Barford v Street[1]
Understanding and Applying the Rule to collapse a Trust[2]

By Charles Wagner and David Elmaleh[3]

There is a tension between the two sometimes conflicting goals of protecting testamentary freedom[4] and permitting *sui juris* beneficiaries to enjoy their property without undue restrictions. Testamentary freedom is a hallmark of the common law in democratic societies that support the rule of law and property rights generally. Accordingly, testators are, for the most part, legally entitled to dispose of assets as he or she wishes. Over time, through both common law and statute absolute testamentary freedom has been circumscribed where: (1) dependants have been inadequately provided for; (2) a beneficiary is an 'unworthy heir' such as someone who had murdered the testator or a group that would benefit from the assets in a manner that is contrary to the *Criminal Code* (terrorist entities, for example); and (3) there are provisions in a Will that violate public policy. The focus of this paper is to analyze a fourth situation where courts collapse trusts when the terms postpone entitlement to some arbitrary time notwithstanding that the beneficiary is an adult with the legal capacity to manage his/her affairs. This is what happened in *Saunders v. Vautier*.[5]

The rule in *Saunders v Vautier* though is unique, in the sense that on its face this blunt 'trust busting' doctrine permits beneficiaries of a trust to depart from a testator's/ settlor's original and explicit intentions. This differs from other instances where the court's interference in the testator's

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[1] (1809), 16 Ves. Jun. 135 (Eng. Ch. Div.). [Barford]

[2] This is an abridged version of the article published in the Estates, Trusts & Pensions Journal The unabridged version is available on line at http://bit.ly/CharlesWagner

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[4] See Ontario — Estate Administration PROOF OF FACTS
Contributing Editor: Megan F. Connolly, Editor: Anne E.P. Armstrong where the author explains,
"Historically, a testator's freedom to distribute her property as he or she chooses became deeply entrenched as a common law principle. This was, for example, stressed in Canada Trust Co. v. Ontario (Human Rights Commission) (1990), 1990 CarswellOnt 486, 74 O.R. (2d) 481, at p. 495, citing Blathwayt v. Cawley, [1976] A.C. 397, [1975] 3 All E.R. 625 (U.K. H.L.):

[5] [1841] EWHC Ch J82; (1841) Cr & Ph 240, (1841) 4 Beav 115 8; 41 ER 482 IN THE HIGH COURT OF CHANCERY. Available on line at http://www.bailii.org/ew/cases/EWHC/1841/J82.html

or settlor's intention is rooted in society's goal to protect vulnerable parties or larger public policy concerns. Under the *Family Law Act*[6] the statute restricts testamentary freedom to protect spouses[7], under the *Succession Law Reform Act*[8] the law circumscribes testamentary freedom to protect dependants[9]. In *Saunders v Vautier* the common law has prioritized the right of the ultimate beneficiary's enjoyment of property over the will-maker's testamentary freedom. To further that end the courts allow beneficiaries to modify or collapse the trust, regardless of the wishes of the testator or settlor.

The *Saunders v Vautier* principle is similar to what has been referred to as the *Barford v Street* principle. *Barford* provides that where a testator gives to a beneficiary a life interest together with a power to appoint how the remainder of the trust will be dealt with after that beneficiary's death (by deed or will), the beneficiary is entitled to exercise his or her general power of appointment in favour of themselves, thereby becoming the owner of the entire beneficial interest in the trust.This paper will review the common law rules and interplay between *Saunders v Vautier* and *Barford v Street*, the rationale behind the doctrines (as compared to the foundational principle of testamentary freedom) and how the doctrines have been judicially considered and expanded over time.

Saunders v Vautier

In *Saunders* v. *Vautier*, a testator bequeathed some stock in the East India Company to his great nephew, Daniel Vautier, via a trust where upon attaining the age of 25 years, Vautier would be entitled to receive absolutely as his own property the principal of such stock plus the accumulated interest and dividends.

The testator died in 1832, and in 1841, Daniel Vautier turned 21, the age of majority. He then petitioned the Court to have the trustees transfer the stock to him immediately as being his own property. He submitted that he was about to be married and needed money to set himself up in business.

[6] Family Law Act, R.S.O. 1990, c. F.3 ["FLA"]
[7] See sections 5-7 of the FLA.
[8] Succession Law Reform Act, R.S.O. 1990, c. S.26 ["SLRA"]
[9] See Part V of the SLRA

Lord Cottenham, L.C., ruled that the gift vested upon the testator's death and *not* when Daniel Vautier reached age twenty-five and that consequently since Daniel was now "of age" (*sui juris*) he was entitled to call for immediate possession of the stock and the accumulated income as his own property.

Despite the explicit direction in the Will that he was not to receive the corpus of the gift until age 25, Vautier was successful in terminating the trust, and he acquired the stock four years sooner than the testator had intended.

The Court's rationale in *Saunders* was later explained by Sir Page-Wood, V.C., in the case of *Gosling v Gosling*:[10]

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

The Supreme Court of Canada in 2006 succinctly summarized the common law rule in *Saunders v Vautier* as follows:[11]

> 21 The common law rule in *Saunders v. Vautier* can be concisely stated as allowing beneficiaries of a trust to depart from the settlor's original intentions provided that they are of full legal capacity and are together entitled to all the rights of beneficial ownership in the trust property...

The merits of the so-called *Saunders v Vautier* rule has been debated since its formation. According to D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in*

[10] (1859) 70 E.R. at 423.
[11] *Buschau v. Rogers Communication Inc.*, 2006 SCC 28 (CanLII), [2006] 1 S.C.R. 973, at para. 21

Canada (3rd ed. 2005), at p. 1175, the rule originated as an implicit understanding that the significance of property lay in the right of enjoyment. The idea was that, since the beneficiaries of a trust would eventually receive the property, they should decide how they intended to enjoy it. If that is truly the principal upon with *Saunders v Vautier* is based then it is logical that any time arbitrary restrictions to the right of enjoyment exist a court has jurisdiction to ignore those restrictions.

On the other hand, some see it as indefensible attack on testamentary freedom. There may be (and often are) good reasons why a testator would not want a beneficiary (or beneficiaries) to obtain the benefits of his or her gift until a certain age. To apply the rule and extinguish the trust would be a clear violation of the testator's wishes for no persuasive or significant public policy reason.

In terms of the rule's application in Canada, courts have indeed applied the principle to permit a beneficiary to effectively ignore and displace the testator or settlor's intentions by varying the terms of the trust. However, there are limitations.[12] ~~.~~

[12] See *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, and *Buschau v. Rogers Communications Inc.*, [2006] 1 SCR 973.

In *S.A.*, the Supreme Court of Canada dealt with a Henson Trust. The court noted, "The central feature of the Henson trust is that the trustee is given ultimate discretion with respect to payments out of the trust to the person with disabilities for whom the trust was settled, the effect being that the latter (a) cannot compel the former to make payments to him or her, and (b) is prevented from unilaterally collapsing the trust under the rule in Saunders v. Vautier (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.)."

~~noted that a~~ A key aspect of ~~the particular~~the Henson trust ~~at issue in that case~~ was that it was structured so that it could not be unilaterally collapsed under the rule in *Saunders v Vautier*. Rather, the court observed that under the terms of the trust, any remainder of the trust fund must pass to some third party upon S.A.'s death. More specifically, an article in the trust specifically prohibited the trustees from appointing either herself or her creditors as remainder beneficiaries.

The Supreme Court noted that the effect of the "gift over" was that S.A.'s interest in the trust was not absolute and therefore it prevented her from terminating the trust on her own in accordance with the *Saunders* principle. The structure of the trust itself prevented S.A. from terminating the trust, thereby distinguishing the case from the more typical *Saunders* scenario where the power of appointment is a general one without specific limitations.

The Supreme Court explained that for the rule in Saunders v. Vautier to apply the beneficiary must have capacity and be absolutely entitled to all the rights of beneficial ownership in the trust property. Under the terms of this Henson trust any remainder of the trust fund must pass to some third party at the beneficiary's death. The trust specifically prohibits the beneficiary from appointing either herself or her creditors as remainder beneficiaries. Therefore, the effect of this gift over was that the beneficiary's trust interest was not absolute so Saunders v Vautier did not apply.~~ultimately ruled that the consequence of the gift over provision, together with another term that provided the~~

For example, ~~-~~in *Khavari v Mizrahi*, 2016 ONSC 101, Justice H.J. Wilton-Siegel presided over a complex motion to determine, among other things, if the rule in *Saunders v Vautier* was applicable. The litigation originally concerned two real estate development projects, consisting of two mid-rise, luxury condominium developments at 133 Hazelton Avenue and 181 Davenport Road. The parties incorporated certain companies to hold legal title to the properties upon which the developments ~~are~~were built as bare trustees for other entities, and signed a document styled "Trust Agreement" reflecting the transfer of shares. Various addendums to the trust agreement were subsequently signed.

There were two principal issues on the motion – whether the trust agreement created a trust, and if so, whether the applicant was entitled to the return of the shares based on the application of the *Saunders v Vautier* principle.

Among many other reasons, Justice Wilton-Siegel noted that the enforcement or rights in respect of a trust, including the invocation of the rule in *Saunders v Vautier*, engages the equitable jurisdiction of the Court. He therefore ruled that to the extent that the party was otherwise entitled to an order under *Saunders*, the Court would decline to exercise its discretion to apply the rule where it would be unconscionable:

> [69] There is no doubt that a return of the Shares to Khash would create events of default under such loan agreements. The potential consequences for other loan agreements to which MEI or Mizrahi is a party cannot be assessed on this motion. Moreover, the effect of an order granting the relief sought by Khash would be to allow Khash to resile from the Agreement after MEI and Mizrahi have relied on the existence of the Agreement in their dealings with the lenders to the Developments, with the full knowledge and acquiescence of Khash. Given the foregoing circumstances, such a result would, in my view, be unconscionable.

This case raises an interesting issue of whether the Court is obliged to collapse the trust if the conditions precedent are met (namely, the beneficiary or beneficiaries are the age of majority, all consent to collapse the trust and no one is under any disability). The decision appears to suggest that the Courts nevertheless have the inherent jurisdiction – and the discretion – to make sure

~~trustees with exclusive discretion as to when payments would be made, was that S.A. had no enforceable right to receive any of the trust's income or capital.~~

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collapsing the trust would be equitable, and the courts may consider external factors such as the impact on other non-parties.

As one author herein noted in a prior case comment, Justice Himel in the case of *Stoor v Stoor Estate* declined to apply the rule in *Saunders v Vautier* in a scenario where the testator included a "gift-over" provision. She noted at paragraph 50 and 51 as follows:

> "50 The application of the rule in Saunders v. Vautier has been wide, but not unlimited. For example, in Rogers Communications, supra, the majority of the Supreme Court held that in the context of a statutorily regulated pension plan, the rule in Saunders v. Vautier had no application (at para. 33).
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> 51 Counsel have not referred me to any case, nor have I been able to find one, in which the rule in Saunders v. Vautier was held to apply in a situation like that at issue here, that is, where there is an absolute discretionary trust over the income and capital to a beneficiary for life, with a gift over of the remainder. That gift over is clearly intended to support the testator's intent to prevent the interest in the income and capital from vesting in the beneficiary. However, as a result of the failure of the gift over of the residue, the beneficiary applies to have the intestacy determined immediately, before the expiration of the life interest, thereby making him the sole potential beneficiary of any trust property."

Justice Himel did not find it appropriate to expand the rule to include situations with gift-over provisions.

A similar result is found in *N-Krypt International Corp. v. LeVasseur*, 2018 BCCA 20, where the British Columbia Court of Appeal recently declined to apply the rule.

In *N-Krypt*, the respondent N-Krypt International Corp. ("N-Krypt") purchased shares in a company controlled by the appellant Thierry LeVasseur. A term of their agreement required N-Krypt to put its shares into a voting trust with Mr. LeVasseur as trustee. When the relationship between the parties broke down, N-Krypt, relying on trust law, petitioned for relief including disclosure of company information, return of its shares or replacement of Mr. LeVasseur as trustee. Mr. LeVasseur opposed the relief sought on the basis that it was contrary to the parties' agreement. The hearing judge declined to terminate the trust or appoint a new trustee, but ordered Mr. LeVasseur as trustee to provide N-Krypt with extensive information relating to the shares, subject to specific limitations set out in the subscription agreement. The appeal and cross appeal largely turn on whether trust law prevails over the terms of the contract.

N-Krypt submitted that since the Voting Trust Agreement stated unequivocally that N-Krypt is the sole beneficial owner of the shares and is entitled to their return when the term of the trust expires, the rule in *Saunders v Vautier* governed and N-Krypt could rightfully demand the return of its shares.

The British Columbia Court of Appeal concluded that the rule in *Saunders* was inapplicable in such circumstances. N-Krypt contractually bound itself to give the trustee the right to vote the shares for ten years as a condition to obtaining the shares. As a result, N-Krypt was not deemed to be solely entitled to the beneficial enjoyment of the property during the term of the trust — the voting rights which form part of the bundle of property rights attaching to the shares are to be "enjoyed" by Cirius, and voted by its CEO as trustee and in Cirius's interests. It follows that the original hearing judge was correct in concluding that:

> [33] … the rule is not a proper means of escaping the overall contractual terms under which the trust property is held. I should say in this regard that I do not think it is possible to analyze the voting trust and subscriber agreements separately in terms of the restrictions they impose on N-Krypt's ability to collapse the trust, as its counsel submits. The subscriber agreement provides for the shares to be delivered to Mr. LeVasseur in trust for NKrypt and requires N-Krypt to enter into the voting trust agreement. Together the agreements form the overall trust arrangement and define the rights and obligations agreed to under it-.

Barford v Street

Another similar principle that has evolved over time is the rule articulated in *Barford v Street*, a case that predates *Saunders* by approximately 30 years. In many ways, the *Saunders v Vautier* rule is an expansion of the original *Barford* principle.

Justice Himel in *Stoor v. Stoor Estate*, 2014 ONSC 5684, noted that the *Saunders* principle

> "has even been applied to a situation in which the beneficiary has a life interest with a general power of appointment over the residue, by deed or by will, with a gift over in failure of appointment. The beneficiary can then exercise that power of appointment in favour of herself, and thereby become owner of the entirety of the beneficial interest….This application of the *Saunders v. Vautier* rule is sometimes referred to as the rule in *Barford v Street* (1809), 16 Ves. 135, after the case in which it was first applied…"

In *Barford*, the Court had to consider a will by which the residue of the testator's estate were given and devised to a trustee to pay expenses to Ms. Barford during her lifetime and then immediately after she passed away, the residue was to be conveyed to any such person as Ms. Barford appointed (by deed or will). Brilliantly, Ms. Barford executed a deed poll directing the trustee to convey and assign all of the estate to herself. The Court effectively ruled that where a testator gives to the beneficiary a life interest together with a power to appoint by deed or will, or by deed alone, the beneficiary can appoint to himself.

One leading Canadian case applying the *Barford* rule is the Supreme Court decision in *Re Mewburn*, 1938 CanLII 25 (SCC). In that case the testator provided that ½ of the residue of his estate would be invested in trust to pay the income to the testator's daughter during her lifetime "and upon her death said share to go and be disposed of as she may by deed or will appoint…" The Supreme Court ruled that the daughter could exercise her power of appointment by deed in her own favour so as to vest in her immediately her share of the residue of the estate and so as to entitle her to have it transferred to her immediately. The court said:

> "In the present case, I conclude that the daughter's life interest, coupled with a power to appoint the corpus by deed, enables her to appoint to anyone, including herself. The testator's manifest intention is contrary to the authority he conferred upon her. By giving his daughter a power to appoint by will only, he could have ensured that his wishes should be respected."

The *Barford* principle was also applied in other Canadian appellate cases in the early 20th Century[13] including *Robinson v. Royal Trust Co.,*.[14] In this case a daughter had a life interest only in the income with the provision that "upon her death said share to go and be disposed of as she may by deed or will appoint". The specific question that the Supreme Court asked itself was whether Ms. Robinson can exercise the power of appointment vested in her by the said will, by deed in her own favour so as to vest in her immediately her share of the residue of the said estate and so as to entitle her to have the same transferred to her immediately?

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[13] *Templeton v. Royal Trust Company*, [1936] 3 D.L.R. 782, ["~~*Robinoson*~~*Robinson*"] where the majority of the Manitoba Court of Appeal held that notwithstanding the clear intention of the testator that only on the death of the life tenant should the corpus be distributed as he might direct, that as the power of appointment was exercisable by deed the life tenant could exercise it in that manner in his own favour so as to entitle him to have the corpus transferred by the trustee of the testator's will to him immediately.

[14] [1939] S.C.R. 75,

The Supreme Court in *Robinson* concluded that:

> In the present case, I conclude that the daughter's life interest, coupled with a power to appoint the corpus by deed, enables her so to appoint to anyone, including herself. The testator's manifest intention is contrary to the authority he conferred upon her. By giving his daughter a power to appoint by will only, he could have ensured that his wishes should be respected. If it be urged that in that event she would be unable to appoint by deed the corpus or part of it so as to assist a child, the same argument now advanced as to why she should not be authorized to deprive herself of the income, would apply. On principle as well as upon a consideration of the authorities referred to, she is able to exercise the power and disregard the testator's wishes.

More recently, in *Guest v. Lott*, 2013 ONSC 7781, the general principle articulated in *Barford* was upheld. Although not explicitly referred to as the *Barford v Street* rule, Justice Beaudoin ruled that the beneficiary of the life interest had a power to appoint the remainder by will, and was properly able to appoint herself.

> [33] I conclude that the facts of the *Robinson* decision are nearly identical to those at hand. In this case, however, Barbara Jane Guest has more than a life interest. Barbara Jane Guest takes absolutely, 21 years after the death of the testator, if she survives. Nothing turns on the fact that she is not entitled to all of the income during that period of time. By conferring on his daughters a power to appoint by deed, the general principle of law found in Jarman, *A Treatise in Wills*, applies. No other person can or will benefit from the residue of the Jane Fund under the terms of the Limited Property Will of Arthur Ronald Guest.
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> [34] While this result may allow the beneficiaries to override the intentions of the testator, I conclude that the rule in *Saunders v. Vautier* applies and that Barbara Jane Guest is entitled to have the Trust distributed to her immediately…

Concluding Remarks

In essence, the principles articulated in the *Saunders v. Vautier* and *Barford* decisions are relied upon by Canadian courts to vary or collapse trusts in specific circumstances. Canadian courts do so notwithstanding that the collapsing or variance of those trusts goes against the express desire of the testator or settlor. However, the application of the principles is not without limits.

As the above-noted cases demonstrate, courts are reticent to vary or collapse a trust in situations where to do so would be unconscionable, lead to an inequitable result vis a vis others, or where there is even an inkling of possibility that someone other than the listed beneficiary would have some type of entitlement.

As the population continues to age, and as business structures, wills and trusts increase in sophistication and apparent complexity, it is likely beneficiaries will seek to collapse or vary trusts that restricts that absolute and immediate entitlement to property. Those litigants will rely and likely attempt to expand the application of e *Saunders v. Vautier* and *Barford.* Time will tell whether our courts are willing to expand or restrict the application of the doctrines created by these cases. It remains to be seen whether Courts will continue to apply the principles in a fairly restricted manner, or whether a more expansive approach will be taken.