 181 at 228-9.

[11] C.C.S.M., c. T160. (Section 60 deals with the courts' authority to confer powers of sale, lease, mortgage, etc., upon trustees, where such powers are not given under the trust instrument and where they are, in the courts' opinion, necessary for the proper administration of the trust. Although it has been suggested that the words, ". . . or any modification or variation of the trust or investment"(which were added in a 1956 amendment), are wide enough to cover the beneficial terms of a trust as well as the administrative terms, it seems highly unlikely that this is the effect, especially since the enactment of s. 61 in 1964, which is specifically directed at variation or termination of the beneficial terms, but which does not confer any direct power on the court to *order* a variation.)

It should be noted that the section merely allows the court to approve of a proposed arrangement on behalf of certain designated types of beneficiaries, or as Russell, J. remarked in *In re Druces Settlement Trusts*, "The jurisdiction in effect enables the court to *contract* on behalf of certain beneficiaries or possible beneficiaries . . .".[12] When approved it follows that the trustees should comply with an arrangement just as they would under a normal application of the Rule in *Saunders v. Vautier*, but only if all the adult beneficiaries have also consented. There is no power in the court to overrule beneficiaries who are *sui juris* and who choose to withhold their consent, or to put it another way, there is no power in the court actually to vary a trust. It simply participates along with all the other *sui juris* beneficiaries in varying the trust through an application of the Rule in *Saunders v. Vautier*. Interestingly enough, as we pointed out earlier, there does not seem to be any support in the cases for the view that a trust can be varied as well as terminated by the combined action of all the beneficiaries, although both the *Chapman* case and the *Variation of Trusts Act*, seem to rest on this assumption.

Along with the Rule in *Saunders v. Vautier* there are some other, related circumstances in which beneficiaries may tamper with or upset a testator's or settlor's intentions. For instance it has been held that where an unlimited gift of income is settled on or bequeathed to a beneficiary and there are no residual beneficiaries and no gift over, this will be deemed to be *prima facie* an outright gift of the corpus. This principle is illustrated in the Manitoba cases of *In re McGrath Estate*[13] and *Re Steinburg Will*.[14]

Under the Rule in *Barford v. Street*[15] a life tenant with a power to appoint by deed or will, or by deed alone, may appoint to himself, thus acquiring an absolute interest in the property involved. The leading Canadian case is *Re Mewburn*[16] in which a testator left one-half of the residue of her estate to a daughter for life with a power to appoint by deed "upon her death" or will. There was a gift over on default of appointment. The Supreme Court of Canada ruled that the daughter could appoint to herself and thus disregard the testator's clear wishes that she have only a life estate. If the power of appointment is by will only, however, the general rule is that the donee cannot appoint to himself, although even in this situation there are cases which have held otherwise.[17] The Rule in *Barford v. Street* has been described as "somewhat analogous" (Ford J.A. in *Re Mewburn)*[18] to *Saunders v. Vautier*, although as the Alberta Institute of Law Research and Reform points out in their 1972 report on this subject,[19] it actually goes

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[12] [1962] 1 W.L.R. 363 at 369.

[13] (1952) 5 W.W.R. (N.S.) 637.

[14] (1968) 63 W.W.R. 649.

[15] (1809) 16 Vesey Jr. 135.

[16] [1939] S.C.R. 75.

[17] See *Re Johnston* (1965) 48 D.L.R. (2nd) 573 (B.C.)

[18] (1938) 2 W.W.R. 433 (Alta.)

[19] Institute of Law Research and Reform, University of Alberta, Report No. 9, "The Rule in *Saunders v. Vautier*", 1972.

further in that *Saunders v. Vautier* merely permits a beneficiary to obtain property sooner than the testator intended, whereas *Barford v. Street* gives the donee of a power the right to acquire complete ownership of the property. Both rules, however, have as a characteristic the possible defeat of the testator's intentions.

To recapitulate our discussion of the beneficiary's rights under a trust, and in particular the right to vary or terminate,

(1) The beneficiary's primary right is to enforce in equity the specific execution of the settlor's intention to the extent of his own particular interest.

(2) If the trust is a simple trust with no specific directions to the trustee, the beneficiary has the right to call for a conveyance to himself or anyone else he might name, of the legal title to the property in question, on the ground that since he has the entire beneficial estate vested in him, he is in effect the absolute owner of the property.

(3) If the trust is a special trust with specific duties imposed upon the trustee, the beneficiary may go beyond his basic right to enforce the carrying out of those duties, and alter or revoke the trust, if

   (a) he or she is *sui juris*, and

   (b) it can be shown that on a true construction of the will the testator or settlor intended the property to vest in the beneficiary immediately and not at some later date.

(4) If all the beneficiaries of a specific trust, whether entitled successively or concurrently, are *sui juris* and all consent, they may unilaterally terminate the trust, and either resettle the property on different trusts, or take possession of it absolutely.

(5) Under s. 61 of "*The Trustee Act*", application may be made to court to have a proposed arrangement approved on behalf of certain types of beneficiary who are unable to legally consent themselves. This does not alter the requirement that all *sui juris* beneficiaries must freely and voluntarily consent to the arrangement before it can be enforced on the trustees.

(6) An unlimited gift of income to a beneficiary with no residual beneficiaries and no gift over, will be deemed to be *prima facie*, a gift of the corpus.

(7) A life tenant with a power to appoint by deed or will, or by deed alone, may appoint to himself, and thus acquire an absolute interest in the trust property. This is known as the Rule in *Barford v. Street*.

## POLICY QUESTIONS

Over the course of the past century the interests of the beneficiary have been accorded increasing importance in relation to the wishes of the benefactor. The Rule in *Saunders v. Vautier* has been expanded into a broad principle of beneficial ownership and has of late been given legislative approval with the passage of such statutory enactments as s. 61 of "*The Trustee Act*". It can no longer be said that the beneficial terms of a trust are inviolable or that the wishes of a testator or settlor are sacred. Having examined the circumstances under which the beneficial terms of a trust may be altered or terminated, we must now ask whether such variation is in accord with current public policy, and if it is, whether it is being achieved in the manner most conducive to justice, both distributive and individual.

### (a) Should trust variations be permitted at all?

The basic approach of the common law to testamentary dispositions and other settlements has traditionally been that the intentions of the testator or settlor should reign supreme, there being no jurisdiction in the courts to alter or vary the beneficial terms.[20] Such exceptions as are allowed e.g. the rules in *Saunders v. Vautier* or *Barford v. Street*, involve rights inherent in the beneficiaries, and exercisable independent of any judicial sanction. The cases which do go before the courts are there because there is some uncertainty as to whether all the circumstances are present for the rights to arise, not because their exercise is dependent on the sanction of the court. Once the right is recognized, it is enforceable as a matter of law. Only in the areas of administration and management does the court have some authority to permit a departure from the terms of a trust, and then only if there is some emergency, i.e. something for which no provision is made in the trust and which could not have been foreseen or anticipated by its author.

The rigidity of the common law was not really a matter of great concern in England until the aftermath of the Second World War when escalating taxes and rapidly changing economic conditions began to leave many trusts, and especially the older ones, in difficult circumstances.

In their 1957 Report, the Law Reform Committee commented, "In the course of the last twenty years or so it has become increasingly clear that the traditional type of settlement has not the flexibility which modern conditions demand. The primary object of the old-fashioned settlement was to preserve the settled property for future generations. The range of investment permitted to the trustees was generally restricted; the settlement

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20 There are (or were) some equitable exceptions to this such as the "maintenance" jurisdiction under which the court can indirectly vary the beneficial interests in order to provide for immediate support of a testator's beneficiaries (this is done on the assumption that the testator's overriding intention must have been to provide sensibly for his family), and the "compromise" jurisdiction under which the court could ostensibly sanction a compromise on behalf of an infant beneficiary or unborn person, if such was to that individual's benefit.

did not generally permit the payment of capital sums to beneficiaries during its currency; and the whole income of the settled property was normally made payable to the tenant for life for the time being in possession, whose interest, if a female, was normally subject to a restraint on anticipation and, if a male, was often subject to protective trusts. In modern conditions such provisions, so far from preserving the settled property, may have precisely the opposite effect. If the capital can only be invested in trustee investments, heavy losses may be suffered in a period of inflation; if all the income is payable to one beneficiary, it may be largely absorbed by tax; if capital cannot be paid to beneficiaries but must be retained until the death of a life tenant, if may be largely swallowed up in death duties while some member of the family who has urgent need of capital for some reasonable purpose cannot be paid it".[21] Having opted for flexibility, the Committee then proceeded to demote the intentions of the settlor from their hallowed place of precedence. "In a few sentences and without analysing the issue the Committee overthrew this ancient rule and reversed the priorities. In their view the interests of the beneficiaries were of paramount importance and the only concession they made to the settlor was in the recommendation that he could be heard on an application to vary trusts . . .; and even then the court could overrule any objection he might make".[22] The pros and cons of both sides were explored more fully in the Parliamentary debates over the proposed *Variation of Trusts Act.* It was said that people today are only too ready to discover that the purposes and plans of a donor were not all that they might have been and to alter them, despite his clearly expressed wishes to the contrary. If a donor is sufficiently moved to benefit someone, and that person is willing to accept the benefit, then it is not inequitable to insist that he or she accept on the donor's terms. On the other hand why should the interests of beneficiaries be controlled often to their disadvantage by the dead hand of a settlor? And could it not be said that a settlor's principal intention must be the benefit of his beneficiaries and that consequently if they were adversely affected by changing conditions would he not be the first to agree to a variation of the trusts to conserve and protect their interests? The latter arguments won the day, and both Houses accepted the proposition that the interests of the beneficiaries must take precedence. As A.J. McClean comments in the opening paragraph of his article on trust variation, "If the trust is to be a useful method of disposing of property it must in some way or other be enabled to keep pace with economic and social change. An inflexible trust caught flat-footed in a period of inflation or depression, confronted with a variable stock market or changing government taxation policies, or even merely faced with the necessity of making some more or less minor family rearrangement may cause the name beneficiary to appear something of a misnomer".[23] Most modern trusts are no doubt drafted with wide discretionary powers to the trustees, but to

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[21] Law Reform Committee, Sixth Report, "Court's Power to Sanction Variation of Trusts", Cmnd 310, November 1957, p. 3.

[22] McClean, A.J., *op. cit.*, p. 229.

[23] *Ibid.*, p. 181.

anticipate in detail every conceivable future circumstance must surely be beyond the powers of even the most astute and fey of draftsmen. Given today's economy and taxation, and given the modern emphasis on benefit to the living and let the dead rest in peace, we concur with the British Parliament, that trust variation is and must be possible. The problem before us now is how best to effect such variation, how best to ensure that while there is no unnecessary loss to the beneficiaries, the wishes of the settlor or testator do not become superfluous.

**How effective is the present law in regard to trust variation?**

Naturally, the cases which have come before the courts in Manitoba are those which have involved a dispute usually between the trustees and one or more of the beneficiaries, the questions to be determined being whether vesting has taken place, or whether there is a sufficient interest in the property to constitute absolute ownership (e.g. *Barford v. Street* situations), etc. We examine these cases not so much to explore further the legal rationale for the Rule in *Saunders v. Vautier*, as to point out how ephemeral and artificial the rule can be in actual practice. Where the courts are seised of an attempted trust variation, the equities of the particular case are far more likely to determine whether the so-called "Rule" is applied than any rigid following of inexorable legal logic. The rule can sometimes be a useful and authoritative vehicle for the doing of justice, but it can also (and just as often) be an impediment necessitating much subtle and unfortunately artificial reasoning on the part of counsel and the judges to work out effective flanking maneouvres. The Rule as originally applied in its limited form in *Saunders v. Vautier*, is very much a matter of convenient construction, while the expanded form under which all the beneficiaries acting in concert can terminate a trust, is a matter of unavoidable application. The one depends largely on judicial discretion, the other on a given and unalterable fact situation.

The earliest reported Manitoba case on the subject is the much-litigated *In re Livingston Estate (No. 2)*.[24] In his will, the testator bequeathed property

> to my wife Lydia, and my sons Peter and Frank to the end that they shall each receive one third of my estate, but my sons shall not be entitled to their shares until Frank shall have attained the full age of twenty-one years, but in the meantime my sons shall be entitled to the income of their respective shares, the same being payable to them at such times, as to my said executrix shall seem desirable.
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> Upon my son Frank becoming of age, I give my executrix full power to convert my estate into cash for the purpose of distribution . . . .

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[24] [1923] 1 W.W.R. 358.

Peter, who was twenty-eight years old, applied for his share of the corpus, although brother Frank, whose age was under the will to be the determining factor in regard to possession of the property was as yet only fourteen. *Prima facie* Peter's interest was vested; there was no residual beneficiary, no contingency, and no gift over. The court noted, however, that the estate consisted largely of farm land and that any attempt to dispose of it under the conditions prevalent at that time would result in serious loss to the estate. It was also observed by Mr. Justice Cameron that although the Rule in *Saunders v. Vautier* "... is now too firmly fixed by a long course of decisions to be disregarded, ... it is difficult for any ordinary mind to conceive that this is anything else but a deliberate interference by the courts with the declared and lawful will of the testator. The reasons assigned for such interference are by no means convincing ...".[25] Having thus revealed the real problem weighing on their minds, and taken a swipe at the Rule to set the stage, their Lordships proceeded to do justice, finding that because an order in favour of Peter would involve the realization of the whole of the assets of the estate, payment of its indebtedness, and finally payment to Peter himself of his share of the ultimate balance, the application was in effect for an order of administration, the granting of which, just happened to be a matter within the discretion of the court. Needless to say, the court justly exercised its discretion by refusing to make the desired order.

The will of William Templeton came under scrutiny in *Re Templeton; Templeton v. Royal Trust Co.*[26] By his will the testator instructed his trustee

> To divide the residue of my estate into two equal shares each of which shares shall be held in trust by my said executor and trustee and net income therefrom paid to my nephew ... Percy Templeton, and my niece, ... Jenny Templeton, during their respective lives.
>
> On the death of either ... Percy Templeton or ... Jenny Templeton, the share of my estate from which they receive the net income shall be distributed as they shall by deed or will appoint and in default of such appointment and insofar as such appointment shall not extend, to their respective next of kin.

The question before the court was whether Percy and Jenny Templeton could exercise the power of appointment in their own favour so as to acquire an immediate vested interest in their respective shares of the estate, and thus break the trust, each taking one half of the residue absolutely. The trial judge held that they each took a life interest in one half of the residue with a power of appointment as to their respective halves, to be exercised severally either by will or by deed to become operative only after death, and that

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[25] *Ibid.*, at p. 359.

[26] [1936] 3 D.L.R. 782.

consequently such power of appointment could not be exercised in his or her own favour to take effect immediately. The Court of Appeal thought differently and applying the Rule in *Barford v. Street* held that Percy and Jenny Templeton could indeed acquire absolute vested interests by appointing to themselves. Mr. Justice Robson commented,

> It is to be noticed that on failure to appoint the property does not go back. In no event does any other interest arise. It would seem that nothing is wanting to unite in Percy Templeton and Jenny Templeton respectively all the usual elements that make up ownership.[27]

Although the Court of Appeal allowed the trust to be broken, their decision was not unanimous, Mr. Justice Trueman strongly dissenting to the effect that the testator's intentions were being manifestly frustrated, which indeed they were. It is clear from the wording of the gift provision that any disposition to be made as a result of the power of appointment being exercised, whether by deed or will, is to take effect only on the death of the person exercising the power. It is also quite evident that Percy and Jenny Templeton were to have life estates only in the residue, a statement of intention which Mr. Justice Trueman found clearly at variance with their taking absolute interests.

> A controlling consideration is that absolute ownership is inconsistent with a life estate, so that where a testator bequeaths a property for life, though accompanied with a power of disposition either by deed or will after death, he means that the donee shall have a life estate only. The enlargement of the limited estate into absolute ownership requires coercive language in some part of the Will.[28]

His Lordship mined a substantial amount of authority for his position, and on balance, there seems little to choose in terms of legal weight between his arguments and those of the majority, although on the face of it, the testator's intentions were not given the consideration they deserved. Whatever unique reasons there may have been for the majority's position are unfortunately not revealed, the legal thinking leading up to the decision providing the entire substance of the judgments. If there were no overriding equities to be considered in the particular fact situation, then this case could be taken as a statement of policy in favour of the beneficiaries' full enjoyment of the property bequeathed them and against the intentions of the testator.

*Re Templeton* was followed by the Court of Appeal in the case of *Re Jones*[29] which involved a gift provision very similar to that found in the

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[27] *Ibid.*, at p. 793.

[28] *Ibid.*, at p. 791.

[29] [1949] 3 D.L.R. 604.

*Templeton* case. Again the crux of the matter was whether the power of appointment could be exercised by deed poll to take effect immediately, or whether, as in the *Templeton* case, it would only take effect on the death of the person appointing. The words used were "operative on his death". MacPherson, C.J.M. one of those in the majority, after comparing them to the words used in *Re Mewburn*[30] which were "upon her death said share to go and be disposed of as she may by deed or will appoint", commented "I cannot draw any distinction either legally or in effect between that clause and the term 'operative on his death' ".[31] He then quoted Kerwin, J. from the *Mewburn* case, to the effect that, "the testator's manifest intention is contrary to the authority he conferred upon her. . . . On principle as well as upon a consideration of the authorities referred to, she is able to exercise the power and disregard the testator's wishes".[32] Of the other majority judges, Richards, J.A., drew a very interesting analogy to illustrate the position of a beneficiary applying to a trustee for the immediate transfer of the corpus of his gift.

> He is in the same position as an applicant for a certificate of title under the Torrens System who can say to the Registrar of Titles: "I have a life interest, I have title to the remainder, I have an assignment of the charges and a conveyance of the easements; I am therefore entitled to a clear certificate of title that I am now seized of an estate in fee simple in possession".[33]

Coyne, J.A. remarked that there were no extrinsic circumstances before the court except for the ages of the beneficiaries and the value of the estate, etc., which is interesting since it seems to eliminate the possibility of equities unique to the case exerting pressure on the judges to decide one way or the other. This is again a decision of general principle, probably decided primarily out of deference to the numerous and weighty authorities cited, but also likely with an element of policy direction in it for the future, although, since two of the judges dissented in a very lengthy and rambling judgment, the policy direction, if any, is clouded with uncertainty.

In the case of *Fast v. Van Vliet*[34] the Court of Appeal had to consider a will containing the following clause: "Two thirds share to be paid to my infant grandchild, Calvin Ralph Fast upon his attaining the age of twenty-five years". Once again the decision was not unanimous, Schultz and Monnin, JJ.A. holding that the gift was contingent upon Calvin Fast attaining age 25, and Miller, C.J.M., holding that it vested upon the death of the testatrix. The judgments of both the majority and minority (by Monnin,

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[30] [1939] S.C.R. 75.

[31] *Ibid.*, at p. 607.

[32] *Re Mewburn (supra)* at p. 83.

[33] *Re Jones (supra)* at p. 611.

[34] (1965) 51 W.W.R. 65.

J.A. and Miller, C.J.M., respectively) are extremely interesting for the manner in which they reveal the underlying wellsprings of decision-making. In the case of the majority ruling, Monnin, J.A., at the very beginning of his judgment remarks that

> The applicant . . . has been rather shiftless and his father, in his affidavit, expressed the opinion that he is not capable at the present time of entering into or operating any type of business as he has no administrative ability. Obviously the testatrix could not anticipate the present situation, but it is clear that shortly before her death she was aware of the problems already encountered by her son in his unsuccessful attempts to provide a good education for her grandson. [35]

After relating these pressing equities, the learned judge proceeded to find the gift conditional, this being the testatrix's "clear intention".

> The tendency of modern decisions is to construe plain words according to their proper meaning with little regard for some of the old rules of construction. If the construction of the will, in conformity with the old rules, would have the effect of rendering nugatory the clearly expressed intentions of the testator, a court should not hesitate to ignore the rules. . . . The condition upon which the grandson is to inherit is so clearly expressed that to treat the bequest as vested upon his attaining the age of 21 would be to do violence to the plain, unambiguous language used by the testatrix. [36]

His Lordship summoned the usual phalanx of legal authorities, in part to do battle with the dissenting judge's reliance on the presumptions of early vesting and preventing an intestacy, but also to bolster his main contention which he summarized with a quotation from the judgment of Schultz, J.A. in the Ontario case of *Re Watson*

> In construing a will or any document, the court confronted with that task pays due regard to the settled canons of construction, but in the final analysis all such rules must yield to the testator's intention ascertainable from the actual language of the will, that is the cardinal principle of construction to which all others are to be subordinated. [37]

This is a fine expression of principle which shines most nobly in support of the majority decision, but it is still a principle absolutely dependent on the particular interpretation attached by a judge to the instrument before him. In this case Monnin, J.A. would appear to have the edge of common sense, in

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[35] *Ibid.*, at p. 73.

[36] *Ibid.*, at p. 77.

[37] [1963] 1 O.R. 416 at 419.

that the testatrix did clearly state that Calvin Fast was not to be paid his legacy until he reached age twenty-five. On the other hand the learned judge could just as easily have found the gift to be vested, and one wonders what the decision would have been had there been no evidence of alleged profligacy on the part of the intended beneficiary. It is to be noted that Miller, C.J.M., in his dissenting opinion, made light of this supposed weakness in Calvin Fast, and indeed concluded that he was the testatrix's favourite.

> I think the grandmother intended Calvin R. Fast who appears to be a favourite, to have a vested interest in his legacy so that his heirs, if any, if he died before reaching 25 years, would not be deprived of the inheritance . . . . I feel disposed to believe that the testatrix did not intend that this grandson should be deprived of his legacy.[38]

This may be a little far-fetched, but then the Chief Justice had the more difficult task of varying the plain intention of the will. Where justice lies in this case is hard to tell, since we do not know the full intricacies of the fact situation, and even if we did, it seems apparent that they would not engender any immediate and intense bias in favour of either side.

The Court of Appeal continued its dissent-ridden travails over the intricacies of vested and contingent interests in *Re Schumacher*[39] in which the testatrix left the residue of her estate on trust to be retained and kept invested ". . . for the benefit of my niece . . . and my nephew . . . in equal shares and to pay their respective shares to them at the rate of . . . $75.00 each per month until the funds are exhausted". There was a further provision that if the niece or nephew should predecease the testatrix or should "die before receiving all of the benefits provided . . . ", the trustees should pay the deceased's share to his or her surviving issue, and if the niece should die leaving no surviving issue, her share should go to the nephew. The trial judge, Wilson, J. noted that the issue was "whether the gift to the person first-named is absolute so that the gift over fails, as repugnant or whether the benefit to the first-named was as to a life estate only, so that the gift over takes effect".[40] He resolved that the intention of the testatrix was to convey an absolute interest, and consequently directed that the corpus of the gift be distributed immediately to the niece and nephew. In the Court of Appeal, however, only Guy, J.A. saw fit to follow his reasoning, the other two judges, Freedman, C.J.M. and Dickson, J.A. finding that the gifts to the niece and nephew were in effect life interests, with remainders to their respective issue. It was held that the words "to retain and keep invested" clearly negated any suggestion of immediate payment or immediate vesting, and that since the will was obviously prepared by an experienced draftsman

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[38] *Fast v. Van Vliet, supra,* at p. 72.

[39] (1971) 20 D.L.R. (3rd) 487.

[40] [1971] 2 W.W.R. 617.

it would have been an easy matter to have provided for outright gifts, if such had been intended. The gift over to the nephew in the event of the niece's early demise, also operated to prevent any immediate vesting. It is difficult, in the circumstances, not to agree with their Lordships' finding, although to be entirely fair, the wording of the gift is to a certain extent ambiguous in regard to the testator's real intentions, and therein, as ever, lies the source of dissent.

The latest case to come to our attention is *Re Sutherland*,[41] which although as yet unreported has been commented on in the Estates and Trusts Quarterly.[42] The residuary clause of the will in question reads:

> I direct that the rest and residue of my estate shall be divided equally among my children, [A, B and C], share and share alike, for their own use absolutely. In the case of [A and B] I direct that the said portion be held in trust until each of them shall have attained the age of twenty-eight years and that in the interim, that they shall on an annual basis receive any income therefrom.

It would be hard to find a more classic example of the *Saunders v. Vautier* situation, indeed, the gift provision is perfectly worded to highlight the tug of war between absolute vested ownership and delayed enjoyment. Solomon, J. apparently had little difficulty in finding that the gifts were indeed vested and that the legatees consequently were entitled to immediate payment. The commentator, Ralph E. Scane, of the Faculty of Law, University of Toronto, writes,

> In coming to its conclusion the court applied well settled law in an unexceptionable manner. The provisions postponing payment were not part of the gifts themselves. The gifts were made in a separate clause, and that clause was immediate and absolute in its terms. The postponement provisions were merely superadded to the gift, and did not postpone the vesting. [43]

In looking back over the above cases, it seems clear that from one fact situation to the next the only constant factor to emerge is the judges' fine instinct for what is fair and equitable in the circumstances, by no means a demeaning commentary on the level of judicial competence to be found in our courts. As with so many other areas of the law, competing policy considerations mean that a sensitive balance must be drawn between the Scylla and Charybdis of certain law and uncertain equity; the sanctity of a testator's intentions; the repugnance of controlling property from the grave; the need to protect a spendthrift from himself; the economics of making assets productive; the conserving of those assets that are subject to waste; all

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[41] April 11, 1974, Man. Q.B.

[42] Vol. 1, No. 3, June, 1974, p. 193.

[43] *Ibid.*, p. 194.

of these factors and more press upon the decision maker in the effort to do justice with wisdom and fairness. And it should be stressed that the construction of documents, particularly testamentary documents, is an exercise peculiarly fraught with competing considerations. It is very easy to look at written directions and express an opinion as to what you believe is the intended meaning, but to have to say conclusively that this particular meaning is the meaning intended, and then give convincing reasons for your settled opinion is another matter altogether. It is hardly to be wondered at, that judges have, over the centuries, devised a great many canons of construction, rules of thumb if you like, to aid them in arriving at decisions that at least import the flavour of objectivity if not the actual meat. Such canons must of necessity be artificial since they are based on deemed presumptions and "reasonable" suppositions. To give them a rigid application would inevitably lead to interpretations that could be fantastically at odds with the plain sense meaning of the words under scrutiny, and judges are well aware of this, as witness the statements of Monnin, J.A. in *Fast v. Van Vliet:*

> The tendency of modern decisions is to construe plain words according to their proper meaning with little regard for some of the old rules of construction. If the construction of the will, in conformity with the old rules, would have the effect of rendering nugatory the clearly expressed intentions of the testator, a court should not hesitate to ignore the rules. It should even struggle to avoid such a rigid and unnecessary construction. Rules have their value, but too rigid an application of them can only unduly fetter the hands of the court. Further, I consider it unsound to apply a canon of construction of wills to something that is abundantly clear. [44]

Despite such pleas for common sense, however, the Rule *in Saunders v. Vautier* will, unless checked, probably continue its uncertain drift through the cases, at one moment a guideline only, at the next a "well-settled rule of law". If it was intended to lend certainty and objectivity to the rights of beneficiaries, then it is a miserable failure. If it was intended to render the law logically symmetrical, then it did so at the potential expense of justice, at least justice as we perceive it in this day and age. To the jurists of the nineteenth century the sanctity of property and its attendant legal rights may well have been the very linchpin of social stability and justice. For us, however, living in a populist society that daily shows greater and greater concern for individual justice, a more flexible approach to the use and ownership of property, must surely be the only way to keep the law in touch with reality. The law needs to be certain, but it also, and more importantly needs to be manifestly just, and if doing justice in a particular set of circumstances means placing more reliance on equitable considerations than on legal considerations, then such must be the case in the practical

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[44] *Supra,* at p. 77.

circumstances of this kind of case. The practical circumstances which permit our inclining to less foreseeable certainty of application of the law in this kind of case are basically twofold: first, the incidence of this kind of case is low, which is one reason we have not regarded this reference as being particularly urgent; secondly, there must always be a fund which the beneficiary thinks it worthwhile to go after, and if the beneficiary fails, costs of the litigation may be borne personally but, more likely, will be awarded out of the fund in question.

Having examined the Rule and its legal rationale, and having taken an extended foray through the Manitoba jurisprudence, we conclude that while the Rule may have some support in legal theory, it is far too often at odds with the dictates of common sense and fairness. To be sure, as a matter of sheer probability, it must in some cases coincide with the equities, but if it does it will be purely by chance and not design. As a rule of distributive justice it simply is no longer tenable, and its treatment by the courts is a clear indication of this.

Perhaps the most telling argument against the rule, however, is that it puts a burden on the drafters of wills and other trust instruments that may well be unknown to them. There should be no excuse for anyone in the legal profession to be unaware of the Rule, but mere knowledge of its existence is no guarantee that it will be successfully avoided. Scott-Harston in his book, *Tax Planned Will Precedents*, leaves his readers with a number of pitfalls to be wary of in drafting testamentary instruments that will avoid the Rule in *Saunders v. Vautier:*

> To achieve the testator's purpose one should insure that the gift does not vest in interest but remains contingent until the beneficiary attains the required age. To do this one must bear in mind:
>
> (i) the tricky distinction between a "gift" and a "direction to pay" — e.g. where a testator gives "to A $100.00 to be paid to him at 25" the gift vests immediately and A can demand that it be paid forthwith: *Stapleton v. Cheales* (1711), Prec. Ch. 318, 24 E.R. 150;
>
> (ii) generally that a presumption of immediate vesting arises where the gift is accompanied by a gift of the interim income of the fund to the donee. If interim *maintenance* is given as a distinct gift it does not raise a presumption of vesting: 39 *Halsbury*, 3rd ed., pages 1132-4;
>
> (iii) that the fact that the gift is followed by a gift over to another donee on a certain contingency does not necessarily prevent the first gift vesting in the meantime and in certain cases may even cause the first gift to be treated as vested: 39 *Halsbury*, 3rd ed., page 1137;
>
> (iv) that the rules as to vesting of conditional gifts of personal property differ from those relating to real property.

> Note however that where the gift is of the proceeds of real property held on trust for sale the gift is deemed to be of personalty.[45]

With so many potential snares, it would be sheer luck for the average layman drawing his own will, to prepare a document that would with certainty carry his intentions into effect. The Alberta Institute of Law Research and Reform commented in their Report that "... the law should not lay traps which require sophistication to avoid"[46] and with this we wholeheartedly concur. They also point out that "... the fact that the rule can be got around by careful drafting actually invalidates any rationale for it. There is no point to a rule which merely penalizes poor drafting and there is nothing to be said for a policy which can be got around by a different form of words".[47] It can also be said that there is no point to a rule which requires judges to engage in what has been described as a "constructional chess game", especially when the judges themselves are increasingly less enthusiastic about playing the game. As for the policy reasons expressed by Sir W. Page-Wood, V.C., in *Gosling v. Gosling*, that absolute entitlement to property must of necessity entail all the incidents of ownership, including use and enjoyment, it may well be from the man of law's point of view that the weight of legal logic dictates such a result, but from the ordinary man's point of view, it must surely be an insult to common sense, that a clearly expressed intention should fall prey to the technicalities of property law.

## RECOMMENDATIONS

If the Rule in *Saunders v. Vautier* is to be replaced it will have to be by some form of judicial discretion. Another rule of law or even a whole set of rules of law would simply repeat the artificial and haphazard application characteristic of the present rule. Judicial discretion, however, imports a few problems of its own not the least of which is the problem of uncertainty. No-one will know for sure what his rights are in any particular situation and the only answer will be to go to court to find out. There is thus the possibility of some needless litigation, although this is a fear that has been expressed before in other situations involving the proposed use of judicial discretion, with later events showing it to be largely a chimera. It should also be noted that the present law itself is far from being certain, except in those cases where all of the beneficiaries are *sui juris* and consent.

The Alberta Institute of Law Research and Reform recommended and the Alberta Legislature has subsequently enacted,[48] that all proposed trust variation be subject to the approval of the court. This effectively does away with the Rule in *Saunders v. Vautier*, at least as a matter of automatic

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45 Scott-Harston, J.C. *Tax Planned Will Precedents*, Toronto, 1968, pp. 134-5.

46 Institute of Law Research and Reform, University of Alberta, *op. cit.*, p. 5.

47 *Ibid.*, pp. 5-6.

48 Stats. Alta., 1973, c. 13, s. 12. See Appendix "A".

application, and creates a more equitable balance between the wishes of the testator or settlor and those of the beneficiaries. But, interestingly enough, the Alberta proposal does not entirely dispense with the Rule, since the court is empowered to give its consent ". . . by way of an order approving any arrangement by whomsoever proposed . . .", i.e. the court does not actually order the trustees to comply with the proposed arrangement, it simply says that it approves of it. This problem of enforcement arose in England in relation to the *Variation of Trusts Act*, and as one commentator reports, ". . . the precise extent of the power given to the courts has not yet been finally settled".[49] It was held in one case that the judge could insert in the order a direction to trustees to carry the arrangement into effect, but this was vigorously objected to in a subsequent case on the grounds that there was no jurisdiction to insert such a direction. All that was required was the court order; the trust being validly altered, the trustees were, as a matter of ordinary law, obliged to carry them out in that form. In other words, the court gave its consent on behalf of the incapacitated beneficiaries, and thus paved the way for a normal application of the Rule in *Saunders v. Vautier*, it being the Rule which forced the trustees to comply and not the court order. If the Rule thus still applies under the Alberta proposal as the actual enforcing power, then the question arises once again of whether a trust variation as well as termination can be enforced, since there are apparently no cases to support such a view. The possibilities are endless. The answer, of course, is to confer a direct power of variation on the court, so that there can be no question about compliance with the arrangement.

Another potential problem area in the Alberta recommendations is their suggestion that the consent of all the *sui juris* beneficiaries must be obtained in writing before the court will have jurisdiction to approve or disapprove of any proposed variation. This is, in effect, another lease on life for the Rule in *Saunders v. Vautier*, or at least a part of the Rule. There are strong arguments to be made on both sides, although the Alberta Institute chose simply to say "On balance we think that unanimity should be required".[50] To expand a bit on this "balance", it could be said in support of the proposal, that to allow trust variation over the objections of one or more of the *sui juris* beneficiaries would be to allow the court too wide a power. It should be remembered that what is contemplated is not dependents' relief legislation but the determination of already established rights to property, rights based on actual or potential ownership. Each and every beneficiary of a particular trust fund has an interest in any contemplated change of his particular benefit. To deprive him of his right of veto would be an unwarranted and dangerous interference with his civil rights and a radical alteration of the law. On the other hand, "much may be said for the argument that the Courts should have a residual authority to overrule the recalcitrant adult when his objections are blocking a proposal

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[49] McClean, A.J., *op. cit.*, p. 232.

[50] Institute of Law Research and Reform, University of Alberta, *op. cit.*, p. 19.

obviously beneficial to the trust as a whole; in such a case his is not the only interest involved".[51] Perhaps such an authority should be allowed the Court, to be used only in cases of clear obstructionism. If a proposed variation is clearly to the material benefit of all concerned, including the recalcitrant beneficiary then there seems little justification for losses to be incurred at the whim of that one individual. What, however, if more than one beneficiary objected? Where would the court draw the line, or, more to the point, where should the Legislature draw the line? There is no easy answer, and perhaps on balance, and considering the low degree of social impact involved, the Alberta Institute's proposal to retain unanimous consent is the best solution. This should not affect, however, the recommendation that the court be given a direct power of variation. The exercise of the power would simply be subject to all adult beneficiaries consenting in writing.

The next point to consider, is what, if any, guidelines should be included in the proposed legislation, to assist the court in arriving at its decision. The Alberta recommendation was that the courts be given virtually an unlimited discretion, the only constraint being the direction presently in force in regard to beneficiaries unable to consent to an arrangement, that it must be for their benefit, and the further stipulation that such an arrangement must, at the time of the application to court, "appear otherwise to be of a justifiable character". This was added to protect the *sui juris* beneficiaries from arrangements that might be to the benefit of the incapacitated beneficiaries but "patently unwise, or unjust, or improvident, or unreasonable from the standpoint of the adult beneficiary", (to borrow from the words of the explanatory commentary), although "justifiable character" could be interpreted in an infinite variety of ways more or less in line with this intention. Nothing specific is said anywhere about the testator's or settlor's intentions, and this, we presume, is because the traditional common law approach of upholding such intentions wherever possible will continue to hold sway. It would be a strange phenomenon indeed for a judge to disregard totally the written directions of a trust and an even stranger phenomenon if the court of appeal upheld him. Nevertheless we think there would be no harm in including a direction that the judge must take into consideration, among other things, the intentions of the settlor or testator. This would at least give the donors of trust property a little more confidence in the future of their directions.

Another recommendation which should be implemented as part of the general scheme, is a direction to the effect that the word "beneficiary" includes charitable purposes and charitable institutions. This is necessary because the Rule in *Saunders v. Vautier* applies to charities,[52] but it is not certain whether s. 61 of "*The Trustee Act*" so applies. A specific direction would clear up the uncertainty in this area.

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[51] McClean, A.J., *op. cit.*, p. 236.

[52] See *Wharton v. Masterman* [1895] A.C. 186.

When the English Law Reform Committee opted in favour of the paramountcy of the beneficiary's interest, they sweetened their proposals with the recommendation that the settlor, if alive, should be allowed the opportunity to be heard on an application to vary the trusts on which he settled his property.

> We think that a settlor should always be entitled to be heard on any application so made. We do not believe that settlors would often object. For in nearly all cases the reason for an application is that circumstances have greatly changed since the date of the settlement and have made its original provisions work in a way which was never intended. But there may no doubt be some settlors who would wish that the original trusts should stand unaltered. If that wish was based on sound reasons, the Court would no doubt give effect to it and reject, or at least modify, the proposals: but if it were wholly unreasonable, we think it right that the Court should be empowered to overrule it. But this should not be done without giving the settlor an opportunity of being heard. [53]

If this proposal was indeed intended as a sweetner, then it was successful, because it has been implemented in England, as an amendment to the Rules of the Supreme Court, this procedure being deemed more appropriate than inserting a provision in the statute. Thus, although he has no power of veto, the settlor can at least voice his approval or disapproval of, a proposed arrangement, which in a way is a remarkable departure from the general law of trusts, because, as we noted earlier, a trust is the equitable equivalent of a gift, and unless a specific power of control is reserved to the settlor, he has no further interest in the property. Once his intentions are reduced to writing in the trust instrument and the document is executed, the terms of the settlement become fixed and unalterable save through one of the statutory avenues such as s. 60 of "*The Trustee Act*", or an application of the Rule in *Saunders v. Vautier*, etc. And in any event, any proposed termination or alteration will be solely at the suit of the trustees or the beneficiaries, never at the instance of the settlor (unless he be himself one of the beneficiaries, or has reserved some control to himself). Perhaps as A.J. McClean comments, ". . . few will begrudge the settlor his day in court" [54] and it can certainly be argued that it is a counterbalance to the expanded rights of the beneficiaries, a further assurance that the settlor's original intentions will not pass unheeded. On the other hand it does nothing for the deceased donor, and in the vast majority of cases, the trust involved will be a testamentary trust. On balance it is hardly likely that implementation of this proposal would have more than a very minor effect on the disposition of trust variation in Manitoba, and we accordingly do not stress it as having any priority.

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[53] Law Reform Committee, *op. cit.*, pp. 8-9.

[54] McClean, A.J., *op. cit.*, p. 257.

In regard to the Rule in *Barford v. Street* we applaud the desire of the Alberta Institute to protect the intentions of the testator but wonder whether their proposed rule of construction would ensure such a result. To say that a general power of appointment may only be exercised by a donee in his own favour if the instrument creating the power shows an intention that he may so appoint, is an invitation to the kind of legal wrangling that has been a hallmark of the cases on the *Saunders v. Vautier* principle. If a testator has to spell it out clearly in his will that such was his intention then is this not as much a trap to the unwary draftsman as the Rule in *Saunders v. Vautier* or indeed the Rule in *Barford v. Street?* We believe that the Alberta proposal could be almost as artificial as the Rule it seeks to replace, although it is difficult in the circumstances to conjure up anything more satisfactory. At least a rule of construction which directs the court to look at the testator's intentions, is a statement of policy more in accord with the appearance of justice than the terse technicalities of the Rule in *Barford v. Street.* To allow a complete judicial discretion in this regard such as that recommended for *Saunders v. Vautier* situations would smack too heavily of unwarranted judicial interference with a testator's intentions. It must be remembered that the Rule in *Barford v. Street* contemplates an actual expansion of the donee's interest in the property, whereas the Rule in *Saunders v. Vautier* is concerned simply with the time at which the ownership of a given interest may be claimed. Considering the general policy tone of this Report which is in favour of upholding the common sense meaning of the testator's intentions, we would go along with the Alberta proposal as a more refined approach to the problem of general powers of appointment, than the uncertain and artificial law presently being applied.

As a final recommendation we agree with the Alberta Institute's proposal to extend the proposed variation of trusts legislation to dispositions of property which do not create trusts, but in regard to which a trust would be beneficial. The application of this power to create a trust would be limited to situations involving "an infant or other incapacitated beneficiary" and the trust would be established only for the period of incapacity.

## CONCLUSION

If the rearranging or termination of trusts were to be placed entirely in the hands of the court as outlined above, the Rule in *Saunders v. Vautier* would for all intents and purposes be a dead letter. Since trust variations would no longer be, at least on the surface, an automatic consequence of vested ownership, the courts could give a testator's or settlor's intentions their common sense meaning, and yet still quite legitimately approve a proposed variation that would thwart those intentions. This would certainly restore a measure of reality to the decision-making process, and it would force the judges to give real substance to the reasons for their judgments. Hopefully there would no longer be the strained constructions of legal logic and archaic precedent to fill out the pages and obscure the real basis of the final decision. Any alteration of a trust which went against the plain sense intentions of the testator or settlor would have to be based on convincing

proof of its necessity and benefit to the beneficiaries, in other words "good cause". Considering the case law, such is the necessary requirement at the moment for a successful trust variation, but with the statutory discretion it would at least be in the open, and of course, all proposed arrangements, and not just those contested by the trustees, would have to come before the court, thus doing away with the current artificial distinction between those cases which come to court and those which do not.

Our general recommendation in regard to the variation or determination of beneficial interests under trusts, is that provisions similar to those drawn from the Report of the Alberta Institute of Law Research and Reform and subsequently enacted by the Alberta Legislature be incorporated into "*The Trustee Act*" as part of and including the present s. 61 of that Act. They are shown in Appendix "A". We would add that the court should be given a direct power of variation and not simply the authority to approve or disapprove of a proposed arrangement, and that further guidelines should be included to assist the court in the exercise of its discretion, in particular a direction to the effect that the intentions of the settlor be given due weight. Our reasons for making these recommendations can be summarized as follows:

(a) All proposed trust variation or termination should be legitimized in the same circumstances and on the same grounds, i.e. it should not be possible automatically to terminate a trust in certain circumstances and not in others, when the only distinction between the two is technical;

(b) The technical absurdities of the Rule in *Saunders v. Vautier* should not be allowed to trip up unwary or unsophisticated drafters of trust instruments;

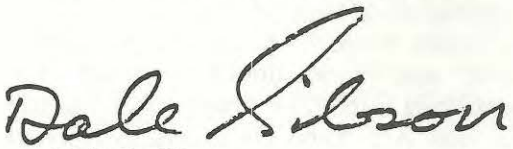
(c) A testator's or settlor's intentions should be given their common sense meaning without necessarily affecting the question of trust variation or termination. The present situation of having to adopt a possibly strained interpretation in order to justify a decision in accord with the equities, does more to bring the law into disrepute than it does to give it certainty;

(d) It gives, at the same time, greater protection to the testator's intentions and enhanced flexibility for the changes in trusts that modern tax and inheritance laws and economic conditions make necessary;

(e) Although it does not substantially alter the approach presently taken by our courts, it provides a necessary cosmetic face lift to the appearance of justice, and ensures that all trust variation is given equal treatment.

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"*, signed this 8th day of January 1975.

Francis, C. Muldoon, Chairman



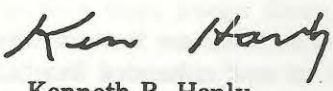
R. Dale Gibson

C. Myrna Bowman

Robert G. Smethurst

Val Werier

Sybil Shack



Kenneth R. Hanly

37. (1) In this section, the words "beneficiary", "beneficiaries", "person" or "persons" include charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the court.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust whereunder the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages, or

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time, or

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by renunciation of his interest by any beneficiary so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the court under subsection (1) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts, or

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trusts, and who by reason of infancy or other incapacity is incapable of consenting, or

(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, or

(c) any person who is a missing person (as defined in *The Public Trustee Act)* or who is unborn, or

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

(6) Before a proposed arrangement is submitted to the court for approval it must have the consent in writing of all other persons who are beneficially interested under the trusts and who are capable of consenting thereto.

(7) The court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person on behalf of whom the court may consent under subsection (5), and that in all the circumstances at the time of the application to the court the arrangement appears otherwise to be of a justifiable character.

(8) Where an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself unless the instrument shows an intention that he may so appoint.

(9) Where a will or other testamentary instrument contains no trust, but the court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of an infant or other incapacitated beneficiary that the court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the court has jurisdiction under this section to approve such an arrangement.

NOTE:

Some amendments were enacted at the 1974 Session of the Alberta Legislature. One dealt with charitable trusts and another made the variation provisions applicable to existing, as well as prospective, trusts.