Report #9

THE RULE IN SAUNDERS v. VAUTIER
1972

INSTITUTE OF LAW RESEARCH & REFORM

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ADDENDUM

A minor point to which we call attention has to do with s. 6 of the Married Women's Act, R.S.A. 1970, c. 227. Subsection (1) provides that a married woman's property belongs to her as if she were an unmarried woman and may be disposed of accordingly. Subsection (2) provides however, as follows: "Nothing in this section interferes with or renders inoperative a restriction upon anticipation or alienation attached to the enjoyment of any such property."

The consequence may be that in a situation to which s. 6(2) applies, a married woman is one who "by reason of infancy or other incapacity is incapable of assenting" within our Recommendation #4(a). We think she should be in the same position as any other adult for purposes of the proposed legislation.

Without making a formal recommendation, we shall set out a provision that would eliminate any doubt:

> *THE JURISDICTION CONFERRED UPON THE COURT UNDER THIS ACT SHALL INCLUDE THE POWER TO VARY ANY DISPOSITION OF PROPERTY, NOTWITHSTANDING THAT THE DISPOSITION CONTAINS A RESTRICTION UPON ANTICIPATION OR ALIENATION ATTACHED TO THE ENJOYMENT OF ANY SUCH PROPERTY; AND FOR THE PURPOSES OF THIS ACT SUBSECTION (2) OF SECTION 6 OF THE MARRIED WOMEN'S ACT SHALL BE CONSTRUED ACCORDINGLY.*

Parenthetically we note that protective trusts of the type provided for in s. 33 of the English Trustee Act might be the subject of a separate study; likewise the Married Women's Act. The latter will doubtless come under consideration in our Family Law project.

INSTITUTE OF LAW RESEARCH AND REFORM

REPORT

The Rule in Saunders v. Vautier

I

THE RULE

Sometime ago the Institute decided to make an examination of various rules in the law of wills and trusts which have been subject to criticism. The purpose of our study is to see whether the rules should be altered, and if so what the new provisions should be. One of these rules is called the rule in Saunders v. Vautier. Theobald on Wills, 12 ed. (1963) para.1539 states the rule as follows:

> 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.

In Saunders v. Vautier itself (1841), 41 E.R. 482 the testator gave East India stock to trustees to accumulate the income until his great-nephew, Daniel Vautier, should attain the age of 25 years, and then to transfer the stock and accumulations to him. The testator died in 1832 and Daniel attained 21 in 1841. Wanting the principal, he petitioned for a transfer to him. Lord Cottenham L.C. construed the gift as vested on the testator's death, and not contingent on Daniel

attaining 25. Next he pointed out that there was no gift over in the event of Daniel's death under 25. Thus he can call for the property on attaining his majority, although the testator intended that the enjoyment of it should be postponed until he attained 25. In Gosling v. Gosling (1859), 70 E.R. 423 the disposition was similar to that in Saunders v. Vautier, though the subject matter was a devise of land. The court held that the testator's desire to postpone enjoyment of the land was simply ineffective. Sir W. Page Wood V.C. said:

> The principle 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.

The rule is not confined to gifts to a natural person, but extends to a gift to a specific charity. The leading case of Wharton v. Masterman, [1895] A.C. 186 so holds.

Although the rule as stated above is one that enables a beneficiary to put an end to a direction to accumulate, the rule is not so confined and is really much wider. Underhill on Trusts and Trustees, 12 ed. (1970), article 68, states 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.

Although the rule may be invoked by two or more persons whether entitled concurrently or successively, the most frequent example is that of a single person who asks for the transfer of the property to him on attaining majority. For centuries this was at the age of 21 but in Alberta is now 18. Thus the beneficiary can call for the property three years sooner than in the past. This deepens the quandary of the conscientious trustee, who must decide whether or not it is his duty, of his own motion or upon request, to tell the beneficiary of his right to call for the property.

The testator can always circumvent the rule by wording the disposition so that the gift will not be vested on his death, or he can dispose of the income to a third

party until the date of distribution, or he can provide for a gift over to a third party on the beneficiary's death prior to the time at which the testator wishes the property to be transferred. The fact is, however, that testators frequently overlook such a provision and it requires skilled and careful draftsmanship.

II

RATIONALE OF THE RULE: CRITICISM: PROPOSED REFORM

Where A puts property in trust for B (who is of age) so that B is the absolute owner and no one else has even a potential interest in the property, then any effort by A, in the instrument creating the trust, to control B's enjoyment of the property is ineffective. A no longer owns the property and his attempts to remove from B any of the incidents of ownership, including the right of immediate enjoyment, is repugnant to the gift and hence ineffective.

The rule has been followed in the common law provinces, Australia and New Zealand. In the United States however, it has in general been rejected in favour of a "material purpose" doctrine. Under this doctrine the court will not terminate the trust if the "material purpose" which the testator had in mind has not yet been carried out. In the leading case of Claflin v. Claflin (1889), 149 Mass. 19, the testator gave the income to A and, as testators frequently do, gave the capital to him in three instalments at the age of 21, 25 and 30 years. The court held that A was not entitled to capital on attaining 21; the testator's intent must not be frustrated. This case formulated the "material purpose"

doctrine. The testator's material purpose was to provide the capital as A became older and that purpose would be defeated by giving the money to A on attaining 21. The common examples of a material purpose are those in which payment of a gift has been postponed to a specific date, to a specific age, or where there is payment by instalments.

In Canada the rule in Saunders v. Vautier has not gone without criticism. In Re Townshend, [1941] 3 D.L.R. 609, Chief Justice Baxter of New Brunswick considered himself obliged to apply the rule, though it compelled the court "to depart from common sense" and "to disregard the wishes of the testator".

We think that the rule should be changed. The theoretical consequence of absolute ownership should not operate automatically to defeat the testator's intention. The law allows him to make the gift, and there should be no rule of "legal theology" to prevent him from imposing restrictions upon enjoyment even when the ownership is vested and indefeasible.

We realize of course that a testator who wants to avoid Saunders v. Vautier can do so by careful drafting. In the typical case where he wishes to have payment postponed, he can provide for a gift over should the beneficiary die before the prescribed date. The fact is that gifts are not always framed in a way to ensure this; and the law should not lay traps which require sophistication to avoid. Further, 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.

We recognize, too, that courts frequently dislike the consequences of Saunders v. Vautier and may go to considerable lengths to avoid them by construing the disposition in a way that will leave it outside the rule. Re Burns (1961), 25 D.L.R. (2d) 427 (Alta. App. Div.) is perhaps an example, and Fast v. Van Vliet (1965), 51 W.W.R. 65 (Man. C.A.) is another.

To leave the rule as it is is to accept the choice that the beneficiary's wishes prevail over the testator's. A complete repeal would reverse the position. In large measure this is what the American material purpose doctrine does. However we do not think that statutory provisions embodying that doctrine would be wise if for no other reason than that it is often hard to determine whether there is a material purpose.

We think that the best course is to replace Saunders v. Vautier to the extent of giving to the court power to decide whether to permit termination or variation of the trust. This will permit the court to take cognizance of the donor's intent, which is ignored when Saunders v. Vautier applies, and also the interest of the donee. We believe the donor's wishes should be recognized. But he may not foresee the circumstances which occur and his true intention may be defeated by the establishment of a rule on the lines of the material purpose doctrine. A change in the value of money or the state of the beneficiary's health may render inadequate a provision for periodic payments which was intended

to give adequate support. A spendthrift may become prudent. Thus under our proposal the court can consider the circumstances which were unforeseen by the testator.

Moreover, the court will not be faced with the choice of giving effect to Saunders v. Vautier on the one hand and on the other putting a strained construction on the instrument in order to avoid it, as is sometimes the case now.

The proposed enactment will be an extension of and will incorporate s. 37 of the Trustee Act, R.S.A. 1970, c. 373 (set out in App. A). That section is based on England's Variation of Trusts Act, 1958. It gives the court a discretionary power to approve on behalf of beneficiaries who are not sui juris and ascertained any arrangement varying or revoking the trust. "In the exercise of this almost unlimited jurisdiction the court is required to have but one criterion--the 'benefit' of the persons on behalf of whom sanction is given" (Waters, the Variation of Trusts, Current Legal Problems, 1960, p. 36, at 48).

Just as s. 37 permits the court to vary or revoke trusts in the case of infants and other persons to whom it applies, our proposed enactment will permit the court to do the same in a Saunders v. Vautier situation. The power of the beneficiary automatically to terminate the trust will be at an end, but the court will be able to terminate or vary it. Thus the beneficiary's wishes will not automatically be met in defiance of the testator's directions, but on the other hand the testator's directions may be modified by the court. This provides a compromise between the rule in

Saunders v. Vautier and its complete abolition. The only criterion will be that so far as the adult beneficiary is concerned, the court thinks the variation or termination of the trust to be justifiable.

III

THE PRINCIPAL KINDS OF DISPOSITION WITHIN SAUNDERS v. VAUTIER

Before going into details of our recommendation, we think it helpful to describe the main types of disposition to which the rule applies.

1. Postponement to a Certain Age

Saunders v. Vautier itself is an example. It is commonplace for testators to wish to delay payment of the principal to a beneficiary, particularly if he is young. Postponement is frequently to an age between 23 and 30. Canadian cases in which the rule has been applied to a disposition of this kind are:

Re Townshend, [1941] 3 D.L.R. 609 (N.B.)
Re Squire (1962), 34 D.L.R. (2d) 481 (Ont.)
Re Mallory, [1951] O.W.N. 661 (Ont.)

The invocation of Saunders v. Vautier will of course fail if the court finds the gift to be contingent as it did in the following cases:

Re Waines, [1947] 1 W.W.R. 880 (Alta. App. Div.)
Fast v. Van Vliet (1965), 51 W.W.R. 65 (Man. C.A.)
Re McCallum, [1956] O.W.N. 321
Re Down (1968), 68 D.L.R. (2d) 30 (Ont. C.A.)

Where there is a gift over on the beneficiary's death before attaining the prescribed age, the gift is sometimes construed as vested but defeasible. In these circumstances Saunders v. Vautier cannot apply. The beneficiary is entitled however to the income from the time of vesting. See

Re Barton, [1941] S.C.R. 426
Re Stedman, [1948] 2 W.W.R. 687 (Alta.)

2. Postponement to a Date

The testator may make an outright gift and then later add a provision for payment or transfer of the subject matter to the beneficiary on January 1st, 1975, or five years after the testator's death. The court will have to decide whether the gift is vested or contingent by application of the rules laid down in Browne v. Moody, [1936] A.C. 635. If the gift is held to be vested the rule in Saunders v. Vautier will apply, but a gift over should the beneficiary die before the prescribed date has the effect of excluding the rule.

Re Boudreau (1965), 47 D.L.R. (2d) 584 (N.B. App. Div.) - gift over
Re Winn (1968), 66 D.L.R. (2d) 182 (Sask.) - contingent

3. Instalment Gifts

In the typical case the testator makes an outright gift and then directs the executor to pay the beneficiary in instalments of $200 a month until the gift is exhausted. In the following cases the court applied Saunders v. Vautier:

Montreal Trust Co. v. Krisman, [1960] S.C.R. 659
Re Price (1966), 55 W.W.R. 26 (Sask.)
Re Dawson, [1941] 1 W.W.R. 177 (Alta.)
Re Burger, [1949] 1 W.W.R. 280 (Alta.)

The last two cases are in the Alberta Trial Division. In Dawson the testatrix left one-quarter of the residue to her son John, to be paid to him at $60 a month, any balance on his death to go to his estate. In Burger the testator left one-third of his net estate to his wife, to be paid to her at the rate of $200 a month. The testator could of course have avoided Saunders v. Vautier by providing for a gift over should the beneficiary die before the whole of his share has been paid out to him (e.g., Montreal Trust Co. v. Klein, [1971] 4 W.W.R. 644 sub nom Re Schumacher 20 D.L.R. (3d) 487 (Man. C.A.)). In one case, Re Eves (1965), 50 D.L.R. (2d) 88 (Sask.), the court construed the gift as an annuity rather than a gift of the capital, so Saunders v. Vautier did not apply.

4. Discretionary Trusts and Powers

Sometimes a will gives to the trustees the power of discretion to pay sums out of a specified fund to a beneficiary or class of beneficiaries. If the discretion permits trustees to pay nothing, then the beneficiaries cannot invoke Saunders v. Vautier; but if the trustees must distribute the whole fund among specific beneficiaries or a class of beneficiaries then the rule will apply. Cases in which beneficiaries of a discretionary trust have succeeded in acquiring the capital under Saunders v. Vautier are:

Re Hamilton (1913), 27 O.L.R. 445
Re Mckeon (1913), 25 O.W.R. 146
Re Johnston (1965), 48 D.L.R. (2d) 573 (B.C.)

5. Charities

In the leading case of Wharton v. Masterman, [1895] A.C. 186 the testator directed certain annuities to be paid, the surplus income to be invested and after the decease of the last surviving annuitant the trustees were to hold the capital and accumulations in trust for five charitable institutions. It is important to note that if the income were not sufficient in any year to pay the whole of the annuities, they should abate. In other words they were not charged on the capital. The House of Lords held that the charities were entitled to stop the accumulation and have immediate payment of the fund though some of the annuitants were still alive. The charities were prepared to secure the annuities.

In the later case of Berry v. Geen, [1938] A.C. 575 the House of Lords distinguished Wharton on the ground that in Berry the annuity was charged on capital. The charity could not ask for the capital under Saunders v. Vautier and at the expiration of 21 years from the testator's death the Accumulations Act forbade further accumulations. As a result the "released" income went to the next of kin.

In Re Burns (1961), 25 D.L.R. (2d) 427 the Alberta Appellate Division applied Berry v. Geen. However in Re Burns, not all of the released income went to the next of kin. The will had given part of the capital and accumulations to individuals and part to specific charities. A portion of the released income came from the capital belonging to the charities. The court found that the gift to the charities showed a general charitable intent so that the

income released from the capital should go to a charitable purpose under the cy-pres doctrine. The court directed that a scheme be submitted for approval by the court.

In Re Birtwistle, [1935] 4 D.L.R. 137 (Ont.) the court refused to approve an agreement between the trustee and the Town of Colne in England, the beneficiary of the capital, for payment immediately of the capital to it. The settlor had directed that there should be an accumulation for 21 years, and that capital and accumulations should then go to the Town, to be used for the benefit of the poor of the Town. Although the Town had a strong case under Saunders v. Vautier, the court doubted that the rule applied. Even if the gift was vested, the real beneficiary was not the Town, but the poor. This was a main reason for the court's refusal to approve the agreement.

6. The Rule in Barford v. Street (1809), 16 Vesey Jr. 135

Where a testator gives to the beneficiary a life interest together with a power to appoint by deed or will, or by deed alone, the beneficiary can appoint to himself. The leading Canadian case is Re Mewburn, [1939] S.C.R. 75. The testator left one-half of the residue to a daughter H for life "and upon her death said share shall go and be disposed of as she may by deed or will appoint", with a gift over on default of appointment. On the testator's death H requested a transfer of the corpus. In the Appellate Division, Harvey C.J. for the majority thought that this would defeat the testator's intention and that no rule of law required the court to hold in H's favour. Her appeal was successful. The Supreme Court held that "she

is able to exercise the power and disregard the testator's wishes."

Cases applying Re Mewburn are:

Re Jones, [1949] 3 D.L.R. 604 (Man. C.A.)
Re Southam, [1955] 1 D.L.R. 438 (Ont.)

Where the power is exercisable by will alone, the general rule is that the donee of the power cannot appoint to himself, but even in that case he may be able so to do if the gift over on default of appointment is to his estate. Middleton J. so held in Re Hooper (1914), 7 O.W.N. 104 and in Re Campbell (1919), 17 O.W.N. 23.

However both in Re Mewburn and Berwick v. Canada Trust Co., [1948] S.C.R. 151, the Supreme Court at least implied that where the power is exercisable by will alone, the person having the power may not appoint to himself. On the other hand Re Johnston (1965), 48 D.L.R. (2d) 573 (B.C.) holds that the donee of the power can appoint to herself even though the power is exercisable only by will and apparently where there is no gift to the donee's estate on default of appointment.

Thus the law in Canada is somewhat obscure in the case of a power exercisable by will alone, though if Re Mewburn operates to defeat the testator's intention, then a fortiori does a ruling that in the case of a power exercisable by will alone the donee may demand the corpus.

There are two other situations which literally may not be applications of Saunders v. Vautier but which are so close thereto that they can properly be considered here.

(1) The first is the commonplace example of a life interest followed by a vested remainder where both life tenant and remainderman are sui juris. The life tenant may acquire the interest of the remainderman or the remainderman may acquire the interest of the life tenant. In either case a single person now is the sole and absolute owner of the property and can call on the trustee to convey it to him. The result is a disposition substantially different from that provided in the will, and one that in all probability the testator would not have wanted.

(2) A testator may direct his trustees to invest a specified sum in an annuity for his widow or daughter or someone else. In general the courts have held that the beneficiary, being sui juris, can call for the capital. The reason given in the leading case of Barnes v. Rowley (1797), 30 E.R. 1024, is that even were the trustees to buy the annuity the beneficiary could sell it and thus obtain the capital so it would be futile to refuse the application. In Re Boxall, [1946] 3 W.W.R. 413, the testator directed the trustees to invest the residue in a Dominion of Canada annuity for his daughter. The Saskatchewan Court of Appeal refused her application that the trustee pay the capital to her. The payment of the capital to the daughter would have defeated the testator's intent. The statute providing for the annuity rendered inalienable the benefits under the annuity contract, so the argument that refusal of the beneficiary's application would be futile, was not available to the daughter. This case produced a debate between the late Professor E. Whitmore who approved the decision and D. M. Gordon, Q.C., who disapproved. The latter thought that Saunders v. Vautier applies (24 Can. Bar Rev. 818; 25 Can. Bar Rev. 117, 121).

It is relevant to ask: is each of the last two cases, that of merger of successive interests and that of the direction to trustees to buy an annuity, within the recommendations that follow? We think they are both within our basic recommendation, which is #1.

To conclude this Part, we repeat the criticism we made in Part II. Each of the dispositions we have described, and to which the rule applies, is a sound arrangement to provide for the family of the testator or settlor. Yet each can be totally frustrated by a sane eighteen-year old who learns of the technical rule called Saunders v. Vautier. Moreover, the question arises whether the dutiful trustee is bound to tell him about it. The trustee should not be put in that position.

We have already mentioned the disastrous results, in terms of the testator's intent, of omitting a gift over, and also the fact that, in the absence of a gift over, difficult questions of construction arise as to whether the gift is vested or contingent. (This is the constructional chess game, as Professor Waters describes it, and illustrated by cases like Re Waines and Fast v. Van Vliet.)

IV

DETAILS OF RECOMMENDATIONS

We propose a somewhat lengthy section which incorporates the present s. 37 and extends its application to the rule in Saunders v. Vautier.

The recommended enactment will have nine subsections. We shall set the recommendations out in order, with an explanatory comment preceding each. They will be in statutory form though we realize the legislative draftsman may change the organization and wording.

(1)

The basic recommendation is that the variation or termination of a trust prior to the period of its duration as specified by the terms of the trust shall require the consent of the court. This puts an end to the rule in Saunders v. Vautier but instead of stopping there and thus creating the American rule, it goes on and gives the court power to decide between upholding the donor's wishes in toto, or contrariwise the donee's wishes in toto, or to approve a disposition between these two extremes.

It will be noted that the following recommendation is prospective. We considered whether it could properly be made applicable to trusts existing before the new provision comes into force, and concluded not to make it retroactive.

RECOMMENDATION #1

> *(1) SUBJECT TO ANY TRUST TERMS RESERVING A POWER TO ANY PERSON OR PERSONS TO REVOKE OR IN ANY WAY VARY THE TRUST OR TRUSTS, NO TRUST ARISING AFTER THE COMING INTO FORCE OF THIS SECTION, WHATEVER THE NATURE OF THE PROPERTY INVOLVED, AND WHETHER ARISING BY WILL, DEED, OR OTHER DISPOSITION, SHALL BE VARIED OR TERMINATED BEFORE THE EXPIRATION OF THE PERIOD OF ITS NATURAL DURATION AS DETERMINED BY THE TERMS OF THE TRUST, EXCEPT BY CONSENT OF THE COURT.*

(2)

Our next recommendation is designed to specify in detail the different types of case to which the provision applies. We think this helpful as a reminder of the main factual situations to which Saunders v. Vautier applies and which have been discussed above. The following subsection is intended to cover all of them except that which is the subject of the rule in Barford v. Street.

RECOMMENDATION #2

(2) FOR THE PURPOSES OF THIS SECTION, BUT NOT SO AS TO RESTRICT THE GENERALITY OF SUBSECTION (1) OF THIS SECTION, SUBSECTION (1) SHALL INCLUDE

(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 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) 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.

(3)

Provision must be made to give the court jurisdiction to consent to an arrangement to vary or revoke a trust and the following provision gives that jurisdiction.

RECOMMENDATION #3

(3) THE COURT SHALL GIVE ITS CONSENT, WHERE IT SEES FIT SO TO DO, BY WAY OF AN ORDER APPROVING ANY ARRANGEMENT BY WHOMSOEVER PROPOSED VARYING OR REVOKING THE WHOLE OR ANY PART OF THE TRUST OR TRUSTS, RESETTLING ANY INTEREST UNDER A TRUST, OR ENLARGING THE POWERS OF THE TRUSTEES OF MANAGING OR ADMINISTERING ANY OF THE PROPERTY SUBJECT TO THE TRUSTS.

(4) and (5)

Where application is made to the court to approve an arrangement under the new provisions, there may be beneficiaries who are not able to consent (in other words the

type of beneficiary described in s. 37, the Variation of Trusts provision). With respect to these beneficiaries the court would continue to have power to consent to any arrangement on their behalf. Our proposal would also include the missing beneficiary. With respect to capacitated adults, who are brought within our proposals and who of course are able to consent, the question arises as to whether all must consent to the proposed arrangement. On balance we think that unanimity should be required; the rule in Saunders v. Vautier itself applies only where there is unanimity. The following two subsections are designed to carry out the policy just described. Recommendation #4 embodies s. 37 and recommendation #5 covers the capacitated adults.

RECOMMENDATION #4

(4) IN APPROVING ANY ARRANGEMENT, THE COURT MAY CONSENT 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; 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.

RECOMMENDATION #5

(5) BEFORE AN 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 ASSENTING THERETO.

(6)

It is advisable to give guidance to the court as to the principle on which it should grant approval. Section 37(2) is such a provision in connection with variation of trusts. The criterion under that subsection is the benefit accruing to the infant or unborn or unascertained person on whose behalf the court varies or revokes the trust. The following recommendation, in its first limb, preserves that criterion. The second limb is added to provide a criterion in the case of the capacitated adult beneficiary. It should not be necessary for him to show that the arrangement is for his benefit, but on the other hand the court should not be obliged to approve the arrangement if it is patently unwise or unjust or improvident or unreasonable from the standpoint of the adult beneficiary. The second limb accordingly provides that the arrangement must be of a "justifiable character" in addition to being for the benefit of the infant or unborn or unascertained beneficiaries.

RECOMMENDATION #6

> *(6) 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 (4), 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.*

(7)

The purpose of the next provision is to make clear that the scheme applies to charitable gifts. This is of course desirable because the rule in Saunders v. Vautier applies to such gifts as Wharton v. Masterman shows. The following recommendation enacts that charities are included in the word "beneficiaries".

RECOMMENDATION #7

> *(7) THE WORDS, 'BENEFICIARY OR BENEFICIARIES', OR 'PERSON', AND 'PERSONS', IN THE FOREGOING SUBSECTIONS OF THIS SECTION SHALL INCLUDE CHARITABLE PURPOSES AND CHARITABLE INSTITUTIONS.*

(8)

The next matter is that of the rule in Barford v. Street (1809), 16 Vesey Jr. 135 which has not been covered in the preceding recommendations. That rule, it will be recalled, deals with a power of appointment exercisable by

deed. It enables the person with the power to appoint to himself even though the instrument creating the power says that the property shall go "after the death of the donee of the power, as he may by deed appoint."

This was essentially the situation in Re Mewburn. The testator left income from a share of the residue to his daughter H with power to appoint the corpus by deed after her death. She requested the corpus. The question put to the court was whether H can exercise her power of appointment by deed so as to vest in herself immediately her share of the residue and so as to entitle her to have the same transferred to her immediately. The trial judge answered in the negative saying "I have a rather fixed idea that the power given to the court to construe a will does not entitle it to break the will, and to grant this application would, in my judgment, be doing this very thing" ([1938] 2 W.W.R. 152). H appealed. Harvey C.J. agreed with the trial judge. There is no rule of law which requires the court to do violence to and defeat the will of the testator in something which is lawful and in his opinion a wise thing to do. Lunney J.A. gave similar reasons. Frank Ford J.A. dissented. His judgment examines Barford v. Street and a number of other cases, concluding that there is nothing in the will inconsistent with H being able to acquire the absolute interest in the corpus ([1938] 2 W.W.R. 433).

On H's appeal the Supreme Court unanimously reversed the judgment below. The reasoning is similar to that in the dissent of Ford J.A. H "is able to exercise the power and disregard the testator's wishes".

Strictly speaking the rule in Barford v. Street is not within Saunders v. Vautier. It is "somewhat analogous" as Ford J.A. said in Re Mewburn. Actually it goes further. Saunders v. Vautier merely permits the beneficiary to obtain the property sooner than the testator intended. Barford v. Street gives to the donee of the power the right to acquire complete ownership in the property, although the donor merely gave the donee a life interest with power to appoint the property "after his death". Technically the power is a "general power" and thus is tantamount to ownership.

As already indicated, we think that in many cases the rule in Barford v. Street defeats the testator's intention. We have considered (a) whether to leave the rule as it is, or (b) whether to put general powers of appointment within our recommendations above, or (c) whether to provide a rule of construction which will forbid the donee of the power from appointing to himself unless the instrument creating the power shows an intention that he may appoint to himself. We recommend the last of these alternatives.

RECOMMENDATION #8

> *(8) WHERE AN INSTRUMENT CREATES A GENERAL POWER OF APPOINTMENT EXERCISABLE BY DEED, THEN THE DONEE OF THE POWER MAY NOT APPOINT TO HIMSELF UNLESS THE INSTRUMENT SHOWS AN INTENTION THAT HE MAY SO APPOINT.*

This provision does not necessarily belong with those recommended above in connection with Saunders v. Vautier. We think it should go both in the Wills Act and the Trustee Act.

In connection with this recommendation we make two comments. First, it is confined to powers to appoint by deed. We think the better view is that Barford v. Street does not apply where the power is to appoint by will alone. We realize there is some authority to the contrary and it may be that ex abundanti cautela the recommendation should include a general power exercisable by will as well as by deed.

The second comment has to do with a special problem that has sometimes arisen in connection with an inter vivos trust wherein the settlor is a life tenant with a power of appointment. Sometimes he wishes to terminate the trust. If the instrument contains a gift over on default of appointment to third parties he may not, but he may if the gift over is to his next of kin, and according to Re McCrossan (1961), 28 D.L.R. (2d) 461 (B.C.) he may do so if there is no gift over. Prima facie we think this result proper but we do not propose to deal with this problem in the present report. Cases like Re McCrossan really deal with revocability of a trust and not with an effort by a beneficiary to defeat the intention of a testator or settlor, which is the situation in Saunders v. Vautier.

(9)

There remains a collateral point. The variation of trusts legislation and also our recommendations in connection with Saunders v. Vautier deal only with trusts and do not extend to a disposition which does not create a trust. There may be cases where it is desirable to extend the legislation to this latter situation. Re Davies (1968),

66 D.L.R. (2d) 412 (Ont.) is an example. A will gave $10,000 to each of four children of a deceased nephew of the testator and then bequeathed the residue to them share and share alike. Seven years after the testator's death one of the children had attained her majority while the others were still infants. The administrator with will annexed had successfully managed the estate and all the beneficiaries wanted the administration to continue until all had attained majority. A section in the Trustee Act provided that on the passing of final accounts, the share of an infant should be paid into court. The beneficiaries applied under the variation of trusts section for approval of an arrangement whereby the administrator would continue to administer the estate with widened powers of investment. The court dismissed the application because the variation of trusts section applies only where there is already an existing trust. "The court cannot create a trust where none existed before." In a case of this kind we think it proper to make applicable the provisions recommended above.

RECOMMENDATION #9

> *(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 SHALL HAVE JURISDICTION AS UNDER THIS SECTION TO APPROVE SUCH AN ARRANGEMENT.*

V

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The Institute also had the benefit of consultation with H. G. Field, Esq., Q.C., of Edmonton, a former chairman of the Board of the Institute

18 February, 1972

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NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this report.

APPENDIX A

THE TRUSTEE ACT

Variation of Trusts

37.(1) Where property, real or personal, is held on trusts arising before or after the coming into force of this section under any will, settlement or other disposition, the Supreme Court 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, 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 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,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

(2) The court shall not approve an arrangement on behalf of any person coming within subsection (1), clause (a), (b) or (c) unless the carrying out thereof appears to be for the benefit of that person.

APPENDIX B

RECOMMENDATIONS

(1) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, no trust arising after the coming into force of this section, whatever the nature of the property involved, and whether arising by will, deed, or other disposition, shall be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except by consent of the court.

(2) For the purposes of this section, but not so as to restrict the generality of subsection (1) of this section, subsection (1) shall include

(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 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) 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.

(3) The court shall give its consent, where it sees fit so to do, by way of an order approving any arrangement by whomsoever proposed varying or revoking the whole or any part of the trust or trusts, resettling any interest under a trust, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

(4) In approving any arrangement, the court may consent 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; 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.

(5) Before an 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 assenting thereto.

(6) 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 (4), 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.

(7) The words, 'beneficiary or beneficiaries', or 'person', and 'persons', in the foregoing subsections of this section shall include charitable purposes and charitable institutions.

(8) Where an instrument creates a general power of appointment exercisable by deed, then 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 shall have jurisdiction as under this section to approve such an arrangement.