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# VESTING/EXPRESS TRUST

* Express trust - Device of equity that enables a settlor to convey to a transferee/trustee the legal title in the property destined to be held in trust for the purpose of administering it for the benefit of a named beneficiary
* Trusts is equity’s law of property
* Trustee has legal title, *Utendi* – administration and control
* Beneficiary has equitable title, *Fruendi* –Enjoyment through habitation or profit making
* *Disponendi*- right to dispose or alienate
* Can be made *inter vivos* (orally, except for land, or in writing) or *per mortis causa* through a testamentary instrument such as a will
* Express trusts can take one of four forms (examined below):
	+ Donor/settlor may declare himself the trustee and continue to hold legal title, but not title is held for a beneficiary
	+ Donor appoints a third person as trustee of the property and directs him to hold the trust asset for a named beneficiary
	+ The parties deal with each other contractually to set up a trust
	+ An incomplete gift of an asset (such as a promise to give) is later perfected by transfer of title through some en passant method of conveyance

### Inter Vivos

* Only perfected or completed trusts are effective as property transfers that render a trust effective
* Land- registering in LTO, shares in company share register, chattels need actual or symbolic delivery, assignments in certain types of choses need be in writing
* An inter vivos express trust involves two stages:
	+ Expression of intention by the settlor to create a trust in favour of a beneficiary using a named trustee who is to receive identified trust assets
	+ Handing over that identified trust assets to the trustee
* Vesting is two-pronged: legal title to trustee, equitable to beneficiary

### Through a Will

* Title in the property is transmitted by legislation into the name of the personal representative of the estate upon death

### Settlor Makes a Personal Declaration

* Settlor owner of property simply declares that he now holds the property as a trustee for the benefit of a named person –also known as “automatic constitution”
* Settlor-cum-trustee retains legal title
* No physical transfer is necessary, the owner is thereafter divested of equitable title in favour of the beneficiary
* It is an easy way of giving property and eluding the transfer rules of the common-law
* Can occur without beneficiary’s knowledge
* Sufficient declaration is sufficient (*Elliot*)
* Maxim “equity follows the law” is not applicable here, since there is no CL rule to follow in these circumstances
* Upon death, personal representatives become trustee and administer the estate

## Elliot v Elliot Estate

* Mother deliberately omitted handicapped daughter from will, and set aside one of the GIC accounts that formed part of the estate, for her
* Court found that the simple declaration from the mother was sufficient to establish trust

## Glynn v Federal Commissioner of Taxation

* Authorities wanted to include dividends from 1600 shares as part of Glynn’s estate, making them subject to death duties
* The father had intended the dividends to go to his sons, who were 4 and 6 at the time
* Some of the money had been used to support the sons
* Court found that the sons took beneficial interest in 1920, evidenced by meeting minutes of share transfer approval by other directors

### Appoints a Third-Person as Trustee

* “Equity follows the law” and “Equity will not assist a volunteer” applies here
* Settlor appoints a third person to act as trustee for the benefit of an identified beneficiary
* A promise (without consideration) to make the gift does not suffice
* If you have done everything you can, the transfer will be seen as complete (*Rose*)
	+ Key factor is that the transferor intended to be immediately and unconditionally bound, and has relinquished control of the property by putting the transferee in a position to complete the conveyance (*Carson v Wilson*)

## Milroy v Lord

* Common law conveyance rules dictate transfer requirements of property
* Medley had left valuable shares for his niece, Eleanor, as beneficiary
* Lord was trustee, but Medley never vested legal interest in Lord because they were never registered that way in the Bank’s books
* Court held that no effective trust had been created

## Ratner v LH Ratner Construction

* Mr. Ratner transferred full title to his ailing mother, and they agreed she would repay him when he returned to Vancouver. After persuasion from her daughter, she didn’t.
* Court held that if you give something absolutely you have no claim to it afterwards

## Re Rose

* For a gift to be completed, it requires *de facto* loss of control
* **Equity looks at what ought to have been done as though it was done** – settlor did everything he possibly could to transfer property to the trustee
* Deceased transfers assets to his wife and son, then dies. Turns out that the assets were never registered, but he did everything he could do. Court enforces trust.

### Settlor and Beneficiary Agree Under Contract

* Trust is constituted when the beneficiary can enforce the contract (i.e. when the contract is binding)
* “Equity follows the law”, and “Equity regards as done that which was intended to be done” here
* Outside the volunteer category since there is consideration, so beneficiary title to property becomes enforceable through specific performance

### Incomplete Gift Later Perfected

## Strong v Bird

* *Strong v Bird* Rule- if an inter vivos gift is imperfect solely due to the fact that the transfer to the intended donee is incomplete (non-vested), the incomplete gift will be perfect if and when the done subsequently acquires title to the property in his capacity as executor
* Applies to both real and personal property
* The probate document has the legal effect of vesting the deceased’s property
* Intention must not have been withdrawn by promisor
* Son was lodging his stepmother, who paid rent. He borrowed 1000 dollars, paid 200 back in decreased rent from her. She forgave the rest. Her heirs declared that the loan must be repaid to them. Court held that upon her death, he, as executor, was passed title of the loan under the laws of succession and administration of estates.

## Hilliard v Lostchuk

* Parents subdivided property for their children. Harry, the third child, worked on the land and helped improve the buildings. His mother sought to rezone the land so he could have it. She then died, leaving the gift imperfect. Harry was appointed executor and received the land upon her passing through laws.

# THE THREE CERTAINTIES

* Certainty of intention – certainty that there is an intention by the settlor to create a trust (as opposed to making an out-and-out gift with mere suggestions to the done as to how to use the property)
* Certainty of subject matter –clear indication of what forms the trust property or, more popularly in common parlance, the “trust assets”
* Certainty of Objects –issues around identity of beneficiaries (objects)

### Certainty of Intention

* Ways to make certain- deed of trust, trust settlement, trust agreement, words such as “in trust”, or imperative language (such as “must”)
* The word “trust” doesn’t have to be used (*Re Kayford* *Ltd*)
* **The question is whether in substance a sufficient intention to create a trust has been manifested** (*Antle*)
	+ **“**Equity looks at the substance, not the form”
* Trust language placing obligation vs. gift-with-hope language
* There is a presumption in favour of a gift, especially in family-type trusts

## Hayman v Nicoll

* Mother left daughter property in her will “in full confidence”
* SCC held that there was no certainty, those words were a moral plea and precatory words
* No trust established

## Royal Bank

* Crossman owed a considerable sum to the Bank, and assigned to the Bank rentals from an apartment building he owned
* Conducted a building swap with Stetson –bank then tried to claim money off the property
* Court held that the bank was not a beneficiary, more of a creditor

### Certainty of Subject Matter

* Need for a thing of value that is capable of transfer (*Institute of the Public Service* *of Canada*)
	+ Cannot be rights to salary
* Bare trust- subject of the trust is a single item in which the trustee has title
* **Two part test: 1) Clear identification of the trust property 2) A certain amount of beneficial interest**
	+ Both aspects must be described with “sufficient exactness”
* If there is not sufficient exactness, the trust will fail and the transferee holds legal and beneficial title of the property (*Beardmore*)
* You must know what the assets are at the outset (*Beardmore*)

## Re Beardmore Trusts

* Inter vivos trust which provided for child support
* “3/5ths of the settlor’s “net estate”
* “Wait and see” approach doesn’t work, must know what assets are at outset

## Re Golay

* The court held that “reasonable income” was what a court might sensibly infer, and therefore was sufficient certainty

## Sprange v Bernard

* Subject to be decided in the future (annuity given to husband, rest to beneficiaries)
* Don’t know how much of the annuity is going to be used – “floating trust”
* Need to know the assets upfront

## Burke v Hudson's Bay

* Fluctuations in value of the pension fund “floating equity”
* The pension fund was clearly a defined payment pension fund
* Pension fund was so good at investing that there was a surplus
* Pensioners want the surplus immediately
* The court says yes, but can't get surplus immediately since it is a fluctuating amount

### Certainty of Objects

* Must have at least one beneficiary or natural person
* Level of clarity required depends on the kind of appointing mechanism used to appoint beneficiaries:
	+ Fixed trust (non-discretionary) –“distribute to x” –list certainty test
	+ Trust power (discretionary)–“distribute to x in class y”-is/is not test
	+ Power simpliciter – “choice to distribute in class y” –is/is not test
* If administering the trust will cost too much, then it will be unworkable
* Evidential uncertainty also leads to administrative unworkability
* Fixed trust and trust power – uses mandatory wording “shall”, “must” etc.
* Power simpliciter – uses wording such as “may”, or gift-over
	+ Also look at whether the property has been vested, if not, then power
* Power of Appointment- where someone other than a trustee, or the trustee himself, is to determine the beneficiary (this person is the donee of the power of appointment)

#### Types of Powers

* Not of much legal consequence, but powers are classified as:
	+ General Power –Donee can appoint anyone including himself
	+ Special Power –Donee can appoint only persons from a named, specified class (*Gulbenkian’s Settlements*)
	+ Intermediate Power –Donee can appoint anyone at all, except a person or class as proscribed by a donor (*Re Manisty’s Settlement* and *Re Hays*)

#### Fixed Trust

* Must make disposition exactly as mandated by settlor
* Evidence must be clear and category can’t be so hopelessly wide as to be unworkable (*Baden 1*)
* Requires list certainty- must be able draw a complete and clear list so that you can say for certain who is owed the duty of upmost good faith (*Broadway Cottages*)

#### Trust Power

* Must make a distribution, but may choose which beneficiary out of a specified class (and when and how much)
* Evidence must be clear and category can’t be so hopelessly wide as to be unworkable (*Baden 1*)
* Conceptual test: is/is not test (individual ascertainably test) – can the trustee determine, with certainty, whether any given individual “is or is not” a potential beneficiary under the settlor’s description of the class of beneficiaries? (*T. Eaton*, *Baden 1*)

#### Power Simpliciter

* The trustee (donee) has power to choose a) whether or not to give at all, and b) If so, who within the group of objects to give to
* There is no evidential certainty required
* Conceptual test: is/is not test (*Re Gulbenkian Settlement*)
* The trustee can only be forced to consider (in good faith) making an appointment (*Re Manisty’s Settlement*) Courts will only intervene if the appointment is made in bad faith (capricious, arbitrary, irrational)
* The potential beneficiaries within the specified class under power simpliciter have no interest in the property until selected as a beneficiary (*Re Manisty’s Settlement*)

# FORMALITIES

* **Land**
	+ Legal interest (settlor and trustee) -in writing (Statute of Frauds)
	+ Equitable interest (trustee and beneficiary)- doesn't have to be in writing in BC under Law and Equity Act s.59 – “substance trumps form” in order to avoid fraud
* **In a will**: Name beneficiaries, signed by the testator in the presence of two independent witnesses
	+ *WESA* provides for exemptions
* Generally formalities are required on death
* If there is no will then the property is dealt with by the rules of intestacy
	+ If you do want it to go to specific people, then you need to have a will
* A will is a formality- Section 37 WESA
	+ It is a document in which you identify who your beneficiaries are
	+ It is a document you must sign
	+ It has to be witnessed by two people
	+ Section 43 may make a witness receiving gifts as void
* **In BC land has to be transferred in writing, money doesn't have to be in writing**
* In many jurisdictions, not BC, there is a requirement of a written memorial of the transaction
	+ If you are disposing property by way of trust you need to identify the beneficiaries as well
* **In a testamentary arrangement vesting occurs upon death**

### Secret Trusts

* Intention of the testator is to benefit a particular person as the real, but undisclosed beneficiary in the will
* The need to comply with the rules of secret and half-secret trusts has lessened given the wide powers granted to the courts under section 59 of *WESA*, and the social acceptance of situations has made them less needed
* Revolve around the knowledge requirement of the beneficiary-cum-trustee

#### Fully secret trust*:*

* Person who's dead has made a will, and in the **will has named beneficiaries (beneficiary-cum-trustee, NOT actual beneficiary)**
* Three requirements:
	+ Testator, A, must intend that the beneficiary named in the will, B, is to hold the legacy on trust for the real beneficiary, C.
	+ During A’s lifetime, he must communicate to B that A intends B to receive A’s property on A’s death as trustee in a trust for C, the real beneficiary, and
	+ B accepts of acquiesces to the proposal
* Names Connor as a friend and beneficiary
* Person who's dead has extracted a promise from Connor
* Told Connor that he's going to get 1M dollars, no one is supposed to know that Connor has promised to use the money to support Mel Mol and her two Children
* *Re Gardner*, probably wrongly decided given its contradiction of the vesting requirement rules
* Courts often want to help the undisclosed beneficiaries in the case that the beneficiary cum trustee has changed their mind

#### Half-secret trust:

* Only difference is that there is a little level of suspicion
* Three requirements:
	+ Before the will is made, A must communicate to B that he is to hold the property on trust for C
	+ Before the will is made, A must communicate to B the identity of C, and
	+ The named trustee in the will must indicate his acceptance before or at the time that the will is made
* Will actually says 1M dollars to Connor as Trustee, so there is suspicion
* People know that Connor cannot keep it for himself
* The worst that can happen is that the money goes back to the estate and to the heirs

## Blackwell v Blackwell

* Mr. Blackwell left 12k pounds to five friends in trust for “person or persons indicated to them by me”
* Turns out they were a mistress and child, but the court upheld the trust

### Defined benefit plan

* Gold plated plan
* Guaranteed a defined benefit when you retire
* Obligation is on the employer that everyone will get x amount when they retire
* Usually a cost of living increase
* Requires the employer to be pretty smart in investing
* Employers don't like doing that because it is so risky
	+ Increasingly trying to get out of it
* Surplus: Goes back to the employer on a resulting trust (*Schmidt*)

### Defined contribution plan

* Employer will pay so much of the salary every month and put it into a pension plan
* Usually the employee has to give a percentage as well
* The money is then given every month to the pension trustee to actually invest the money
* If that trustee is able to grow the money, that is for the account of the employee
* Pension fund has an account for every employee
* There is a capital appreciation if all things go well
* When they go bad, they decrease
* The employee then holds the ball, not the employer
* Surplus: there is inherently no surplus, all belongs to the employees (*Schmidt*)

### WESA rectification powers, section 59:

* Can rectify the will if there is an error arising from accidental slip or omission, a misunderstanding of the will makers instructions, or a failure to carry out the will makers instructions
1. An error arising from an accidental slip or omission
2. A misunderstanding of the will-maker’s instructions, or
3. A failure to carry out the will-maker’s instructions

2) Extrinsic evidence, including evidence of a will-maker’s intent, is admissible to prove the existence of a circumstance described in subsection (1)

# REVOCATION OF EXPRESS TRUSTS

* General rule is that once the trust is constituted, settlor falls out of transaction (*Bill*)
* There may be powers in the express trust for the amendment or revocation of the trust
	+ Can be far reaching, but have to be specific (*Schmitt*)

## Bill v Cureton

* Classic example
* P created a trust in which her trustees were to invest property and pay her the dividends for life, remainder to her husband for life, remainder to their children
* Didn’t have a husband or children
* Sought to terminate trust
* Court held that she could not end trust because of the interests of the possible future spouse and chance of having a child
* If she had been sole beneficiary, she could have ended trust under Saunders

## Nolan

* Pension case
* Employer cannot use surplus of a defined benefit contribution plan unless a power of revocation had been expressly included in the trust at the time of inception

## Schmitt v Air Products

* Settlor can reserve any power as long as it's in the instrument
* Powers can be far reaching

## Metro Toronto

* Trust instrument has to be clear and specific
* Broadly defined amendment provisions do not imply a power to revoke

# RESULTING TRUSTS

* Resulting trusts are implied trusts- the word trust may never even come up
* Trustee holds legal title on automatic resulting trust for the settlor, who retains equitable interest (and can then call in the trust under *Saunders* rule)
	+ Exception to the usual settlor-falling-out idea
* There are two main categories:
	+ Presumed resulting trusts: where there has been a gratuitous transfer of title to property
	+ Automatic resulting trusts: four categories (below)
* There are two theories behind resulting trusts: unjust enrichment (rejected in Canada, *Nishi*) and **implied intention**
* **The acts of the transferor and transferee may convey legal title, but the grant is tacitly understood not to transfer equitable entitlements to the transferee unless there is evidence that contradicts this tacit understanding (*Re Vandervell*)**

### Automatic Resulting Trusts

* Firmly rooted in cultural, economic, commercial realities
* Four categories:

A transfer under a Void Trust **(due to lack of certainty or any other certainty etc)**

IRC v Broadway Cottages- trust power failed for want of certainty of objects

* Large and fluctuating class of objects which was not possible to draw up
* Here it was uncertain class of objects –settlor’s wife, specific relations, employees, their wives and widows, and a charity (at the time it was “complete list test”)

## Re Ames Settlement

* Money, title to which was in the trustee's name, was found to beneficially belong to the settlor because it had been paid on a consideration that had failed under a marriage settlement

#### Transfer with Surplus Equitable interest

## Re West

* If there is a surplus after the trustees fulfill the provisions of the trust, they continue to hold the remaining assets for the testator's heirs/next of kin on a resulting trust, unless it is specifically disposed to them to hold for themselves (either by provision or testator’s intention)
	+ The trustee's entitlement is only legal and not beneficial

King v Denison – says that there are two ways in which property is transferred

* Sometimes an out and out gift, in which case you can keep the balance
* If that is not demonstrable, then the more reasonable cultural understanding is that

Schmidt v Air Products – Trust set up in respect of a corporation which was insolvent

* When it was created it had been put together from two previous companies
* There was a surplus upon bankruptcy, question was who was entitled to the products
* In a defined benefits plan- surplus goes back to company on RT
* In a defined contribution plan –no surplus, employees are entitled to all of it

#### Quistclose Trust

* Quistclose trust occurs in circumstances where property is transferred for a specific purpose which has not been fulfilled – usually involves loans and third parties
* Allows the lender to have an equitable interest (right of reverter) ahead of other creditors, becomes lender-cum-creditor (*Barclays*)
	+ The requirements:
	+ There is a transfer of property
	+ Transfer is subject to **specific purpose, condition, or limitation (*Giles*)**
	+ The purpose, etc, has not been fulfilled
	+ When these conditions are met, a resulting trust is created in favour of the transferor
* Helps if the money is segregated (*Westar*)

## Quistclose

* Lent money to a company called Rolls Razor for the purpose of paying dividends
* Rolls Razor did not pay out dividend and instead went bankrupt
* The money that had been loaned was held in a bank account
* Rolls Razor owed Barclays (the bank) for other money it had taken out as well
* Issue was whether Barclays could get money owed over Quistclose
* The court says when you advance a specific purpose loan, **then if that purpose is not met**, then that property is being held in a resulting trust for the person who transferred it
* Claimed Barclays was holding it on a resulting trust for Quistclose
* Quistclose doesn’t have legal title, but had equitable title
* Exception to the general rule of the settlor falling out of the arrangement
* **Settlor has in rem right over property and other creditors except a BFPFVWON**

Twinsecta- in rem right that results from quistclose trust

* Quistclose imposed a fiduciary duty on the borrower

## Westar Mining

* Joint Venture arrangement to engage in coal mining
* Money that Poscan put in were for the operating costs of JV
* Westar put in its money, poscan didn’t
* At that point Westar went bankrupt
* Creditors call for money from poscan
* Employees and contractors claim it is not Westar’s money, it is in a quistclose trust for the employees and contractors
* They win, **it was a JV with very specific purposes of how the money could be used**

#### Surplus of Funds after Trust Objectives Have Been Achieved

* Generally where there are charitable arrangements
* Assume not caught under charities legislation (*Hatchett*)
* If there are no members left, the estate of the deceased member can have no claim in the assets, since they are being held by joint tenants in equity (*Re West*)

Re British Red Cross(large donors)

* There is a war going on, people are advised to put in a bunch of money to help victims
* War finishes, and there is surplus money
* Trustee holds it on a resulting trust for the donors, all who were known
* Donors were given the money back prorated for the proportions of original gifts
* Gets more complicated when you don’t have large donors

Re Bus Disaster(lots of small donors, *bona vocantia*)

* If you can claim it you get it
* Money ended up going to crown (bona vocantia)

## Re West Sussex Constabulary

* Judge looked at who owned the money when enterprise was exhausted
* When an unincorporated association becomes moribund, the outcome depends on the following classification:
	+ Collection boxes (*Re Gillingham Bus Disaster*)
		- Intent of donor: part with money
		- Surplus is *bona vacantia* (“unclaimed goods”)
	+ Legacies and major donations (*Re British Red Cross*)
		- Intent of donor: give to the *specific* purpose
		- Surplus is held on an ART for the donor
	+ Street entertainments, raffles, and sweepstakes
		- Intent of donor: receive entertainment, not donate to a fund
		- Surplus is neither gratuitous or founded on a void settlement, so once the club becomes moribund (i.e. on the verge of termination), those surplus funds are *bona vacantia* and belong to the Crown

## Hanchett-Stamford 2008

* Mrs. Hanchett-Stamford was the sole remaining person of an unincorporated club
* The club held 2.5M pounds
* Question was whether she could be appointed as trustee to dispose of the assets
* Court found that the members of the time being of an unincorporated association are beneficially entitled to “its” assets, subject to contractual relationships
* Rejects *Bucks Constabulary*

## Re Bucks Constabulary 1971

### Set out law for *Hanchett*, but stated that one person could not receive funds, that they would be *bona vacantia*

### Presumed Resulting Trusts

* **Are a presumption: i.e. can be rebutted with evidence**
* Attempt to decide who holds equitable title
* Occurs when:
	+ A purchase of property in the name of another (purchase money resulting trust-*Nishi*) OR a voluntary transfer of property to another (gratuitous transfer resulting trust), and
	+ There is no clear evidence concerning the actual intention of the payor or transferor about who is intended to benefit from the transfer
	+ **If there is clear evidence as to in whom the transferor intended the equitable or beneficial interest to repose (i.e. give a gift), this will settle the dispute, regardless of whether the transaction is an out and out gift or express trust**
	+ **If unclear, *prima facie* presumed resulting trust** (*Eisner v Baker* - gf co-signs title, bf doesn't change it. Break up, bf claims house was in resulting trust, ct agrees)
* A standard form K to protect the interests of a bank is insufficient to establish evidence of an intention (*Niles*)
* Clear communications to 3rd parties will suffice to show the intent (*Russell v Scott*)
* The court will still give effect to the intention if it subverts wills leg’n (*Young v Sealey*)
* Onus is on the transferee to rebut the presumed resulting trust (must show that the transferor intended to pass beneficial title)
* Onus of rebutting the presumption of advancement is on the transferor
	+ The transferor will then be able to recall legal title, since he still holds beneficial title

#### Cases on Rebutting Presumption of Resulting Trust

(Onus on the transferee)

Re Vigogradoff - page 185

* Grandmother transferred war loan stocks into a joint account that was held in her and her minor granddaughter’s name
* The grandmother then bequeathed her interest to a third party
* Court found that the presumption of a resulting trust had **not been rebutted**, and the grandmother therefore held the stocks beneficially, and the bequeathed third party owned the entire interest in the stocks

## Eisner v Baker

* BF bought house for him and his gf to live in. Gf snuck name on title, bf didn’t care (probably wanted to get laid) at the time. Then they broke up, bf claimed presumed resulting trust. Court agreed, **no evidence to rebut** presumption.

## Standing v Bowring

* Presumption **was rebutted** - the godmother intended to give the grandson the gift, could not revoke the gift
* Banks books reflected the ownership (compare to *Niles*)

## Nishi v Rascal Trucking

* Money was transferred “without any conditions or requirements and these instructions are irrevocable”
* Further evidence also led to out-and-out gift, presumption of money purchase resulting trust **was rebutted**

## Niles v Lake

* Sisters owned joint bank account, one sick one put money in, other withdrew to pay for healthcare costs
	+ Contract makes it abundantly clear that it is money held by both of them
* Question is whether the document, which the bank requires you to sign, sufficient to rebut the presumption of resulting trust?
	+ The document is for the bank's benefit, and therefore does not rebut the resulting trust
* Court says you **need more to rebut** the resulting trust, standard form will not do it alone

## Russel v Scott

* Aunt opened joint account with nephew
* Told to employee and solicitor that the money would belong to PR on death
* There was additional evidence that Mrs. Russell had made it absolutely clear that she was intending to make an out and out gift of the money to the nephew with which she had the joint account
* Court found that this evidence **was sufficient to rebut** presumption of resulting trust

## Young v Sealey

* Similar facts
* It was clear that the elder child was only beneficial after the lady dies
* Court says yes it does follow the *Wills Act*, but going to follow precedence set in Ontario
* English court was ready to enforce gift, **presumption rebutted**

## Oord v Oord

* Family agreed to combine resources to buy a property and live there together
* All four were registered, but only the parents paid
* Court found that *prima facie* presumed resulting trust existed, but that the lack of any suggestion that the parents expected repayment **rebutted the presumption**, and made it an out-and-out gift (they were entitled to half the property)

#### Presumption of Advancement

* Confined the operation of the presumption to children who are minors (*Pecore*)
* In BC do not have statutory abolition of other instances, but wide discretionary power of the courts has limited it
	+ Might apply still for old style relationships (*Mehta Estate*)
* Onus of rebutting the presumption of advancement is on the transferor
	+ The transferor will then be able to recall legal title, since he still holds beneficial title
* Timing: Evidence to rebut presumption of advancement must be before, at, or immediately after (*Shepherd* - )

##### Illegality

* Problem of determining the admissibility of evidence when transferor conveys property 1) in order to pursue some unlawful activity or 2) to avoid some lawfully protected interest of third parties
* Five lines taken by the courts:
	+ *Par Delictum Rule*
		- Court will not review any evidence or any presumptions taking the place of evidence, and will leave the title situation as is
		- "in cases of equal guilt, the possessor is preferred"
		- *Schuerman*
			* Mere intent to fraud can soil ones hands
			* Husband transferred house to wife to avoid creditors, wife sold house
			* Husband claimed resulting trust, which court denied, gave equitable title to wife as well
			* Many cases have followed
	+ Pontius Pilate
		- Let matters stand, exactly as the chips fall
		- Allows the presumption of advancement to apply
		- *Foster v Foster*
			* Transferred four properties to children to avoid creditors, one did not give back
			* Court held that presumption must stand
		- *Goodfriend v Goodfriend*
			* Departure from general trend, raised doubts about *Scheuerman*
			* Wife-swapping case, court allowed trust
	+ Side Stepping
		- Helps the transferor (instead of transferee for first two)
		- Court intervenes by making an order for retransfer of title without considering any potentially tainted rebutting evidence (sidesteps the evidence)
		- *David v Szoke*
			* Cohabiting owners, guy gave his interest in house to girl, since he had drinking problems and didn't want to risk it. Girl left. Guy claims property.
			* Obviously did not intend to give gift
			* Court held in favour of the guy, saying there were no creditors at time of transfer
	+ *Locus Poenitentiae*
		- Operates to allow the inclusion of ordinarily excluded evidence, thus preserving the opportunity to rebut the presumption
		- Applies when parties (i) never actually carry out their illegal scheme and (ii) repent of their wrongdoing (i.e. transferor withdraws from the scheme
		- Pull out of the scheme half way for whatever reason
		- *Tribe v Soiseth*
			* Father pays for daughter and her husband condo, they divorce, husband claims half of the condo, parent claim resulting trust
			* Court says that no tax exemptions have been filed and it is open to father to repent from the scheme and give evidence to his true intention and rebut the presumption
	+ Proportionate Harm
		- Australian
		- Canadian courts did not accept this approach

# THE BENEFICIARY

### Rights

* "Fruendi" - enjoyment through habitation or profit taking from interest on capital investment NOT "Utendi" - in the sense of management and administrative controls
* Equitable interest in property is an in rem right –it avails against the world
	+ The beneficiary may recover the thing ahead of any creditors
* Beneficiary should keep away from administration (*Schalit*), except in rare cases (*Re Bagot’s Settlements*)
* Beneficiary may not want to own the property for tax reasons

### Equitable and Beneficial Title/Sub-Trusts

* Distinction between equitable title and beneficial title
	+ When there are two ‘beneficiaries’, both beneficiaries have equitable title, B2 has beneficial, B1 doesn’t
* When transferred from B1 to B2, it is a *chose in action*, or assignment
	+ Trustee has legal title in assets
	+ Equitable title sits with the beneficiary when B1 passes it on to B2
	+ Priority among assignees (“first in time is preferred in law”) (*Re Wasdale*)
	+ Can be done in one of four ways (*Timpson’s*)
		- Can assign to third party directly
		- Can direct the trustees to hold the property in trust for the third party
		- Can contract for valuable consideration to assign equitable interest to him
		- Can declare himself to be a trustee for him of such interest
	+ Section 36 of Law and Equity Act
		- Allows a sub-beneficiary to enforce his rights against trustee directly
			* Usually it would be subject to contract privity
		- Transfer by B1 of equitable estate to another beneficiary
		- The assignment is in writing to trustee, and the assignee, about transfer
		- Otherwise you have to bring it through the assignor, if they aren't around it is extremely difficult

**Set Meal or A la Carte?**

* Set meal – all trust assets as one –more likely for trusts with larger asset base
* A la Carte –beneficiary has right to each asset separately –more likely with fewer items
* Beneficiary has in rem rights to tracing trust assets (as far as a BFPFVWON)
* In Canada we have both arguments, hasn’t come up

## Baker v Archer-Shee

* Despute around taxes. She argued that her income that she had received from the shares was not really income from stocks
* Never got dividend from one particular class of stock from the Archer trust
* Don’t really understand facts. Court held that her rights were a la carte.

## Archer-Shee v Garland

* Brought again to a New York court this time. Court agreed with previous case, but stated two situations where set meal might be better
	+ Where the trustee has exclusive power to dispose of the assets in the trust
	+ Where items fluctuate quickly and constantly (i.e. pension plan type assets)

### Protective Trust

* Principal beneficiary gets equitable determinable life interest, second beneficiary gets rest
* **Settlor cannot use protective trusts to transfer property for himself,** totally against public policy
* Determining events are attempts to alienate the equitable interest
* It is, in reality, two trusts:
	+ The settlor transfers assets to a trustee, giving a determinable life interest in favour of the principal beneficiary, under terms of transfer; that
	+ Upon the occurrence of the determining event, the trust property is *ipso jure* to be held on a second trust, which is often a discretionary trust in favour of a class of objects
* If you forbid your transferee from disposing of property straight-up it is invalid
* If you use language in which the condition was not phrased as a condition, but as an event that would terminate the estate given, then you could engage a restraint on alienation
* **Key is understanding distinction between a condition and a determinable interest**
* To Denis, he can have all interests, but if he were to dispose, or call for the end of the trust, then it is to go to Belinda or Basil - NO as an invalid restraint on alienation
* To Denis, until he disposes to Belinda or Basil -YES, determinable format- Not conditional

# TERMINATION OF THE TRUST (*Saunders v Vautier*)

* Law has a preference for outright ownership, freedom of property
* Courts have general desire to treat adults as autonomous agents

### Requirements for Termination

1. Beneficiary has attained majority
2. Be *compos mentis*
3. Be absolutely entitled to the trust property – interest in property must be vested, not contingent (even though enjoyment of it may be postponed) (*Re Lysiak*)
4. If multiple beneficiaries, must be unanimous
* If these requirements are met, the beneficiary is “sui juris”
* Does not apply to large pension funds (*Buschau*)
* Beneficiaries with successive equitable interests can call in the trust unanimously (*Re Smith*)
* Beneficiaries have the right to call in the trust for their respective shares, if divisible, and if they are sui juris (*Re Sandeman*). Not all beneficiaries have to be sui juris.
	+ UNLESS this division imposes hardships on other beneficiaries (*Duker*)
		- *Marshall*- division of property where other beneficiaries wouldn’t be sui juris for 20 or 30 years constituted harship

## Saunders v Vautier

* Stock was bequeathed to Vautier as sole beneficiary
* The trustee was to accumulate the income until Vautier turned 25 years of age, after which he would receive the capital and accumulated income of the assets
* When he turned 21, he called for the trust
* Court found that only is enjoyment had been postponed, equitable interest had been immediately vested in him, so he could call in the trust

## Re Lysiak

* Conditions to postpone enjoyment were found, but not postponement of interest
* Husband bequeathed his estate to wife and son living in Ukraine
* Postponed distribution of enjoyment until “they are absolutely satisfied that the beneficiaries are free and unhindered to receive the said benefits without interference from the regime under which they are presently residing”.
* Could call in the trust

# VARIATION OF THE TRUST

* Often times a beneficiary might not want to call in a trust under *Saunders*, but the trust might need to be revamped
* Two ways, through CL, and through statute

### Common Law

* Courts have very limited jurisdiction -4 narrow exceptions:
	+ Administrative terms - unforeseen emergencies
		- May only vary trustee’s management/administration powers
		- May *not* vary quantum or type of beneficial interest
			* This is not easily evoked (*Chapman v Chapman*)
		- Often used to protect trust property, e.g. effect essential repairs to a building *or* split shares in the reconstruction of capital matters to make them more realizable (*Re New* – 1901)
	+ Maintenance jurisdiction - over living conditions of beneficiaries, allow them to live in a manner appropriate to trust expectations
	+ Conversion – infant’s property from realty to personalty or vice versa
	+ Compromise - court acts for beneficiaries who are not *sui juris* in a judicially sanctioned compromise of a litigious dispute

### Statute

* If brought forward under statute who is not sui juris, trustee must be notified in writing
* Court only requires majority, not unanimity
* The court can consent on behalf of those who cannot consent for themselves
* **Section 1 a-c is subject to section 2 “benefit”**
* Court has jurisdiction to give consent under *Trust and Settlement Variation Act* - section 1

**1** If property is held on trusts arising before or after this Act came into force under a 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 [not sui juris]** 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 a specified description or a member of a specified class of persons

(c) any person unborn, or

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

any arrangement proposed by any person, whether or not there is any other person beneficially interested who is capable of assenting to it, 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.

* 1(b) Not a clause that allows the court to change the trust for people who have only a mere hope in interest of the property (*Knocker v Youle*)
	+ Does not seem to include adults that are simply missing (except *Bentall*)

Bentall Corp v Canada *Trust* - good bargain test – perhaps wrongly decided

* Defined benefit pension fund, where people get what is set out in the contract
* Trust fund may exceed amounts that are necessary to discharge any obligations to the beneficiaries
* Employer will take some and give it to the employees, asks all beneficiaries to consent
* What would a prudent adult do, motivated by intelligent self-interest…
* Court requires only majority -almost all of the pension holders agreed except 6 or 7
* Court said that the pension holders, overwhelmingly wanted the change -97%
* Court said that they have jurisdiction and agreed to it, disagreeing opinions didn't count

## Buschau

* Sandra Buschau was one of 112 employees in Rogers
* Defined pension plan, where Rogers sought some benefit, along with the employees
* Lacked consent of 25 sui juris beneficiaries
* Court can only give consent on behalf of those who are unascertained (not sui juris)

#### Section 2 – Benefit

* Court cannot approve a variation unless it is for the benefit of that person
* Depends a lot on circumstances
* “Benefit” has been construed broadly to include financial, moral, educational, psychological, and social benefits
* Helpful to look at prudent advisor test: A prudent adult motivated by intelligent self-interest, after a careful consideration of the potential benefits and risks, be likely to accept the proposed variation? (in *Russ* and *Smith*, similar to *Bentall*,)

Re Burns – tax advantage

* Trust instrument is not wide enough to give the trustee powers with regards to investment
* There was no power to get rid of the shares
* Getting rid of shares was important for tax advantage, needed to wind up family business
* Judge said getting a tax advantage is a good thing, if the will needs to be amended in order for all of the beneficiaries to get that advantage, it would be granted
* However, you can't say that tax advantage is always a legitimate motive

Westin's Settlement - page 255 – social and educational benefits may outweigh financial benefits

* Court withheld its consent on this case
* Lord Denning asked whether it was for the benefit of children to be uprooted from England simply to avoid tax
* Intangible benefits
* Children are like trees, they grow stronger with firm roots
* Bookend to Re Burns in a way
* They may have to pay taxes, but there are a lot of educational and other benefits to these children

Remnant's Settlements - page 256 - family equanimity

* Dealt with two sisters, one who was catholic and one was not
* Will only disposed of property if neither were catholic, but one was
* They both agreed that there should be equanimity
* Financial benefit of the catholic kids is being improved at the expense of the protestant kids
* Financial benefits are for one group of kids, social benefits are for the other
* Courts obligation is to only give consent if there is consent from all beneficiaries
* Court does give consent, since the family benefits in a manner that outweighs the financial detriment of the protestant kids
	+ If the forfeiture clause is deleted then protestant's kids now have a much wider group of suitors

Re Harris- testator's intent page 256

* Very unhappy life because family had some mental issues and committed suicide
* Was partial to one child more than the other (5/8) and only 1/8 to the others
* Mother wanted equality for the family
* Court refused, looked at testator's intent
	+ *Fishlea-Eaton v Eaton-Kent* - page 257
		- Testator's intent is considered
	+ *Re Tweedie Estate* - page 257
		- Can include psychological and family benefit

## Russ

* BCCA
* Confirmed prudent advisor test, and that the court is not bound to preserve the basic intention of the settlor

# THE TRUSTEE

### Appointment

* “a trust will not fail for want of a trustee”
* When a trust is created with several trustees, they hold the position as joint tenants
* Unanimity is required for all decisions, unless the trust deed provides otherwise and sets out majority vote decision making
* Four primary ways to appoint new trustees
	+ Under express power in the trust
	+ The beneficiaries can appoint a new trustee under the principles of *Saunders v Vautier*
	+ The court on application by the beneficiaries (*Re Tempest*)
	+ A general statutory power under the *Trustee Act*
		- Section 27 minimizes applications to the court to make appointments
		- Section 31 – appoint where court may appoint “where it is expedient to do so”
* Instrument of appointment (whether *Trustee Act* or power in trust) gives automatic vesting
* If the last trustee dies, the trust will pass to the personal representative, if this fails, the court will appoint a Public Guardian and Trustee
* The protector/guardian is not intended to be trustee
	+ But if you give her too many powers she may become a trustee

### Trustee retirement:

* Need for written declaration to other trustees and beneficiaries – section 27
* Acquiescence required by other trustees and beneficiaries
* Need by retiring trustee, after acceptance of retirement by other trustee to disengage from the assets
* Maxim "equity will not allow a trust to fail for want of a trustee" - court will appoint under section 27

### Trustee removal:

* Courts have the power of judicial removal, even if there is no misconduct by the trustee
	+ Criterion is whether the actions are ultimately detrimental to the execution of the trust - *Re Consiglio Trusts* - "impossible or improbable administration"
	+ Doesn’t matter if no misconduct, if there is friction between beneficiaries and trustees, concern for “welfare of the trust” –*Conroy v Stokes, Newton*
* Beneficiaries can do this if they are all *sui juris* and they are acting under *Saunders-Vautier*
	+ If the trust instrument has been given this role to the protector beneficiaries may not be able to, turn to legislation instead
* Can also be removed by legislation under section 31- page 272 "expedient"
	+ Under section 30 **majority** of trustees or beneficiaries is required

### Trustee Duties

* Three main duties
	+ To take and get control of trust property
	+ To protect the value of the trust fund through prudent investment decisions that are also compliant with other trustee obligations (such as impartiality)
	+ To distribute income fairly according to the distribution requirements under the trust settlement
* All duties require good conscience –fiduciary relationship
* Trustee cannot use assets to advance/promote his/her personal interests
* No automatic right to payment, remuneration may be possible under *Trustee Act*

#### Duty to take custody of trust assets

* If the person with power to designate trustees does so, then that appointee is automatically vested with title, must still take steps to vest property (i.e. register where appropriate)
* Collection and storage of trust assets is important duty of the trustee
* Trustee to act personally - *delegatus non potest delegare* – does not apply anymore
	+ Under *Trustee Act* trustees can delegate for proper administration
	+ Trustee is not held liable for these actions, unless very negligent (*Speight*)
* Sales of shares: need to use stockbroker - *Speight v Gaunt* - page 278
* Solicitors and Bankers
* Implied indemnity of trustees for acts of agents - section 95

#### Duty to Invest

* Regulated by section 15.2 and 15.3 of *Trustee Act*
* Check trust instrument (there may be a requirement to retain)
* If there is no requirement then there is a duty on the trustee to make sure that the property is secured and that there are appropriate benefits for the beneficiary
* A bare trust is where there is a single asset which might not be investable (that is ok)
* **What you would expect a prudent investor would do with his own investments** (*Trustee Act*)
	+ Before this it was whether or not they had done their personal best (*Re Whitley*)
* Authorized investments - trustees could be liable for losses where they had not invested in authorized investments
* Statute allows trustees to delegate money to experts for investment (section 15.3)
* If you set up a plan like a portfolio then you will not be liable for breach of trust
* If it's a small trust then prudent is relatively easy
* **Where shares are held in a closely held corporation, and with succession of beneficiaries, trustees are under a duty to convert "as soon as advantageously possible"**

## Fales v Wohlleben

* Closely held corporation invested in Boyle Brother shares
* Transferred shares to Inspiration which is a subsidiary of Power Corporation
* Trustees figured that Power would never allow one of its subsidiaries to go under -it went under
* Beneficiaries were left with nothing, sued for breach of trust, trustees pointing fingers at each other, Court came to conclusion that both trustees were at fault
* Court says that they should have come to court since they had idiotic trustee, but they did nothing, so held them liable
* The widow argued that she was not a businessperson, argued old test
* **Court said there needs to be one test, but under trustee act Court can exercise discretion and exonerate a breach of trust where there had been good faith (s.296)**
* It was an honest mistake
* **The SoC required of a trustee in administering the trust is that of a person "of ordinary prudence in managing his/her affairs”**
	+ No higher standard for anyone (i.e. corporate trustees)
* So the court exempted her, but not Canada Permanent Trust (the other corporate trustee)

## Cowan v Scargill

* Whether or not trustees are actually in breach of trust if they engage in ethical investing
	+ Where you will not purchase certain shares because the companies are not ethical (i.e. cigarettes)
	+ They did not want to invest in any coal mining companies that were not involved with their union
	+ **Sole obligation is to do what is best for the beneficiary**

## Nestle v National Westminster Bank

* Trustees sued for lack of productivity of the investment, had made less than market increase (although the value had improved)
* Defendant was successful since it showed the bonds had suited the life tenants, and that equities had been regarded as risky investments at the time
* Court noted that the performance must not be judged with hindsight
* The courts are probably stricter now
* If the trust is small, you have to think twice to accept position of trustee

#### Duty of Loyalty

* Trustee must act in good faith and not abuse position of trustee
* Trustee not to act for personal benefit
* **If profits are reaped for personal benefit, the trustee is liable to disgorge any profits to the beneficiary**
* In dealings with beneficiary - fair dealing not self dealings
	+ Fair dealing is acknowledging that what he or she is purchasing is the equitable interests
	+ There is a buyer of the equitable estate, the trustee, and a seller of the equitable estate, the beneficiary
	+ **Must be full disclosure of the transaction (*Creighton*)**
	+ Standard is a high standard
* Self dealing- where the person signs it as seller and buyer
	+ What he is buying is the equitable interests
* Fair dealing- where the person goes to the beneficiary, and says wants to buy equitable interest
	+ Equitable interest owned by beneficiary
	+ **Will not work where there is power imbalance**

## Keech v Sandford (1726)

* Trust where main asset was a lease
* Beneficiary was an infant
* Lease came up for renewal
* Trustee asked to renew the lease but landlord wouldn't
* Landlord said he'd renew the lease in trustee's name
	+ Had legal and beneficial interest
* When the infant became a major, he sued the trustee for breach of trust, and was successful
* Court places an absolute standard of integrity and doesn't want anything to ruin it

##  Boardman v Phipps

* + It is in the trust documents that the trustees cannot move into a company and operate it
	+ So they let Boardman and Phipps take over the company
	+ Beneficiaries say that all the profits made belong to them
	+ Boardman and Phipps say no, it was their work, the trust didn't want the company
	+ The majority of the court said there was a breach of trust, the duty of loyalty had been breached
	+ **It is an absolute standard (until *Canadian Aero*)**
		- If there is any hint of a conflict of interest you have to back away
	+ The court imposes an accounting of profits, the company continues to run but profits go to trust

## Canadian Aero Services v O'Malley

* The director had a fiduciary towards the company
* Two senior officers left a company and joined competing company
* Court held that they were faithless directors
* Case relaxed strict approach set out in *Boardman* and *Keech*
* Must look at Relaxation of the strict rule against conflict, assessing the directors conduct against (i) the position held, (ii) the nature of the opportunity missed, (iii) the ripeness of the opportunity, (iv) the relation of the director to the opportunity, (v) the amount of knowledge possessed, (vi) the circs in which it was obtained, (vii) was it a private or special opportunity, (viii) time frame that breach occurred w/ respect to employment, and (ix) the circs under which the employment rel’nship was terminated—retirement, resignation, discharge
* **There has to be full disclosure from the trustee to the beneficiary-** *Creighton* pg 301

#### Duty of Impartiality

* There is a common law duty of impartiality on the trustee in the administration of trust funds
* There may be a deviation if it is expressly stated in the trust settlement (must look to instrument first)
* There may be specific directions which allow the trustee to be impartial, if not, then he must be fair to all beneficiaries
* More problematic when you are dealing with life tenants and remainders (beneficiaries in succession), might be inherently unfair
* If you are life tenant, you are entitled to income that comes out while you are alive
	+ Life tenant wants to have that maximized
	+ Remainder wants his interest considered at the same time
* Life tenant of property gets income *in specie*, as *Howe* rule does not apply
* Job of the executor to assemble debts, check the will, check for debtors, sell to help debts and legacies
	+ Mix of assets that the trustee has assembled under his investment powers may have caused unequal treatment of the successive beneficiaries
* A return of assets that are rapidly exhausting or have become exhausted - both as to income and capital (i.e. a mine)
	+ Can get it the other way, where the value increases a lot during the remainder's time

#### Assets Benefit Life Tenant –*Howe Rule*

* *Howe rule*
	+ ***Howe v Lord Dartmouth does not apply to real estate, and only applies to residuary personalty***
	+ Where a testator dies and leaves residuary personalty to persons by way of succession (i.e. life tenant and remainder), the trustee must sell the reversionary/wasting asset, and must invest them in authorized investments (an asset that is in compliance with the *Trustee Act* section 15.2, prudent businessperson), and use 4 percent (assuming not high inflation period) of value for life tenant while corpus is preserved for remainder
	+ If shares are sold within a year of testator's death, the value of the shares is assessed at the date of sale. If they are not sold within a year, the value is taken at the first anniversary of the testator's death
		- If the duty to apply is in an inter vivos trust (where the testator expressly requires impartiality), the value of assets are assessed at the date of the trust
		- If the income received from sale is less than 4 per cent of the value of the property, the life tenant receives all of the income
		- If the income later exceeds 4 percent, difference is made up
* It depends on a concept called **fair return** - depends on the consumer price index (was set at %4, went as high as %9)

#### Reversionary Asset- *Chesterfield* Rule

* Reversionary Asset - non-income producing assets that disadvantage the life tenant
	+ Reversions, remainders, life-insurance policies, etc.
* Trustee must calculate what portion of the sale price, if it had been invested at the date of the testator's death, would have produced an income of 4 per cent per year and risen to the sale price
* IE. If sale price was 100, investment would be x, so that it increases by 4% over y years to equal 100. LT gets different of 100 and x as out of pocket for those y amount of years.

### Special Clauses and Impartiality

* Clauses in instrument implying partiality:
	+ Residue in a will directed to be “retained”
	+ Authorizing total discretion of trustee with investments
	+ Life tenant directed to receive income "*in specie*"
* Any time there is "trust for sale" or a "trust to convert" then impartiality is implied
* Often a power to postpone sale, which may impact the force for trust for sale
* All are hints in analyzing where there is partial or impartial treatment to the beneficiaries
* Look at trust instrument- settlor may intend for property and real estate to be lumped together (*Lauer*) so that impartiality applies to all
* Trust to sell - impartial
* Trust to retain - partial
* Power to sell - *Re Smith*: suggests it might be enough to trigger impartiality and *Howe*, but can be overridden by clear intention to remain partial
* Power to retain- depends
	+ Power to retain may imply ability to enjoy *in specie*, but to a lesser degree than trust to retain
* Power to postpone + trust for sale - impartial (inevitable conversion)
* Power to postpone (alone) - enjoy *in specie*

**Cases- Power to retain/postpone**

Lottman v Standford - Page 311

* There was a requirement to sell all of his personal estate
* But they were also given a wide discretion to postpone discretion
* **Does it trump to order sale? No, ordinarily it doesn't. There would have to be very strong evidence**
* Parcel of land was leased to the testator's son for 20 years, but income generated was so low
* Widow, who had life interest, said that there was no income and it was partial treatment
	+ Cited *Howe*, SCC hung on to the restriction in *Howe*, saying that it only applied to residuary personalty

Lauer v Stekl- page 312

* Court had ordered real estate to be sold according to *Howe*
* Distinguished from *Lottman* based on clauses in the instrument
* Court held that if you read the will, the provision of requiring sale applied to all of the assets, it was quite specific, both personalty and realty
* The directions given stated that *all* property must be sold

Royal Trust v Crawford *-* Page 313

* Shares in a stevedoring service company
* Widow was life tenant, remainder was a bunch of nieces
* When the company was being wound down, the widow obtained a huge dividend
* Under the rules of being impartial, she would have got a fair return, instead of 400k
* She was getting the bulk of the dividends
* The nephews complained as remainder man, and were successful
* Trust instrument even said "any surplus income"

**Case-Powers to Sell and Retain**

Re Smith (page 314)

* Father died, in his will directed 25% of share income go to wife for life
* Power to retain might not be sufficiently clear to avoid impartial duty

**Cases – Trust Assets as Settled Shares**

* Look to intent of company to see whether they are classified as shares (capital-to remainder), or dividend income (to which 4% goes to LT)

## Re Waters Estate­

* Set out “form is substance” rule

## Re Welsh

* Case where the man left shares in company for wife and children
* Wife remarried and husband had other kids
* Court overruled form is substance where testator’s clear intent would be denied
* Company returned dividends in form of income, meaning that it would go to wife and her children, so court held that it could be returned as capital, and go to his children

#### Duty To Apportion Debts and Other Disbursements

* WESA s 144 - unless the testator enquires otherwise, or there is insufficient capital – income from LT is not available in isolation for payment of debts, rather, payments are to be made out of capital

#### Duty to Provide Information

* Idea was that if you were to expect transparency, many trustees wouldn't want to act
* **Generally, beneficiaries are not entitled to information, just to the trust document**
* Trustee does have to advise the beneficiary of the financial situation of the trust
	+ Financial statements must be given at reasonable intervals

## Re Londerry's Settlement

* Beneficiaries were entitled to something very very small
* Wanted all the minutes and agenda of meeting, was concerned with how trustees had used their discretionary power
* Courts are not prepared to help too much
* **Have to show that trustee is acting in bad faith**, **or that you are a very particularized beneficiary**

## Schmidt v Rosewood Trust

* Affirms that a beneficiary has no right to disclosure of anything that can plausibly be described as a trust document
* Rule is strengthened when there are issues with personal or commercial confidentiality, in which the court will need to balance competing interests of different beneficiaries, trustees, and third parties
* To evaluate competing interests, the court will need to evaluate the claim of the beneficiary. If the applicant has no more than a theoretical possibility of benefit, it’s unlikely that disclosure will be ordered. If disclosure is ordered, there may be limits and safeguards.

#### Duty to Account

* Trustee is obliged to account for the trust assets and the beneficiary has a right to inspect these records

## Sanford v Porter

* Beneficiaries are not entitled to an instantaneous response even though they are entitled to inspect all accounts
* Every case depends on its own circumstances
* Section 99 *Trustee Act* gives trustee two years from date of appointment to file the accounts

### Trustee Rights

#### Rights to Remuneration

* Not a common law right, but may be set out intrust instrument
* Trustee Act s 88 - Expenses plus "a fair and reasonable allowance " not exceeding 5% on gross value for all assets
	+ Cannot exceed 0.4 per cent as a fee, and have to apply to a court to get it
* Courts are not likely to give it, must show that you have been doing some special work to do it
* If it is a huge trust and a lot of responsibility, that helps, along with time and care and management
* Courts say that the trustee should have negotiated the remuneration
* Have to show some special success that has come about as a result of care and management
* *Re Sproule Estate* and *Re Pedlar Estate* are both instances where court gave fees

#### Right to be Indemnified

* Beneficiaries are getting all these benefits, and ordinarily should pay
* Would not have to pay where excess costs are due to the acts of the trustee
* Section 95 of *Trustee Act* gives implied indemnity to trustees where the trustee gave property to a third party for management (i.e. banker, lawyer etc)

## Re Reid

* Property was in the UK, trustee was there, and beneficiaries were in BC
* Taxes were levied and trustee paid them for net loss, asked beneficiaries to pay
* Beneficiaries said they wouldn't, and that the trustee shouldn't have paid
* Court said that the trustee was at risk, and the benefit was for beneficiaries, and the court made them pay

###  Administrative Powers of the Trustee

* *Trustee Act* (all statutory powers unless excluded or curtailed by settlor):
	+ If subject to a trust for sale, power and discretion to choose the **form of sale** (e.g. public auction) and is exempted from good faith exercises of that discretion (ss. 5 and 6)
	+ Power to **appoint a solicitor/banker** to receive/discharge money (s. 7)
	+ Power to **insure property** (s. 8)
	+ Where expedient, power to **compound debts**, abandon debts, issue releases, and refer disputes over debts to arbitration; not liable to beneficiary for same (s. 9)
	+ **Spend money** (incl through loans) on **repairs or improvements** to prevent deterioration of land (s. 11)
	+ Power to **delegate specialist agents to invest** in accordance with investment objectives of trust, **ensuring due diligence in the selection of agents** (s. 15.5)
	+ Power to **vary investment decisions** (s. 22)
	+ Power to **exercise discretion** around **corporate management** and **reorganization** in respect of **companies to which shares relate** (s. 23)
	+ Power to apply trust property for the **maintenance and education of infants** (s. 24), including the sale of property if necessary because of insufficient income upon application to court (s. 25)

### Control of Trustees by Beneficiaries

* Beneficiaries cannot bring about minor changes, only big ones
* Settlors cannot control unless they placed provisions in instrument (*Bill v Cuerton*)
* Call in the trust if all sui juris – *Saunders v Vautier*
* Combine with trustees to amend terms
* Compel trustees to vote for the shares as directed *or* change articles of the company (*Butt*)
* Cannot compel trustees to act in a particular way (*Re Brockbank*)

 *Re Martin Estate*

* Opens up from *Butt* with the amount of disclosure to beneficiaries “balance the interest of all stakeholders (in line with the need for transparency)

### Control by the courts

* Courts don't want to be running trusts - problem is trying to decide the limits of the jurisdiction
* The broadest rationale behind trusts is to have FREEDOM OF PROPERTY
* Advice and opinion - s.86 of *Trustee Act* - advice on administration and management of trust property – must give notice upon all interested parties
* Courts do not mediate stalemates between trustees (*Tempest*) unless there is a serious, unworkable deadlock (*Re Billes*)
* Courts will give opinion on trust fundamentals, but not on sale price of trust asset (*Re Wright*)
* Absolves trustees of responsibility for breach of trust except in abuse of provess
* Overburdening the court

## Re Billes -

* Contrasting case with substantial asset base
* Shares in Canadian Tire
* Charities thought that they weren't getting enough money back (2.2%)
* Charities were able to show that there wasn't any serious attempt to move out of a single asset, beneficiaries complained

#### Intervention where trustee acts outside trust objectives

## Schipper v Gauranty Trust

* Look to trust purposes
* Trustee was given uncontrolled discretion to run the trust
* The answer is no they can't, there may be other controls
* If all the trust was considered, it was evident above all else that the wife should have all the benefits of a very comfortable lifestyle
* Courts generally refuse to interfere with “uncontrolled discretion”, unless the trustee is acting inconsistently with the settlor’s intent (as it was here)

#### Failure to be Even Handed

## Re Fleming

* Trustees were not fulfilling their duty to be impartial
* Wife was getting very low yield returns, and being short-changed over remainder
* Court stepped in to make adjustment

#### Ousting Court's Jurisdiction

* Courts will not allow trust provisions which disallow the courts intervention
* Will also disallow provisions which promote fraud, bad faith, or poor accounting
* *Re Wynn*
	+ Attempts to oust the court from a review of the will is against public policy
* *Boe v Alexander*
	+ Privative clauses preventing normal trustee duties are against public policy
* *Re Tuck's Settlement*
	+ Trust or will may allow third parties to exercise reason (here it was a Rabbi evaluating an “approved wife”) unless they are wholly unreasonable or engage in misconduct, then the court has jurisdiction to intervene
* *Re Poche*
	+ Similar to *Boe*, trustee was grossly negligent, but provision excluded her from liability
	+ Court held that you cannot have such a provision

# CONSTRUCTIVE TRUSTS

* Different from resulting trusts in many ways, one in that there is intent to give, "reward" language
* Arises by operation of law rather than as a transfer in furtherance of a personal objective
* **Where someone does not have legal title but feels legally entitled**
* Institutional constructive trusts (per se) and (ad hoc)
	+ Good conscience is the unifying concept of the institutional constructive trust (*Soulos*)
* The “remedial” constructive- applies to fiduciaries as a form of equitable relief and to unjust enrichment as restitutionary relief
* Gives the claimant an equitable interest and in rem right - wholly or in part - in an asset where the legal title is held by the defendant, and afterwards in trust for the claimant, who can then call in the trust
* More concerned with the position of the parties that results from the relationship which gives rise to the fiduciary duty than with the respective position of the parties before they enter into the relationship
* "equity will regard as done what the parties manifest an intention to do"
* Court can give in rem monetary restitution (preferred*-Soulos)* or compensatory proprietary relief (share in property)
* Sometimes, P may not want constructive trust over the property, just establishment of fiduciary duty to give him equitable compensation (*Simms*)
* **Good conscience is the unifying concept of the institutional constructive trust (*Soulos*)**
	+ Unjust enrichment is a large part, but not required

### Fiduciaries Per Se

* Automatic as from the date of misconduct
* Include, disloyal trustees, faithless directors, delinquent agents, miscreant solicitors, overreaching partners, bribers, corrupt officials, undue influencers

### Fiduciaries *ad hoc*

* Compared to *per se* fiduciaries in that they have not fallen within relationships that equity has for a long time recognized and characterized in case precedents as fiduciary
* Broad conditions for asserting an *ad hoc* fiduciary relationship, should not remain closed(*Guerin*):
	+ A power dependent relationship between plaintiff and defendant
	+ Mutual understanding and undertaking by the fiduciary

Elder v Alberta- test for ad hoc relationship

* An undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries
* A defined person or class of persons vulnerable to a fiduciary's control
* A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affect by the alleged fiduciary's exercise of discretion or control

Frame v Smith Three criteria to become a fiduciary

* A scope for the exercise of some discretion or power
* A power or discretion that can be exercised unilaterally so as to affect the beneficiary's legal or practical interests
* A peculiar vulnerability to the exercise of that discretion or power - being "at the mercy of the fiduciary holding the discretion or power” (*Guerin*)

## Guerin v The Queen

* Category of the fiduciary is not closed
* **Hallmark of a fiduciary relationship: one party at the mercy of another's discretion**
* Court says the government is in a fiduciary position, and this is a fiduciary position that has been breached
* It is the nature of the relationship
* Government was not liable for breach of contract, because there wasn't one, they were in breach of a fiduciary duty
* **Vulnerable if you're at the mercy**
* Question was whether the musqueam was entitled to in rem relief?
* Getting a constructive trust was not the best way to go, but they were entitled to equitable damages
* **Equitable damages which award you for recompense that you would have had if the breach of fiduciary duty had not occurred**
* Sometimes you might want an accounting of profits instead of an equitable interest

Galambos v Perez

* Perez was the law firms bookkeeper, and used a lot of her own personal money in the firm
* Firm went bankrupt and she lost her money, sued
* **Shows that not all dependency relationships are fiduciary** (Perez knew more than Galambos about the firm's finances)

## Lac Mineral v Corona

* Court found that the relationship between Lac Minerals and Corona was not fiduciary, since there was no vulnerability (both were large companies)

## Hodgkinson v Simms

* Client-broker relationship
* Vulnerability not necessary (majority), there was
* **Sometimes, P may not want constructive trust over the property, just establishment of fiduciary duty to give him equitable compensation**
* Tasks were beyond Hodgkinson's abilities

## M (K) v M (H)

* Parent-child relationship is fiduciary

## Sun Indalex Finance v United Steelworkers

* Statute may form the basis of an ad hoc fiduciary duty

### Remedial constructive trust

* Applies to situations where there may not be fiduciary relationship, but there is unjust enrichment
* *Pettkus v Becker* criteria for constructive trust:
	+ An enrichment by the defendant
	+ A corresponding deprivation by the plaintiff
	+ An absence of any juristic reason explaining or justifying the enrichment
	+ Causal connection between the acquisition of property and the corresponding deprivation to the plaintiff
* If family, could say that it is a “joint family venture”
* Imposed by courts where "good conscience" (*Soulos*)
* If successful plaintiff/claimant is assigned an equitable interest in defined pieces of property at the behest of the court, or
* Compared with above two categories, where they are characterized by their fiduciary component
* Four conditions must be shown for the remedy (*Soulos*):
	+ The defendant must have been under an equitable obligation
	+ The assets in the hands of the defendant must be shown to have resulted from deemed or actual activities of the defendant in breach of his equitable obligation to the plaintiff
	+ The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties
	+ There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case (eg. The interests of intervening creditors must be protected)

Pettkus v Becker- **3 categories for unjust enrichment**

* Bee farms built up by common-law couple
* Say that it is a joint family venture, so both parties have done things that require an apportionment
* Court rules that there was an unjust enrichment since Pettkus had complete title
* Constructive trust was used remedially and awarded Becker equitable title in the property

Kerr v Baranow SCC established the constructive trust more as a restitutionary measure

* Measurement may be assessed on the basis of *quantum meruit*
	+ Partner’s contributions determined at the end of the relationship
	+ Looks at assets instead of work
* Idea is to award each party a fair share of a “joint family venture”
* Only when restitution cannot be awarded, then a constructive trust can be created in proportion to the plaintiff’s contributions

# PRIVATE PURPOSE TRUSTS

### Non-Charitable, Private Purpose Trusts

* There is a transfer of legal title to a trustee, but no disposition of equitable title to a person (object of beneficiary)
	+ Equitable interest is purportedly a disposition of equitable to a purpose
* In *BC* the *Perpetuity Act* attempts to deal with the beneficiary principle in private purpose trusts by treating such trusts as powers
* A private purpose trust (ie. Lack of beneficiary), that is not for charity, is usually invalid
* Something you think may be a charitable purpose may turn out not to be
	+ **There must be public benefit, and only for current members** - *Leahy* - disposing money to nuns present and future, also a private group, not for public benefit

#### Exceptions

* The exemption purpose trusts only last for 21 years, usually enough, then residual beneficiaries
	+ Horses, dogs, graves and monuments
		- *Pettingall v Pettingall*
			* 50 pounds per annum for the benefit of testator's black mare
			* For memorial the trustee must be prepared to perform the task
			* Cannot endure beyond 21 years
		- **Where main purpose is charitable but some minor non-charitable element is present it is still ok** - *Re Coxen*
			* *Law and Equity Act* Section 47 states to separate the two and that the gift operates solely for the charitable purpose
			* Courts will try and give weight to charitable purpose
		- To give to a charitable group, but benefit individuals at the same time
	+ Through the listing of beneficiaries "*Denley*" rule to get around private purpose trust rules
		- Testator left land to trustees and employees of company for sports use, was upheld
		- *Keewatin Tribal Council*
			* Owned land in which it provided residence for first nation students
			* Not enough to give members *locus standi*
	+ Unincorporated Associations as Likeminded Individuals
		- Issue that can arise is how are you giving to the unincorporation
		- **It needs to be clear that the gift is a gift to a group, and state *current* members, not future members**
		- May be put beyond doubt if the gift is to every member of the club
			* It means that when they leave, they are entitled to that money
			* Unless trust gift goes to an official and is paid in trust as an accretion to the funds of the club, and are regulated according to the rules of the club, so there is no beneficial ownership by individual members
		- Must look at the contract which binds the corporation
		- If you give to a club as a whole, then there is a risk if the club dissolves or amalgamates, and trust will not be enforced *Re Recher's Will Trusts*
	+ To have the trusts to be actually conceived of as powers
		- There is a movement in BC
		- The trustee has power to utilize the assets to further a particular objective
		- If the power is not exercised then it becomes a resulting trust

### Charitable Trusts - can be private purpose trusts

* Public interest bodies and religions
* Must fit into a principle division, have public benefit, and serve the public widely
* Are a form of express trusts, certainty of intention and subjects apply, objects, however, can be more vague
* Cannot be so vague as to "any charitable institution" *Chichester Diocesan Fund*
* Rule involving perpetuities on a conditional gift over does not apply, (i.e. if given to one charity, but that charity dissolves, give to another even after 21 years - maxim shall not fail for want of trustees)
* Gifts to charities involve a lot of tax benefits
* What is a Charity? *Statute of Elizabeth* (1601)
	+ A matter is not charitable simply because the members of the society believe what it is doing is for public benefit- *National Anti-Vivisection Society*
* **Four principle divisions (decided by purpose):**
	+ Relief of poverty
		- It is a relative one
		- Charity doesn't need to cater only to the very poor - *Jones*
		- Look at a large group of people
	+ Advancement of education
		- Widely defined, low threshold *- Dupree* (chess players)
		- Perpetuating family name etc does not help
	+ Advancement of religion
		- Really depends on social attitudes towards religion
		- If there is a belief in a supernatural being or principle, and if there is conduct correlated to that belief
		- **Counter argue that charitable purpose is a moving subject, especially in the field of religion** *Re South Place Ethical Society*
	+ For other purposes beneficial to the community
		- Protection of animals - *Re Moss*
		- Promote welfare of sick
		- Hospitals
		- Nursing homes or hospices
		- Sports are not typically charitable *AYSA Amateur Youth Soccer Association*
* **Has to have clear public benefit**
	+ Cannot be all employees of one company *Oppenheim*
	+ 20 cloistered nuns *Gilmour* does not satisfy
	+ *Neville*'s nuns spent time in the world so it did satisfy
	+ *Jones v T. Eaton Co*. - Disposition was directed to the executive officers of the T. Eaton Co and to be used for "any needy or deserving Toronto members of the Eaton Quarter Century Club" - was held to be charitable purpose
	+ Promoting political objectives are not valid charitable trusts
* **Must also serve the public widely**
	+ Cannot serve a narrow, small, constituency
	+ *Oppenheim vs Tobacco Securities Trusts*
		- Education of employees for 110,000
		- Didn't fit public, large number benefit component
	+ Only 20 religious people, didn't meet public benefit
	+ *Jungs vs Steveton*

### Notion of *Cy-pres*

* Where uncertainty occurs, the courts can apply the trust to some other charitable purpose as close as possible to the one seemingly described -*Canada Trust Co*
* Rule of inalienabiltity does not apply