

WHAT YOU NEED TO KNOW ABOUT VARYING A TRUST

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INTRODUCTION

Trust variation applications are necessary because people cannot predict the future. Testators, settlors and their lawyers do their best to plan for every eventuality but sometimes, a set of circumstances arises in the course of an administration that no one expected. A settlor settles an *inter vivos* trust with his two named children as capital beneficiaries and then goes on to have an unexpected third child. A testator prepares his will at a time when interest rates are over 20% and never foresees a world two generations later where a bank account no longer pays any significant amount of interest. Changes to the *Income Tax Act* could result in unanticipated tax consequences. The burdens and costs of administering the trust may become disproportionate to the benefits of the structure. Often, variations are prompted by tax planning for the 21-year deemed disposition of trust assets. A named charity may no longer exist. This paper will briefly outline the various ways that a trust may be varied, with a focus on how to commence an application under Ontario's *Variation of Trusts Act*.

PART A: METHODS OF VARYING A TRUST

In Ontario, there are several possible mechanisms to vary a trust:

1. By the trustees, if specifically sanctioned by the terms of the will or trust instrument.
2. If all beneficiaries entitled to share absolutely in the trust are *sui juris* and agree, those beneficiaries can require the trust to be terminated and the trust property distributed to them in such proportions as they agree.
3. By court application pursuant to the Court's inherent jurisdiction to supervise the administration of trusts. However, in light of legislation enacted to deal specifically with variation of trusts, resort to the Court's inherent jurisdiction is increasingly rare.
4. Pursuant to s. 13 of the *Charities Accounting Act*.²
5. By court application under the *Variation of Trusts Act*.³

¹ Many thanks to Susan Stamm at the office of the Children's Lawyer for sharing her paper, "Variation and Termination of Trusts" with me. I relied on it heavily in preparing this paper. Warm thanks as well to my fabulous colleagues Angelique Moss and Laura Cardiff for their editing help.

² *Charities Accounting Act*, R.S.O. 1990, c. C10

³ *Variation of Trusts Act*, R.S.O. 1990, c. V.1 (the "Act")

It is this final manner of variation which is the focus of this paper; I will first briefly address the others.

1. Variation by Trust Instrument

In rare cases, a testator or settlor will include a mechanism in the trust instrument permitting the trustees to vary the terms of the trust. Accordingly, as with most legal issues involving estates and trusts, a lawyer should always start by reviewing the will or trust deed to determine if the testator conferred specific amending authority in the constating document.

2. *Saunders v. Vautier*

The requirements to terminate a trust pursuant to the rule in *Saunders v. Vautier*⁴ are as follows:

- a. All of the beneficiaries of the trust must be *sui juris* (i.e., mentally competent and over the legal age of majority).
- b. All of the beneficiaries must consent.
- c. The interests of the beneficiaries must be vested **and** indefeasible⁵.

If all of three conditions are met, the beneficiaries can require the trustee to deliver the trust property to them immediately as agreed by them and irrespective of what the testator intended.⁶

The simplest example would be a will leaving “the residue in trust for Lucky Child, with the income to be paid to Lucky Child until age 30, at which time the capital shall be distributed to Lucky Child.”

In this example, Lucky Child is the only residual beneficiary. If Lucky Child is over 18 and capable, he can require the estate trustee to terminate the trust and pay all of the trust property to him at age 18, irrespective of the testator’s intention that the child not take the entire gift until age 30.

To provide a second example, imagine that a testator leaves the residue of his estate to Devoted Wife for her lifetime, and on her death to his three children, A, B and C. The gift is vested in Devoted Wife, A, B and C as of the date of the testator’s death. Assuming they are all *sui juris*, and agree to divide up the assets now, they can require the trustee to distribute the money to them now in such proportions as they may agree without the need to go to court.⁷

⁴ *Saunders v. Vautier*, (1841) Cr. & Ph. 240, 41 E.R. 482

⁵ Donovan Waters, *Laws of Trusts in Canada*, (1974), P. 813, as cited in *Re Campeau Family Trust* (Ont.C.A.) (1984), 50 O.R. (2d) 296, 44 O.R. (2d) 549, 1984 CANLII 1977 (ONCA) at paragraph 12 (hereafter, “*Re Campeau Family Trust*”)

⁶ M.E. Hoffstein and Robin Roddey “Charitable Trusts and Cy-Prés” at paragraph 2. Presented Monday September 18, 2006 at “Trust, Trustees, Trusteeship”, accessed online at fasken.com (hereafter “Hoffstein and Roddey”).

⁷ Hoffstein and Roddey note that *Saunders v. Vautier* will apply “where a trust divides interest in the trust company between various beneficiaries – either as between capital and income or in

If *Saunders v. Vautier* is applicable, no court application is required; the beneficiaries are simply entitled to call upon the trustee for their share of the fund and the trustee is required to comply. However, it can be tricky ascertaining whether the wording of a particular instrument gives rise to an interest which is vested and indefeasible.

As explained in the Ontario Court of Appeal decision in *Re Campeau Family Trust*, age contingencies can be of three types, depending on the language of the trust:⁸

Type of Age Contingency	Example	
Attaining the age is a condition precedent to receiving the gift	To Dear Son, provided he attains the age of 30	This is NOT an indefeasible and vested gift. It is a contingent gift, which will only come into effect IF Dear Son makes it to age 30. IF he dies at 29, he does not receive a gift at all.
Attaining the specified age may be a condition subsequent to receiving the gift	To Dear Son, the residue in trust, with the income to be paid to him until age 30, and the capital payable at age 30; provided that if Dear Son dies before age 30, the capital shall be paid to Dear Son's issue.	Although the son's gift vested on the death of the testator, it was still defeasible because of the giftover to Son's issue in the event that the son did not live until age 30 – see <i>Yeoman v. Yeoman Estate</i> (1986) 23 ERS 136 (Ont HC).
Attaining the specified age relates only to the timing of payment	To Dear Son to be held in trust for him until age 30, with income payable to him until age 30, and the capital payable to him when he turns 30 years old.	This is a vested indefeasible interest to which <i>Saunders v. Vautier</i> applies.

Where there is uncertainty about whether the beneficiary interests are vested and defeasible, it may be prudent for the trustee to apply to court for directions pursuant to the *Trustee Act* before distributing the trust property.

3. Inherent Jurisdiction of the Court

chronological succession – collectively, the beneficiaries have an absolute interest in the trust property.” See Hoffstein and Roddey, at paragraph 1.

⁸ *Re Campeau Family Trust* (1984), 50 O.R. (2d) 296, 44 O.R. (2d) 549, CANLII 1977 ONCA

There are four recognized categories of cases in which the Court will exercise its inherent jurisdiction to vary the terms of a trust. The House of Lords decision in *Chapman v. Chapman*⁹ listed them as follows:

- a. A conversion power, enabling trustees to dispose of specific property if to do so would be in the interests of a minor (given the enactment of the *Variation of Trusts Act*, discussed below);
- b. A salvage or emergency jurisdiction, which could empower trustees to enter into a transaction or corporate reorganization where the trust document does not provide adequate powers;
- c. For the maintenance of a minor, even though no such provision is made in the trust; and
- d. A compromise jurisdiction, allowing the Court to approve arrangements on behalf of non-sui juris beneficiaries (again, no longer necessary given the enactment of the *Variation of Trusts Act*);¹⁰

4. The *Charities Accounting Act*

If dealing with a charitable interest, section 13 of the *Charities Accounting Act* allows parties to obtain a court order on the consent of the Public Guardian and Trustee for matters such as varying the objects of the charitable trust or expanding investment powers where no discretion is provided in the trust deed.¹¹ The Public Guardian and Trustee's website contains an excellent guide, including checklists, and detailed instructions, for using this procedure.¹²

5. *Variation of Trusts Act*

It is this method of varying a trust which is the focus of this paper. In essence, a trust variation application is brought on the consent of all *sui juris* (over 18, and legally capable) beneficiaries, asking the court to consent on behalf of all beneficiaries who are under 18, not born yet, unknown, or incapable. Since those persons cannot legally consent to a variation, Court approval is necessary. In most cases, the litigator would only commence the court application after securing the consent or non-opposition of whomever represents the interests of the non-*sui juris* beneficiaries.

The *Variation of Trusts Act* contains only two provisions. The Act is reproduced in its entirety below:

Jurisdiction of courts to vary trusts

⁹ *Chapman v. Chapman* [1954] A.C. 429 (H.L.)

¹⁰ *Hoffstein and Roddy*, subparagraph note 5, paragraph 4

¹¹ Brian Schnurr, Estate Litigation, (Looseleaf) 15.2 (e), (hereinafter, "Schnurr, Estate Litigation")

¹² Public Guardian and Trustee, "Procedures for obtaining an order under s.13 of the *Charities Accounting Act*. Accessed online:

<<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/proc4order-s13-CAA>

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.

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. [emphasis added]

Thus, court approval of a variation can be sought if the variation affects any of the following persons: (a) adults incapable of consenting; (b) minors incapable of consenting; (c) unascertained and unborn persons who may become entitled to benefit from the trust; and (d) persons with a discretionary interest.

Three things are worth noting about the wording of the Act. First, its wording is discretionary, not mandatory.¹³ While the Court is prohibited from approving a variation which does not provide a benefit for the incapacitated beneficiaries, there is nothing mandating a Court to approve a variation if a benefit *is* provided. In other words, the Court could find that the variation would benefit the incapacitated beneficiary and still decline to approve it.¹⁴

Second, there is nothing in the Act which requires a Court to maintain adherence to a testator's original intention.

¹³ see bolded sections of Act, above

¹⁴ Schnurr, "Estate Litigation", 15.3 (d)

Third, there is no requirement for the Court to consider whether the arrangement benefits adult capable beneficiaries. The Act requires the Court to consider whether the proposed arrangement benefits the person on whose behalf the Court is providing consent. It does not require a judge to consider the benefits to *sui juris* beneficiaries.¹⁵

PART B: DISTINGUISHING BETWEEN A TRUST VARIATION AND AN ACCELERATION OF INTEREST

One important question to ask before commencing a variation application is whether variation is required at all. Several cases have considered the difficult issues of whether a disclaimer by a life tenant accelerates a gift under the will or trust deed, and if so, whether the requisite variation legislation is engaged at all.

In *McGavin v. National Trust Company*, the trust deed provided for the fund to be held in trust for the settlor's son Richard and Richard's wife Lucie (so long as she remained married to Richard) and the children of Richard and Lucie. Income was payable on a discretionary basis to Richard, Lucie and their children. Lucie survived Richard. The trust provisions stated that if Lucie survived Richard, the fund was to be held in trust to be divided on Lucie's death or remarriage, whichever was earlier. On death or remarriage, the fund was to be divided into as many parts as there were children of Lucie and Richard. Each part was then to be held until that child turned 35. There was a substitutional gift to the children's issue if the children did not live to the date of division.

Lucie and Richard had two children: James and Caroline. Caroline had died without issue. Lucie wanted to disclaim her own life interest to accelerate the payment of the capital to her son James. James sought a declaration that Lucie's disclaimer had this legal effect. The Public Trustee in B.C. opposed the order sought, presumably on behalf of the unborn issue of James. The unborn issue of James had a contingent interest; they would take only if James died before the age of 35.

The legal effect of disclaimer by a life tenant is that the gift accelerates unless a contrary intention of the testator is expressed in the will.¹⁶

If a gift to a class is accelerated (e.g., the issue of X alive at Y's death), the cases are divided on the issue of whether the acceleration also closes the class.¹⁷ Take an example: A gifts the residue of his estate in trust for B during her lifetime, with the capital to be distributed on B's death to A's issue alive at the time of B's death. B disclaims her life interest. Do we have to wait until B's death to determine who will inherit (i.e., who are the members of the class)? Or is the capital distributable among the issue of A alive at the time of B's disclaimer? Professor Oosterhoff opines that acceleration and class closing are two separate questions, both of which are answered by reference to the testator's intention.¹⁸

¹⁵ Susan Stamm, "Variation and Termination of Trusts" at paragraph 10

¹⁶ Albert Oosterhoff, *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters (2016)), at paragraph 587

¹⁷ Oosterhoff, at p. 587.

¹⁸ Oosterhoff, at p. 587.

If the evidence does not rebut the presumption of acceleration, the gift accelerates under trust law principles, and no variation is required. That is, the gift will accelerate unless the will or trust and surrounding circumstances show that the testator would not have intended for the gifts to accelerate on disclaimer.

Determining the testator's intention is a tricky matter, as the testator usually would not turn his mind to the possibility of a gift being disclaimed. Intention is therefore determined in light of the circumstances existing when the will was executed.¹⁹ Who was alive and who was dead when the testator made the will? What were the financial circumstances of the beneficiaries? What was everyone's marital status at the time? Do any of the other clauses in the will shed any light on what the testator would have intended had he turned his mind to the issue of disclaimer?

In *McGavin*, the Public Trustee was served with the court application seeking a declaration that the gift had been accelerated to James. In concurring reasons from the B.C. Court of Appeal, Justice Southin wrote:

I infer the petitioners [served the Public Trustee] because they were under the misapprehension that the *Trust and Settlement Variation Act*, now R.S. B.C. 1996, c. 463, applied to this case, and that the Public Trustee had to be served because of the provisions of section 3 [the section of B.C.'s variation legislation allowing the Court to consent on behalf of incapacitated beneficiaries]. That statute, as my colleague has demonstrated, has nothing whatever to do with the question of acceleration or no acceleration which is a question of law not engaging the discretion conferred by the statute.²⁰

These comments serve as a reminder of the importance of thoroughly analyzing the trust document prior to commencing an application and carefully considering whether the relief to be sought requires a variation at all. The appropriate relief might be to seek the court's advice and direction pursuant to section 60 of the *Trustee Act*.

PART C: STEPS TO TAKE BEFORE COMMENCING A VARIATION APPLICATION

One unusual feature of trust variation litigation is that the court application is generally only commenced after extensive negotiation with the Children's Lawyer and/or the legal representative of any incapable adult affected by the variation. Sometimes there are also extensive negotiations with Canada Revenue Agency. Accordingly, in the vast majority of cases, variation applications are not opposed by any party.²¹ An unfortunate by-product is that the case law is not terribly well-developed because most variations are granted on an unopposed basis with no written reasons.

Before commencing your application, it is recommended that you take the following steps:

¹⁹ *Re Brannan*, at p. 10.

²⁰ *McGavin v. National Trust Company*, 1998 CANLII 535 (BCCA) ("*McGavin*"), at paragraph 57.

²¹ There are, of course, variation applications which have proceeded on a contested basis. In *Finnell v. Schumacher*, the variation was opposed by both of the official Guardian and the Public Trustee

1. **Complete a detailed analysis of the trust to be varied:**²²
 - a. **Identify each and every beneficiary or class of beneficiaries who are either entitled to take under the will or trust or *could be* entitled to take under the will or trust.** This step seems obvious but is often overlooked. In *McGavin*²³, the applicants did not realize until after the appeal had already been heard that there were 7 grandchildren of the deceased who were contingent beneficiaries and had never been served with any of the materials at first instance, or on appeal. In concurring reasons at the Court of Appeal, Justice Southin had some strong words about that oversight.
 - b. **Identify the nature of each beneficiary's interest.** Is the interest vested? Is it contingent? Is the interest defeasible or indefeasible?
 - c. **Determine whether the beneficiaries are capable and over 18.** For those who are not, identify who will represent the interests of those beneficiaries. The Children's Lawyer represents the interests of minors and can also be appointed to represent the interests of unborn and unascertained beneficiaries. (It is recommended that you seek a representation order appointing the Children's Lawyer to represent the interests of the unborn and unascertained beneficiaries as part of the relief sought in your application.²⁴) Sometimes, where there is a legal conflict of interest between two sets of beneficiaries who would otherwise be represented by the Children's Lawyer, that office will arrange to have the Public Guardian and Trustee represent the conflicting interests.

If a beneficiary is over 18 but incapable, you will need to identify and speak to the incapable person's attorney for property or Guardian of Property. If the incapable person has no attorney for property or Guardian, the Public Guardian and Trustee would be served with the application on behalf of the incapable person.
 - d. **Identify all necessary parties to the proposed variation and how each person's interest will be affected by the proposed variation.**
2. **Find out whether the proposed variation will trigger a tax consequence.**²⁵ Susan Stamm, in her paper, "Variation and Termination of Trusts" which quotes from a paper by Timothy Youdan, identifies three potential tax traps to watch for:
 - a. the variation could constitute a disposition of the trust's property and therefore be subject to taxation;

²² Schnurr, Estate Litigation, at 15.4 (a), quoting from a paper delivered by the former Children's Lawyer, Wilson McTavish.

²³ *McGavin*, at para. 2.

²⁴ Susan Stamm, "Variation and Termination of Trusts", at page 14, citing a chapter written by Ann Lalonde "Variations of Trust" in *Key Developments in Estates and Trusts Law in Ontario* (2008 ed.), B. Croll and M. Yach, eds. (Aurora, Ontario; Canada Law Book), chapter 12

²⁵ Susan Stamm, "Variation and Termination of Trusts", at p.15.

- b. the variation could trigger attribution rules; or
 - c. the variation of a testamentary trust could create a new inter vivos trust and the graduated taxation rates applicable to testamentary trusts could be lost.²⁶
3. **Draft a Deed of Arrangement setting out recitals and identifying the specific clauses and words to be deleted and inserted into the trust deed or testamentary trust.**²⁷
4. **Negotiate a sufficient benefit with the Children’s Lawyer and/or legal representative for the incapable individual.** Before approaching the Children’s Lawyer, you should have completed the analysis in Step One, above, have a specific idea of what the proposed wording of the variation will be, and have an understanding as to the tax consequences.
5. **Once a deal is reached, prepare the necessary court materials:**
- a. A variation application is commenced by way of application under Rule 14.05(1)(f) of the *Rules of Civil Procedure*.²⁸
 - b. In Toronto, a variation application should be brought on the Estates List.²⁹
 - c. Prepare and serve a Notice of Application and supporting affidavit. The affidavit would include the background facts, explain why a variation is being sought and exhibit sufficient evidence to allow a judge to evaluate how the incapacitated interests will be affected by variation.
 - d. Typically, the court materials should also include a draft Judgment, with the proposed Deed of Arrangement attached to the draft judgment as a schedule.
 - e. If the variation is tax-driven, the evidence should include a tax opinion and/or an advance ruling from CRA.
 - f. The materials should include written consents from all *sui juris* beneficiaries.
 - g. If the variation aims to improve returns for the beneficiaries, the record should include reliable and detailed evidence comparing the projected returns for all classes of beneficiaries under the current trust and the projected returns following the proposed variation.

²⁶ Timothy Youdan, “Income and Tax Consequences of Trust Variation, Revocable Trusts and Powers of Appointment”, presented at LSUC, Sixth Annual Estates and Trusts Forum, November 19, 2003, Toronto

²⁷ Schnurr “Estate Litigation”, at 15.4(c), and see precedent Deed of Arrangement in Appendix at 15.1

²⁸ This subsection provides for commencement by application for “the approval of an arrangement or compromise of the approval of a purchase, sales, mortgage, lease or variation of trust.”

²⁹ Online: www.ontariocourts.ca/scj.practice-directions/toronto/estates

PART D: THE TEST FOR COURT APPROVAL: IS THERE A SUFFICIENT BENEFIT FOR EACH PERSON ON WHOSE BEHALF APPROVAL IS SOUGHT?

How does a Court decide whether a proposed variation should be approved on behalf of the incapacitated beneficiaries? In more recent case law, there seems to be a shift away from an earlier emphasis on keeping alive the testator's original intention. The oft-cited passage from *Re: Irving*³⁰ suggested that the Court should consider three things when considering whether to approve a variation:

The Court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the *Variation of Trust 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? 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 expectations and risks and the proposal made, would be likely to accept?³¹

Later in *Re Irving*, Pennell J. eloquently put it this way:

The spirit of the Act, as I read it, permits pruning of the trust in order to promote fruitfulness, but the root is to be preserved.³²

In the case law that has developed since *Re Irving*, judges have questioned whether a variation must stay true to the testator's intention to meet the test for approval. This makes sense, given that the well-entrenched rule from *Saunders v. Vautier* permits beneficiaries to terminate a trust altogether if certain conditions are met. *Saunders v. Vautier* allows a trustee to ignore the testator's intention completely if all beneficiaries are *sui juris* and together hold a vested indefeasible interest in the trust fund. Why then would "keeping alive the basic intention of the testator" be a central requirement or consideration when approving a variation on behalf of minor or incapable persons?

Ontario's Court of Appeal articulated this point in Ontario's leading variation of trusts case, *Finnell v. Schumacher*.³³ At first instance, the applications judge considered and applied the above criteria set out in *Re Irving*, including whether the proposed variation "kept alive the basic intention of the testator" and approved the variation. Both the Official Guardian (as the the Children's Lawyer was then called) and the Public Trustee (as that office was then called) appealed. The Court of Appeal allowed the appeal and denied the variation for reasons discussed in more detail below. In *obiter*, the Court of Appeal questioned whether faithfulness to the testator's intention should be required, but left this issue to be determined in another case:

³⁰ *Re Irving* (1975), 11 O.R. (2d) 443 (H.C.)

³¹ *Re Irving*

³² *Re Irving*

³³ *Finnell v. Schumacher*, 74 O.R. (2d) 583 (Ont. C.A.), 1990 CANLII 6766 (ONCA)

In light of the rule in *Saunders v. Vautier* (1841), 41 E.R. 482, [1835-42] All E.R. Rep. 58, 4 Beav. 115, Cr. & Ph. 240, 10 L.J. Ch. 354 (L.C.), that a trust can be varied to any extent if all potential beneficiaries are adults and consent, the position taken by Pennell J. on the first consideration in limiting the scope of the Act may be open for argument in another case. For present purposes it is sufficient to say that if there is a limit on the power of variation under the Act, it is only in respect of that limit that Pennell J. refers to the general intent of the testator. In that context the reasoning of Carruthers J., quoted above, and the arguments of the respondents would have relevance. In effect, both make the point that if the testator were alive today he may well, given all the circumstances that we know, have considered this deed of arrangement to be a pruning of the tree rather than a severance of the root.³⁴

In *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*,³⁵ the Ontario Court of Appeal again questioned whether keeping alive the testator's intention should be a necessary requirement to vary a trust. However, it was not necessary to decide this issue to resolve the Children's Lawyer's appeal and therefore the Court of Appeal left the issue for another day. In *obiter*, the Court of Appeal wrote:

The case law both in Ontario since *Re Irving*, as well as in other provinces, suggests that the original intention of the settlor need not be considered when the court approves a variation as long as the necessary criteria are met: See *Russ v. British Columbia (Public Trustee)* (1994), 1994 CanLII 1730 (BC CA), 89 B.C.L.R. (2d) 35 (C.A.); *Teichman v. Teichman Estate* (1996), 1996 CanLII 12472 (MB CA), 134 D.L.R. (4th) 155 (Man. C.A.); *Finnell v. Schumacher Estate* (1990), 1990 CanLII 6766 (ON CA), 74 O.R. (2d) 583 (C.A.). However, because of my first and third responses to the appellant's submission, it is not necessary in this case to finally decide this issue.³⁶

Indeed, as noted above, the *Variations of Trust Act* itself contains no reference to the intention of the testator.

What court approval truly comes down to is this: Does the proposed variation provide a sufficient benefit to the non-*sui juris* beneficiaries to justify approval?

PART D: CASE LAW APPLYING THE VARIATIONS ACT

Schumacher Estate: There Must be a Benefit for Every Incapacitated Person

In *Schumacher Estate*, the Ontario Court of Appeal overturned the application judge's approval of a proposed variation on the basis that the applicant had failed to provide adequate evidence of a sufficient benefit to each non-*sui juris* beneficiary. Even if the incapacitated beneficiaries benefitted (or certain of them did) as a group, this was not enough. The Court must find that there is a sufficient benefit for each and every beneficiary on behalf of whom the Court is asked to consent.

³⁴ *Schumacher Estate*, at paragraph 9

³⁵ *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, [2012] O.J. NO. 5772 (C.A.), 2012 ONCA 862 (CANLII) ("Poloniato")

³⁶ *Poloniato*, at paragraph 93

In *Schumacher Estate*, the deceased's will had a long reach. The capital of his estate was not distributable until 21 years after the death of his grandson Michael. On Michael's death, $\frac{3}{4}$ of the capital was to be distributed to a charity – the Schumacher Foundation - and $\frac{1}{4}$ of the capital was to be distributed to Michael's issue. At the time that the application was heard (1988), the projected date for capital distribution, based on actuarial evidence of Michael's life expectancy, was 2030. By then, the court speculated that there could be two more generations entitled to share in $\frac{1}{4}$ of the capital.

As with many applications to vary a trust, the variation in *Schumacher Estate* was prompted by tax problems. The most significant Canadian asset of the trust was a portfolio of over 200 properties with mining potential. Under trust law, mining revenues are treated as capital and therefore had to be preserved for the capital beneficiaries, while under income tax law, the mining revenues were taxed as income. Further, on the 21st anniversary of the trust, and every 21 years thereafter, there would be a deemed disposition of the capital mining properties, triggering a large tax liability.

The estate trustees devised a deed of variation aimed at addressing these tax consequences. The proposed variation would allow the trustees to distribute the mining revenues (capital in the eyes of trust law) to the income beneficiaries to be taxed in the income beneficiaries' hands. In exchange, the capital beneficiaries would begin receiving a share of income right away rather than having to await the far-off division date. A portion of the mining revenues would be paid into a fund for the great-grandchildren of the testator and another portion of the income would be paid into a fund for the remoter issue.

The application judge approved the variation. Both the Official Guardian (as the Children's Lawyer was then called) and the Public Trustee (as that office was then called) appealed.

The Official Guardian argued against the variation on the basis that considerable capital receipts would be distributed to persons having no interest in capital under the will.

The Court of Appeal could not find that each person (or future person) affected by the variation would receive a sufficient benefit to warrant approval of the variation on behalf of incapacitated beneficiaries. The Court wrote:

The above analysis was prepared on a group basis. However, it is clear from the Act and the jurisprudence (e.g., *Re Irving*, supra, at p. 450 O.R.) that the benefit must be for every member of a class as an individual. To the extent that there are group benefits under the deed, they arise because persons with only contingent entitlements under the will are to be given shares and the timing of entitlements is advanced. This means that children not yet born will share in the distribution of mining revenues when born, although the share may only be one year's receipts if the child is born a year before the division date. This is an extreme example but is a contingency condoned by the rule against perpetuities and must be considered when the testator methodically takes advantage of the rule to postpone capital distributions.³⁷

³⁷ *Schumacher Estate*, at paragraph 13

The Court of Appeal denied approval of the proposed Deed of Arrangement, but its decision was without prejudice to the estate trustees coming forward with an alternate Deed of Arrangement for approval.

What Will Constitute a Sufficient Benefit?

As several commentators and judges have noted, the Children's Lawyer is in a good bargaining position when negotiating a trust variation on behalf of minors, the unborn, and unascertained. The Children's Lawyer will not usually accept the argument that a variation enriching a child's parent provides more income for the family and therefore provides a sufficient benefit for the child.³⁸ Moreover, if the benefit of the proposed variation to a minor child is "family harmony", without any additional financial benefit to the minor, it is unlikely to meet with approval.³⁹ Although there is precedent for approving a variation to delay payment to a child beyond age 18⁴⁰, this type of variation will not generally be supported by the Children's Lawyer other than in exceptional situations, given the provisions of Ontario's *Age of Minority and Accountability Act*.⁴¹

Commonly, the benefit to the incapacitated beneficiaries will take the form of a payment into court⁴², payable to the class of beneficiaries whose potential or remote interest is being extinguished by virtue of the variation. Another tool used to provide a benefit is insurance. Insurance is an especially useful tool when the will or trust provides a giftover to remoter issue if a beneficiary does not live to a particular age (say, 30). The *sui juris* beneficiaries can take out a term life insurance policy providing that if the named beneficiary dies before age 30, his or her remoter will receive insurance proceeds to make up for the gift extinguished by the variation.

In *Weir Trust v. Weir*⁴³, the settlor executed a trust deed which provided that the settlor would receive the net income of the trust during her lifetime, and on her death, the corpus of the trust was to be divided among a defined group of beneficiaries in whatever proportions the trustees in their discretion deemed appropriate. The capital beneficiaries included the children of the settlor, their issue, and one step-grandchild of the Settlor. A second step-child was born after the deed was settled. A variation was approved which expanded the class of beneficiaries to include the step-grandchild and to replace the discretionary distribution with a fixed distribution.

CONCLUSION

Trust variations can fix a number of problems that were not or could not have been anticipated at the time the trust was settled. While it may seem at first blush that a variation application is a simple matter, there are a number of important things to keep in mind before seeking to vary a trust. A variation on consent of all parties is no less worthy of your "A game" than a hotly contested hearing. Even if you have properly determined that an application to vary is required, there are many possible

³⁸ P.A. Lalonde, "Variations of Trust", at 167

³⁹ P.A. Lalonde, "Variations of Trust" at 167

⁴⁰ See, for example, Re N.S. 2007 N.S.S.C. 288 (S.C.)

⁴¹ Susan Stamm, "Variations of Trust", at paragraph 13

⁴² See, for example, the endorsement of Justice Morawetz in *Eaton v. Eaton-Kent*, 2013 ONSC 785 (CanLII)

⁴³ *Weir Trust (Trustees of) v. Weir* (2003), 50 E.T.R. (2d)

ways to get tripped up. Failing to read the trust document thoroughly, apply the relevant trust principles to determine the interests of all beneficiaries, or understand the tax consequences, could lead to problems for your clients. Make sure to take all of the preparatory steps outlined above, and be prepared for the Court to take an active role in ensuring that the incapacitated interests are protected by the proposed variation.