***VARIATION OF TRUSTS ACT*– A CASE LAW PRIMER**

By Justin W. de Vries

This paper will address a number of cases that have considered the *Variation of Trusts Act*[1] (the "**Act**"). It is not hyperbole to state that there is a plethora of variation of trust cases. However, the cases chosen are either leading cases in the area or cases that show a unique set of circumstances in which the court either varied a trust or declined to do so.

As varying a trust is almost entirely within the discretion of the court, subject to "certain basic requirements", it will quickly become apparent to the reader that whether a trust is varied often depends on the "luck of the draw" when it comes to the judge hearing the application. In other words, much depends on a judge's unique biases and perspective. Such a comment is not meant to belittle the justice system or disparage our judiciary, but discretion is, and always has been, a fickle thing.

***Re Irving*[2] -- The Three Basic Requirements**

In the leading case of ***Re Irving***, Pennell, J. stated[3]:

> From the foregoing the conclusion is inevitable, that in giving or withholdings its consent to a proposed arrangement the function of the court is to protect the interest of those who cannot protect themselves; and so long as they are adequately protected, the court will as a rule give its consent. It becomes a matter of the court exercising the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs…
>
> 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 [Ontario]

---

[1] R.S.O. 1990, c. V.1. The Act is attached as an Appendix

[2] (1975), 66 D.L.R. (3d) 387 (Ont. H.C.)

[3] *Ibid* at pages 393 and 394

> *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? [emphasis added]

Rose v. Rose[4] -- Approval by The Children's Lawyer not Determinative

Rose v. Rose is a leading 2006 Ontario decision that deals with marriage breakdown, disillusioned children, and the finality of an irrevocable trust (one of Lissaman, J.'s last decisions before retiring from the bench). Brian Rose ("**Brian**") and Janice Rose ("**Janice**") were married and had two daughters (Ashley Rose "**Ashley**" and Kelsey Rose "**Kelsey**"). In 1992, Brian and Janice transferred a ski chalet and cottage into trust for the benefit of their daughters and their issue. Brian was the trustee for the trust. The trust was irrevocable. The family enjoyed the use of the chalet and cottage before and after the establishment of the trust.

Brian and Janice separated after this trust was established. Unfortunately, Brian's relationship with his daughters also deteriorated. Ashley and Kelsey ultimately became frustrated with their father as trustee and commenced an application to have him removed. They also sought an order winding up the trust and distributing the capital income to them.

For his part, Brian wanted to continue to use and enjoy the chalet and cottage, despite the separation from his wife. However, the court held that the trust deed, the foundation document for the trust, could not be interpreted as authorizing Brian (or Janice for that matter) to use and enjoy the two properties without the consent of his two daughters. Furthermore, the court was not prepared to rectify the trust deed to provide Brian with the use and enjoyment of the two properties.

---

[4] 24 E.T.R. (3d) 217, 81 O.R. (3d) 349, 2006 CarswellOnt 3776 (Ont. S.C.J.)

Brian also hoped to transfer the cottage and chalet back to him and his former wife. The court held that once the trust had been created, no such transfer could take place as Brian had failed to retain the power to revoke the trust.

The court noted that there was a great deal of hostility between Brian and his two daughters. Ultimately, the court held that it would be impossible for Brian to act impartially as trustee and removed him as trustee.

The court also held that there was no basis for the claim by Ashley and Kelsey that they were entitled to call for the winding-up of the trust and for the distribution to them of the property of the trust. According to the court, such a procedure would have, in all probability, lead to serious tax consequences and, in the judgment of the court, terminating the trust was not in the best interest of the trust beneficiaries.

In its decision, the court considered the rule in *Saunders v. Vautier*[5]. In order for that rule to apply, the beneficiaries would need to establish the following:

1. the beneficiaries must be *sui juris*, that is, adult and have full mental capacity; and
2. the beneficiaries must be absolutely entitled to the trust property.

According to the court, the first part was satisfied in the case, but not the second. To be absolutely entitled, all the beneficiaries must be ascertained and, together, their interest must account for all of the interest in the trust property.

Given the potential interest of the unborn issue of Ashley and Kelsey, the court held that it would not be appropriate to terminate the trust under *Saunders v. Vautier*. The court also held that the trust should not be terminated pursuant to the Act for basically the same reason; namely, the

---

[5] (1841), 49 E.R. 282, [1835-42] All E.R. Rep. 58

proposed termination would not have provided any benefit for the potential unborn issue of Ashley and Kelsey as required by section 1(2) of the Act.

Of particular interest was the fact that a proposed payment into court negotiated with The Children's Lawyer did not, in the opinion of the court, satisfy the interests of the unborn issue who were potential beneficiaries. As such, the application to wind-up the trust was denied.

Leir v. British Columbia (Public Trustee)[6] -- Filling a Void in a Testator's Will

Under the terms of his father's Will, the applicant (the case refers to the applicant as the "petitioner") was to receive only the income for life from his share of the residue of his father's estate. However, that life interest was subject to forfeiture on the happening of certain events, which would occur if the son became insolvent. If the applicant became insolvent, the capital and income were to be held in trust for such of the applicant's children as had reached age 18. Unfortunately, the Will was silent as to the disposition of the applicant's share in the event that he died without having forfeited his share.

The applicant applied under the B.C. *Trust Variation Act*[7] for an order distributing the funds in accordance with an agreement approved by all those living who might possibly be beneficiaries on the failure of the trust, except for one child who was a minor and unable to give consent. The agreement proposed to divide up the capital of the applicant's share and distribute it among the applicant, his two adult children, and a trust for the one minor child and any future children.

Not only was the approval of the court needed on behalf of the minor child but also on behalf of potential future children of the applicant.

[6] 15 E.T.R. 241, 1983 CarswellBC 263 (B.C.S.C.)

[7] R.S.B.C. 1979, c. 413

According to the court, the issues raised were difficult, not only because of the duty owed by the court towards the minor children and the unborn, but also because the proposed disposition seemed contrary to the expressed wishes of the testator.

The proposed arrangement reached between the adult beneficiaries and the BC Public Trustee (who was acting for the minor children and the unborn) was: (1) $15,000 go to each of the two children of the applicant; (2) $15,000 be held for the applicant's minor child; (3) $5,000 to be held against the "unlikely possibility" there might be a future child; and (4) the balance of approximately $67,000 to go to the applicant. The Public Trustee did not oppose the application to vary the trust on the basis that the disposition was fair to the minor child and any future children.

According to the court, the proposed distribution to the children was well in excess of the present value of the benefit they might receive on their father's death, assuming that the father had an average life expectancy and that they would be entitled to his share on his death (the reader will recall that the Will was silent in this aspect).

The court then considered the nature of forfeiture clauses. According to the court, forfeiture clauses of the type in question were to be construed with considerable strictness. Their primary purpose, as the court noted, was not to assure the passing of the bequest to the contingent beneficiaries, but, rather, that the bequest be preserved from passing to the life beneficiary's creditors.

The court noted that the making of a voluntary assignment or bankruptcy seemed to be the type of event which would result in the forfeiture clause being triggered. However, the court was also of the view that bankruptcy was improbable based on the overall incidence of bankruptcies.

However, in the applicant's case, there were complications. He had liquidity and cash flow problems in his business and his home was under order for sale in favour of a mortgagee. As such, the court concluded that the prospect of the applicant's children obtaining any benefit under the Will, either during his lifetime or on his death, were slim. Accordingly, the court

concluded that the proposed disposition, under which they would receive more than 40% of the funds, was for their benefit.

The court also considered how much weight the wishes of the testator should be afforded. The court noted with approval the statement of Pennell, J. in *Re Irving*[8]:

> … 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 flaunted arbitrarily. It can never be pretended that the court had the power to make a new will in the guise of approving an arrangement under the *Variation of Trusts Act*.

According to the court, it was apparent that the testator never intended for the applicant to receive any of the capital of his share of the estate. The applicant was to receive income only and that was, in turn, subject to the possibility of forfeiture. The proposed agreement contemplated an outright gift of more than half the capital to the applicant. There was, of course, no protection against the gift ultimately falling into the applicant's creditors - a possibility that clearly worried the testator.

For the court, the real difficulty in giving effect to the testator's wishes was that the court did not know for whom the testator wished the applicant's share to be preserved upon the applicant's death. The court was being asked to resolve a problem which had arisen through the testator's own oversight or indecision. By contrast, the family had sought to resolve the problem by agreeing to an immediate distribution, which would remove the uncertainty and avoid considerable, potential costs to the estate.

Furthermore, the testator's other children were willing to renounce their potential claim on the applicant's share and let it be divided between the applicant and his children. For his part, the applicant was willing to compromise his claim to take the fund absolutely. The agreement worked out by the family filled a void in the testator's directions in a way which was fair,

---

[8] 11 O.R. (2d) at page 448

acceptable to the family, and for the benefit of those on whose behalf the court was asked to consent.

> I think it in accord with the purpose of this legislation that the court exercise its discretion in favour of an agreement of this sort, by which an uncertain trust can be sensibly wound up, even though the disposition may to some extent run counter to the express wishes of the settlor.[9]

The court approved the agreement.

Finnell v. Schumacher Estate[10] **-- Every Member of a Class as an Individual must Benefit and not just as a Group**

The Official Guardian together with the Public Trustee appealed to the Ontario Court of Appeal ("**C.A.**") from the decision of Carruthers, J. approving an arrangement varying a trust pursuant to the Act.

The testator died in 1957 with a Will postponing division of capital until 21 years after the death of his grandson, Michael Finnell ("**Michael**"). The date had been predicted by actuaries to be the year 2030. The Canadian assets of the estate comprised nearly 200 properties with significant mining potential in Northern Ontario. Michael was a co-trustee of the estate, along with Canada Trust.

The Will established a charitable foundation called the Schumacher Foundation (the "**Foundation**"). The Foundation was to receive ¾ of the capital of the estate on the division date. The remainder was to be divided among the issue of Michael, alive on the division date, *per stirpes*.

---

[9] 1983 CarswellBC 263 at paragraph 24

[10] 37 E.T.R. 170, 74 OR (2d) 583, 1990 CarswellOnt 479 (Ont. C.A.)

Until the division date, the income from the estate was to be paid 5/8 to the Foundation, 2/8 to Michael, or his issue alive from time to time, on a *per stirpes* basis, and the remaining 1/8 to the sister of Michael. Upon the death of the sister, the income was to be paid to the Foundation, as she was without children and "beyond child-bearing age".

The C.A. noted that the potential of the mining properties had begun to be realized. For example, in 1987, revenue (i.e. income) from leases and options totaled $800,000 with the expectation of increased income in the future. The law of trusts and estates treated mining revenue as capital, being a converted form of value in the land. However, Revenue Canada (as it was then) treated mining revenue as income either in the hands of the estate or the beneficiaries. The dilemma facing the estate was that the $800,000 had to be retained as capital in the estate until the division date, but it was immediately taxed as income.

A further complication facing that the trustees was that under the current income tax laws, there would have been a deemed disposition of capital properties owned by the testamentary trust in 1993 and every 21 years thereafter. Thus, according to the court, if the properties continued to appreciate in value, significant capital gains tax would have had to be paid out of accumulated royalties, or, alternatively, some properties would have to be sold to meet the obligation.

Not surprisingly, the trustees wished to minimize taxes payable. As such, they devised a complex deed of arrangement, which had received a favourable advanced ruling from Revenue Canada and was presented to the court for approval under the Act.

In considering the arrangement on behalf of the minor great-grandchildren and "unborn persons", the court noted that the arrangement plainly gave immediate benefits to the living beneficiaries and to the Foundation. All of the adult beneficiaries had approved the arrangement, as had the Foundation. The issue before the court was whether it gave benefit, and sufficient benefit, to the more remote beneficiaries, including the two minor great-grandchildren and the unborn. The Official Guardian (as it was then) opposed the arrangement on behalf of the minor great-grandchildren and unborn children. The Public Trustee (as it was then) also opposed the variation, arguing that a better alternative was available for the Foundation.

The judgment of the court was delivered by Carthy, J.A. His analysis began with the question of whether there was a benefit to those represented by the Official Guardian and, if so, whether that benefit was such as would be accepted by a prudent self-interested adult.

The court then went on to note that in order for the proposed agreement to be approved pursuant to the Act, it was required that the arrangement be sufficiently beneficial for the class of beneficiaries on whose behalf the court's approval was sought. The court further noted that any estimation of entitlement under the Will or the proposed arrangement was conjecture. Moreover, it was not sufficient that a mere benefit be shown; the benefit had to be sufficient to justify the court's approval.

According to Carthy, J.A., the court was required to look at the situation through the eyes of the unborn person, "as if they were here today and looking forward to their birth".[11] Is the variation proposed a prudent transaction from their vantage point? If not, whatever good business sense there was in saving taxes, the remote beneficiaries had no interest in varying the trust simply to benefit their relatives alive today.

However, Carthy, J.A. was quick to caution that the Official Guardian should not "gouge" on behalf of those it represented. **Nevertheless, the benefits at least had to be fair to all those who took in the future, when it was clear that living beneficiaries were going to benefit substantially.**[12] The C.A. also went on to hold that it was clear from the Act, and the jurisprudence, that the benefit of any variation **must be for every member of a class as an individual and not just as a group**.

Ultimately, the variation was not approved and the appeal allowed. According to the C.A., the problem was that the trustees had made an assumption that by giving some group benefit to the minor and unborn beneficiaries, the immediate attraction of a tax savings would carry the day.

---

[11] 1990 CarswellOnt 479 at paragraph 25

[12] *Ibid* at paragraph 24

However, that was not good enough for the C.A. What was missing was a sufficient and individualized benefit on behalf of minor and unborn beneficiaries when compared to the benefits received by the current adult income beneficiaries, which would persuade the prudent advisor to support the application.

Finnell v. Schumacher Estate[13] -- Awarding Costs

In its decision, the C.A. also dealt with the issue of costs. Costs were awarded as follows: (1) Michael and the Foundation on a solicitor and client basis out of the funds available from time to time for payments to income beneficiaries; the Official Guardian on a solicitor and client basis out of the mining receipts; no costs to the Public Trustee or to Canada Trust (which played no active part). All costs were to include both the application and the appeal.

According to the C.A., the allocation of costs was premised on the observation that the effort of the trustee to save taxes was worthwhile. The court recognized that there was enough virtue in the general effort to save taxes that the trustee was not to be discouraged from further effort by having the successful parties' costs thrust upon them.

Coffie v. Coffie Estate[14] -- Protecting the Applicant, not the Remote Beneficiaries

The testator established a trust for his daughter. She was 40 years of age. The trust fund was approximately $120,000 at the time of the application. While it is not altogether clear from the decision, the group impacted by the proposed variation seemed to be the daughter's unborn children.

Pursuant to the terms of the trust, $250 per month was paid out to the daughter and continued to be paid out to her. In addition, other encroachments had been made to assist the daughter with

---

[13] *Supra,* Note 11

[14] 16 E.T.R. (2d) 38, 1996 CarswellOnt 5026 (Ont. Gen. Div.)

rent, expenses, and vacations. These total encroachments were in excess of the income being earned such that the trust capital was being eroded.

The daughter sought to vary the trust. The Children's Lawyer supported the variation as long as the sum of $15,000 was to be paid into court for the benefit of unborn or other children.

In considering whether to approve the variation requested, the court noted that the intention of the testator was to protect his daughter. However, the court further noted that "one should not overstate intention -- it should not be overpowering"[15]. The court noted that it had no discretion to alter the trust. The court could either agree to the variation as requested or dismiss the application.

The court pointed out that no cases of financial hardship, such as the one before it, had been sought as a basis for varying the trust (the application was brought in 1996), except one, *Fischel v. Budovitch Estate*[16]. In that case, the requested variation was denied.

In the case before it, the court dismissed the application to vary the trust. In considering the variation, the court held that the testator intended to protect his daughter. If the variation was ordered, there would be little left for the daughter in later years. According to the court, the testator structured the fund to aid his daughter when her working days were done. The court noted that the design of the testator was to encourage his daughter be self-supporting within her limited abilities until she reached an age when financial support from her own efforts might not be enough. As such, the balance of the trust would then be available for her care and comfort. The court held that to agree to the suggested variation would not benefit the daughter, as it would place her in a position of possible impecuniosity in her later years which, in the view of the court, would be quite wrong.

---

[15] 1996 CarswellOnt 5026 at paragraph 7

[16] (1990), 108 N.B.R. (2d) 187 (Q.B.)

What is striking about this case is that the court seemed to pay scant attention to the unborn children and the consent of The Children's Lawyer to vary the trust. Instead, the court focused solely on the intention of the testator and what was in the best interests of his adult, albeit financially strapped, daughter.

Lafortune v. Lafortune Estate[17] -- Preserving the Substratum of the Original Trust

The testator died on June 3, 1987 leaving his widow, Yolande Lafortune ("**Yolande**"), and three children of his earlier marriage to Marguerite Lafortune ("**Marguerit**e"). The testator's eldest daughter, Anne Miggeman, had two young children. His two other children did not have any children. There were no children of the marriage between the testator and Yolande.

In his Will, the testator made a small provision for Marguerite (his ex-wife). The sizable residue of the estate went to his three children subject to survival provisions. However, the receipt and possession of part of the residue was deferred in favour of a life interest for Yolande. The value of the estate was approximately $3.6 million.

An arrangement was proposed to the court that would have the effect of an immediate realization and distribution of the assets of the estate to Marguerite, Yolande and the testator's three children. The interests of the contingent, minor beneficiaries were to be protected by means of an insurance policy on the lives of the children (their parents). The insurance policy was to be taken out and maintained for 10 years from the date of the testator's death. All the adult beneficiaries agreed to the proposed variation, as did the Official Guardian representing the minor and unascertained beneficiaries. However, the trustees opposed the application.

Counsel for the trustees argued that the arrangement did not preserve the "substratum" (i.e. foundation or basis) of the trust and, as such, amounted to a resettlement of the trust and not a variation. Counsel for the trustees also maintained that the insurance coverage for the minor

---

[17] 40 E.T.R. 299, 1990 CarswellOnt 507 (Ont. H.C.J.)

beneficiaries was not adequate, not because of the amount of the insurance, but because the coverage was for only 10 years from the date of the testator's death.

The adult beneficiaries and Official Guardian submitted that the insurance policy was more than adequate, and indeed was generous and clearly beneficial. The parties, other than the trustees, submitted that the proposed arrangement, while accelerating the payment of capital, preserved the basic thrust of the testator's intention by assuring security and a good standard of living for Yolande with the residue go to the testator's three children. No new beneficiaries were involved, the substratum was said to be respected.

The same parties stressed that many serious difficulties with the terms of the Will had been raised, such that an interpretation application was pending before the court. They submitted that there was a real risk of significant dissipation of the estate's assets in litigation arising both under and outside of the Will. The avoidance of such litigation was an important objective of the proposed arrangement. They went on to contrast the problems under the Will with the harmonious way in which the deed of arrangement was arrived at, and the continued harmony which its approval was likely to encourage within the family.

The position of the trustee was basically that the intention of the testator, as set out in his Will, was to ensure that neither Yolande nor the testator's three children would receive their ultimate capital share of the estate all at once, or in large and early lump sums.

In considering the variation application, the court noted that there were rather severe limitations on the inherent jurisdiction of the courts to alter trusts. Such alternations were confined mainly to emergencies, danger to property, obvious errors, and other snags. The court therefore held that the emphasis of the court should be on acting judicially in light of the facts of the case.

The court noted that where the intention of the testator was clearly stated and not offensive to public policy, absurd, or grossly unfair, regard should be had to that intention. As such, a gratuitous disregard of the intention of the testator was inappropriate. However, the court was not prepared to enshrine the testator's intention to the degree suggested by the trustees.

According to the court, the avoidance of family dissention was clearly an important consideration for the court when it viewed the overall fairness of the proposed arrangement. Here there were admitted difficulties with the interpretation of the Will and many possibilities for litigation, both under and outside the Will. The difficulties weighed heavily on the court's discretion.

In terms of the proposed insurance, it was adequate since all of the interests of the children would vest in 10 years from the date of the testator's death. Accordingly, the proposed arrangement did provide a benefit to the minor beneficiaries. Moreover, the proposed arrangement provided for roughly the same division of the assets among the principal beneficiaries as existed under the Will. Accordingly, the substratum of the trust was maintained.

Finally, the court again noted that the testator's intention was a relevant fact to be taken into account in the exercise of its discretion. However, the intention of the testator was not a conclusive factor.

Re Heintzman[18] **-- Adult Beneficiaries in Best Position to Protect Unborn Beneficiaries**

An application to vary a trust was brought so that the children of the deceased could be added as trustees when each child attained the age of 25 years.

The deceased had five children whose ages ranged from 20 years to 27 years of age. The testator made provision for his unborn grandchildren in the event that any of his children died prior to vesting and leaving issue. The court noted that its main concern was the welfare of the unborn beneficiaries. Evidence was pleaded before the court indicating: (1) the testator's family was, and always had been, a closely knit group; (2) the testator's wife had managed the financial affairs of the family both before and after the testator's death.

---

[18] 9 E.T.R. 12, O.R. (2d) 724, 1981 CarswellOnt 494 (Ont. H.C.J.)

The application to vary the trust was a companion proceeding to an application for an order accepting the resignation of Canada Trust Company as one of the co- executors of the estate (the testator's widow was the other co-trustee) and appointing two of the testator's children in its place and stead. According to the court, both children were eager and qualified to act in the management of the estate.

The remaining children of the testator, all of age, were in agreement that the administration of the estate should be handled by their mother, brother and sister, with the provision that they be appointed trustees if they so desired, when they turned 25 years of age.

According to the court, the material before it disclosed ample justification for the position taken by the family that the estate would be better managed by the beneficiaries. However, the court had to consider, on the facts of the case, whether the appointment of the two trustees protected the unborn grandchildren of the testator. It was obvious that the chance of one or more of the testator's children (all under the age of 30) having children of their own who would take a vested interest in the estate was a real one.

The question that remained before the court was whether the appointment of contingent capital beneficiaries, as trustees, provided as good or better protection to the unborn issue than a trust company, having regard to all of the circumstances, and in particular, to the wide powers of encroachment contained in the Will.

In the view of the court:

> … well educated, private trustees, who had demonstrated a keen interest in the management of the estate, had participated in the decisions made, had demonstrated sound judgment and perhaps, most importantly, had an interest in the unborn and contingent beneficiaries, both financial and otherwise, that was clearly beyond that of any trust company, may be appointed to replace a corporate trustee.[19]

---

[19] 1981 CarswellOnt 494 at paragraph 18

Canada Trust was replaced as co-executor and the variation to the trust granted.

N.S. (Re)[20]**—Postponing an Adult Beneficiary's Entitlement**

The issue before the court was whether a trust could be varied to postpone distribution to a beneficiary.

A.J. and N.S. were minors and beneficiaries under separate trusts created by the Will of their late uncle. If they became entitled to their share of the estate before reaching the age of majority (19 years of age in Nova Scotia), the trustees were to hold and keep invested that share of the estate until they obtained the age of majority. In the meantime, the trustees were directed to pay the income arising from the investment of the trust fund for the maintenance, education and support of A.J. and N.S. As of August 31, 2006, the two trusts were each valued at approximately $1,100,000.

A.J.'s mother and great aunt were the trustees of both trusts. They applied to the court for a variation of trust so that the capital distribution of each trust was delayed beyond the date when each child turned 19. It was anticipated that the value of each trust would increase significantly over time as both A.J and N.S. were relatively young.

The trustees filed affidavits, along with the mother of N.S., indicating that they were all concerned about A.J. and N.S. inheriting such substantial amounts of money at the age of 19. They raised concerns about the children: (1) not having the life experience, judgment, financial skills and wisdom to deal with such wealth at such an early age; (2) being open to exploitation or bad influence; and (3) sapping their ambition and drive to pursue higher education and a challenging career. N.S. was also described as suffering from learning disabilities, including dyslexia.

---

[20] 2007 N.S.S.C. 288 (S.C.)

The trustees proposed a variation of both trusts so that the capital distribution was delayed until each child respectively attained the age of 35 years, unless the trustees, in their discretion, determined that either child was capable at a younger age of managing the trust funds personally.

The litigation guardian, who was appointed to act on behalf of A.J. and N.S., argued that no evidence had been presented to support the suggestion that a person of 19 years did not have the requisite life skills to handle their own affairs, including a substantial inheritance. The litigation guardian also pointed out that the trustees were seeking to postpone the receipt of the trust funds to an age that was almost twice the age of majority.

Prior to the hearing, the court had been advised that counsel for the applicants and the litigation guardian had reached a compromise and both agreed that the trust should be varied so that the capital distribution was delayed until each child attained the age of 25 years (rather than 35 years as originally requested by the trustees). Further, it was proposed that upon reaching the age of 19 years, A.J. and N.S. would become a co-trustee of his/her respective trust so that each could have exposure to the management of the trust funds under the guidance of the existing trustees.

In considering whether to approve the variation, the court noted that the courts had, over the years, taken a broad view of the term 'benefit'. The court ultimately concluded that delaying the capital distribution of each of the trusts until A.J. and N.S. attained the age of 25 years was for their benefit. According to the court, delaying the capital distribution of each fund for an additional 6 years would afford each beneficiary an opportunity, once they became an adult, to learn and acquire the skills that were necessary to manage an inheritance of this magnitude. This was very much to their benefit. In the interim, A.J. and N.S. would also continue to receive the income produced by their respective trusts.

The court was also satisfied that the basic intention of the testator was maintained with the proposed arrangement (referring back to one of the 3 requirements set out in *Re Irving*). In particular: (1) each beneficiary would still receive their full share of the residue of their uncle's estate; (2) nothing in the decision would alter the vested interest that each child had in the estate; (3) each beneficiary was still entitled to receive the annual income arising from the investment of

the trust funds; and (4) the trustees would continue to have the power to encroach for the support, maintenance, or education of A.J. and N.S.

On balance, the court was satisfied that the benefit to be obtained as a result of the proposed variation was one that "… a prudent adult, motivated by intelligent self-interest and sustained consideration of the expectation and risk of the proposal made, would be likely to accept".[21]

Finally, the court considered the rule in *Saunders v. Vautier*[22] and its impact on the proposed variation. The court concisely stated the common law rule in *Saunders v. Vautier* 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".[23]

The issue was raised as to whether the court should grant the application to vary the trusts given the rule in *Saunders v. Vautier*. In other words, either of A.J. or N.S., once they turned 19 and were fully capable, could require their trust to be terminated and the trust funds paid out without regard to the terms of the trust or the wishes of the trustees.

However, the court was satisfied that nothing in its decision would alter the rule in *Saunders v. Vautier* and nothing in the rule prevented the court from approving the proposed variation. In fact, the effect of the arrangement was that the trustees would not be obliged to automatically distribute the capital of the trusts to A.J. and N.S. at the age of 19. However, the right of each child to seek relief based on the rule of *Saunders v. Vautier* would not be altered and the court order would specifically state as much. An order varying the trusts was issued accordingly.

---

[21] 2007 N.S.S.C. 288 at paragraph 26

[22] *Supra*, Note 6

[23] 2007 N.S.S.C. 288 at paragraph 36, See *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973

Conclusion

Suffice it to say that the above cases demonstrate that predicting when the court will exercise its discretion and vary a trust is next to impossible. The court seems ready to grant or withhold its approval for all sorts of reasons -- good and bad. However, relying on the statements of the C.A. in *Finnell v. Schumacher Estate*[24], it is likely fair to venture that what will motivate the court to approve a trust variation is whether there is a sufficient and individualized benefit to minor and unborn beneficiaries when compared to the benefits received by the current adult beneficiaries, such that a prudent advisor would be persuaded to support the application.

---

[24] *Supra*, Note 11

APPENDIX

Variation of Trusts Act

R.S.O. 1990, CHAPTER V.1

Consolidation Period: From June 22, 2006 to the e-Laws currency date.

Last amendment: 2006, c.19, Sched.C, s.1(1).

Jurisdiction of courts to vary trusts

1. (1) Where any property is held on trusts arising under any will, settlement or other disposition, the Superior Court of Justice 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. R.S.O. 1990, c. V.1, s. 1 (1); 2006, c. 19, Sched. C, s. 1 (1).

Benefit

(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. R.S.O. 1990, c. V.1, s. 1 (2).