TAB 1

Post Mortem Alterations to Wills and Trusts – A Litigator's Perspective

Eric N. Hoffstein
Fraser Milner Casgrain LLP

13th ***Annual*** **Estates and Trusts Summit**
Day Two - November 18, 2010

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

POST MORTEM ALTERATIONS TO WILLS AND TRUSTS: A LITIGATOR'S PERSPECTIVE

Eric N. Hoffstein and Arden V. MacLean[1]

INTRODUCTION

Testamentary freedom is not absolute, and no testator can force a beneficiary to take a gift.[2] For a variety of reasons, a beneficiary may wish to either refuse a gift or request a modification or alteration to the trust document which creates the gift. As such, a testator cannot ensure that his or her wishes will be carried out.

This paper will provide an overview of the various methods by which a beneficiary under a Will can avoid or vary the gift bestowed upon him or her, and will review recent developments in the judicial application of the doctrine of acceleration and the rectification of testamentary documents. This paper will focus on the jurisprudence and legislation as it exists in Ontario.

In particular, this paper will review the state of the law relating to variation and rectification application. But first we will consider the consequences of disclaimer, release and surrender of beneficial interests, with a focus on the application of the common law doctrine of acceleration in these circumstances.

THE IMPACT OF DISCLAIMER, RELEASE AND SURRENDER ON TRUST BENEFICIARIES

Trust and Estate beneficiaries might want to avoid a gift: for example, a substantial inheritance could lead to adverse tax consequences or the loss of social benefits for the beneficiary; a gift of property might be an unwanted complication for someone anticipating marital problems or liability in a civil action. Whatever the reason, a beneficiary has the right to disclaim, release or surrender a gift or inheritance. This section of the paper will consider the consequences of taking these steps.

Disclaimer

Upon the death of a testator, a beneficiary can disclaim a gift orally, by his or her conduct, or in writing.[3] A disclaimer of a gift is effectively a renunciation of all of the beneficiary's legal rights to and interests in the gift. However, in order to be effective, a disclaimer must be made with knowledge of the gift, with

---

[1] Eric N. Hoffstein is a partner and Arden V. MacLean is an associate in the litigation and dispute resolution department at Fraser Milner Casgrain LLP.

[2] Unless otherwise stated, the term "testator" will be used throughout this paper with no distinction being made for gender.

the intention to disclaim the gift, and before the beneficiary has, or can be said to have, accepted the gift.[4] A disclaimer is a final act wherein the intention of the testator is altered and the disclaimer may only be retracted if the disclaiming party can demonstrate a retraction will have no prejudicial effect.[5]

Upon an effective disclaimer, the disclaimed gift becomes void *ab initio*.[6] If the gift is specific, in the case of a Will, it will fall into the residue of the Estate, to be dealt with accordingly, whereas if the gift is residuary, it will be disposed of as if on an intestacy.[7] If the property is inherited as a result of an intestacy or partial intestacy, this too can be disclaimed and the gift will pass to the next heir at law.[8]

One issue which has been the subject of some legal debate is whether or not a partial disclaimer can be made.

Historically, a gift could be partially disclaimed if it could be characterized as a single gift. In *Re Coulson*, the testator provided that the residue of his Estate was to be divided into a number of shares and the income from each share was to be paid to each of his nieces and nephews.[9] Each income beneficiary was also given the power to appoint a beneficiary of the capital of their share upon their death. One beneficiary accepted the income of the gift and designated her Estate as her capital beneficiary. The beneficiary later disclaimed her interest as an income beneficiary for one year, which disclaimer was held to be effective by the court.[10] M.M. Litman, in his annotation to this case, points out that the decision in *Re Coulson* is a significant departure from the clear rule that single, undivided gifts must be taken as a whole. However, he notes that Justice Estey allowed this disclaimer because, first, the partial disclaimer was not an attempt to disclaim the burden of the gift while retaining the benefit; and second, the disclaimer did not prejudicially affect any other person. The law appears settled that the ability to disclaim part of a gift does not apply where a beneficiary wishes to obtain the benefit of a gift but not the burden.

---

[3] *Wolfson Estate v. Wolfson* (2005), 22 E.T.R. (3d) 255, 2005 CarswellOnt 7667 at paras. 29, 30 and 32, with respect to the fact that disclaimer is only possible upon the death of the testator as before this time, there is no interest and only an expectancy. *Montreal Trust Co. v. Matthews*, [1979] 3 W.W.R.621, 11 B.C.L.R.276 at para 25.
[4] A.H. Oosterhoff. *Oosterhoff on Wills and Succession, Sixth Edition*. Toronto: Carswell, 2007 at p.584. ("Oosterhoff"); M. Elena Hoffstein and Julie Y. Lee. *Restructuring the Will and the Testamentary Trust: Methods, Underlying Legal Principles and Tax Considerations*. Estates and Trust Journal, Volume 13, 1997 at p. 45.
[5] See *Woodward Estate, Re (*2001), 38 E.T.R. (2d) 139, 2001 BCSC 635, 2001 CarswellBC 1012 (B.C.S.C.) at para.24.
[6] *McFaden, Re* (1937), [1937] O.W.N. 404, 1937 CarswellOnt 205 (H.C.). *Re Metcalfe*, [1972] 3 O.R. 598, 29 D.L.R. (3D) 60.
[7] Oosterhoff, at pp. 584-585. *Montreal Trust Co. v. Matthews*, supra, at paras. 23 and 29.
[8] See *Bank of Nova Scotia v. Chan* (1987), 68 C.B.R. (N.S.) 118, 26 E.T.R. 180 (Man. Q.B.) at para. 16
[9] *Re Coulson*, (1977), 16. O.R. 2(d) 497, 1 E.T.R. 1, 78 D.L.R. (3d) 435 (C.A.).
[10] *Ibid*. at para. 8.

Release and Surrender

A beneficiary might still relinquish his or her interest to a gift after the gift has been accepted by means of releasing or surrendering that gift.

The term "release" is defined in Black's law dictionary, in the trust and estate context, as "the act of conveying an estate or right to another, or of legally disposing of it".[11] The term "surrender" is described as the act of yielding or giving up a right or claim in or to an Estate, which act results in returning the right or interest to the person who has it in remainder.

In *Genova v. Giroday*, a 2000 decision of the Ontario Superior Court of Justice, the testator created a trust for his only son which was settled with half of the residue of his Estate. The son had a life interest in the income and the trustees had a discretionary right to encroach on capital.[12] The testator further expressed that upon his son's death, the remaining capital in the trust was to be payable in equal parts to any of his son's issue, and if they were deceased, to their issue. The testator's son was not happy about the trust that had been set up for his benefit and released his interest in the Estate, which release was said to be in favour of his children.[13] The court held that "a life tenant who signs a "release" or a "disclaimer" of a life interest cannot simply choose who is to receive the benefit of the release or disclaimer" and the terms of the Will continue to govern.[14] The court further held that the son could not revoke his release.

It is clear from this case that beneficiaries must exercise caution and obtain proper advice when dealing with their beneficial interests as they may not fully understand the legal implications or distinctions between the various methods by which they can reject a gift. The question that typically arises when considering disclaimer, release or surrender is, what happens next?

THE DOCTRINE OF ACCELERATION

There has been much debate, both academic and judicial, as to the proper disposition of the gifted property following a disclaimer, release or surrender of the benefit. In the case of a testamentary trust,

---

[11] The subject of "release" in the context of estate litigation often focuses on a release of rights between spouses pursuant to separation agreements and this particular application is outside the scope of this paper.
[12] *Genova v. Giroday*, [2000] O.T.C. 664, 2000 Carswell Ont 3267(Ont. S.C.J.).
[13] *Ibid.* at para. 7.
[14] *Ibid.* at para. 7.

does the property fall into the residue of the deceased's Estate or does it pass to one or more particular beneficiaries pursuant to the doctrine of acceleration?[15]

The Ontario *Succession Law Reform Act* provides that a disclaimed gift of property, or an interest therein, in the absence of any contrary intention in the testator's Will, will be included in the residue of the Estate. In particular, s. 23 of that Act reads as follows:[16]

> 23. Except when a contrary intention appears by the will, property or an interest therein that is comprised or intended to be comprised in a devise or bequest that fails or becomes void by reason of,
>
> (a) the death of the devisee or donee in the lifetime of the testator; or
>
> (b) the devise or bequest being disclaimed or being contrary to law or otherwise incapable of taking effect,
>
> is included in the residuary devise or bequest, if any, contained in the will. [Emphasis added]

The doctrine of acceleration states that a testator is presumed to have intended an acceleration of a subsequent gift where a life interest fails unless a contrary intention can be shown in the testamentary document or demonstrated by implication.

In *Re Coulson*, referenced above, after the income beneficiary disclaimed her income for a year, the court applied the doctrine of acceleration so as to distribute the rejected income equally among her issue. The court made this decision after considering the express words of the Will which made no provision for the distribution of income in case of disclaimer by the life tenant.[17] The court held that the income disclaimed should be accelerated and distributed among the beneficiary's issue.[18]

The doctrine of acceleration has more recently been considered in a series of cases heard in the province of British Columbia.

In *Brannon v. British Columbia (Public Trustee)*, the British Columbia Court of Appeal held that, upon the determination of a life estate, either by death or disclaimer, there is a presumption that the failed gift

---

[15] The doctrine of acceleration can be invoked in a number of different circumstances, but for the purpose of this paper the authors will focus on acceleration following a disclaimer, surrender or release of a gift.
[16] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 23.
[17] *Re Coulson*, supra note 9, at para. 22.
[18] Ibid. at para. 24

will accelerate unless a contrary intention of the testator can be shown.[19] The testatrix in this instance had left the residue of her Estate in trust for her husband, "until his death or remarriage", with a gift over to their children. The husband disclaimed his interest although he had not remarried, and the question before the court was whether the gift of the residue should accelerate to the children.[20] The Public Guardian and Trustee argued that the gift should not accelerate. The court provided a helpful review of the historical treatment of this issue, and confirmed that the question of whether the gift should accelerate to the children was a matter of the testatrix's intention.[21] The court concluded, from the language of the Will, that the testatrix intended that the children's interest should only be deferred until the husband's interest was determined.[22] The husband's disclaimer was a final determination of his interest in the gift and the gift should therefore pass to the children without delay. The decision turned, in part, on the inclusion of the words "or on his remarriage" in the Will as this suggested to the court that the testatrix intended that the husband's interest could be determined (and the children could inherit the property) earlier than on the husband's death. The court further held as follows:[23]

> ...to limit acceleration only to cases where the testator specifically contemplated that a beneficiary would refuse a gift or to exclude acceleration in any case where there is the contingency of survivorship would be contrary to the weight of authority and to the very concept of acceleration.

The reasoning in *Brannon* was applied again by the British Columbia Court of Appeal in *McGavin v. National Trust Co.*[24] The facts were similar to the *Brannon* case in that a remarriage clause was included in a testamentary bequest. The beneficiary disclaimed any right, title or interest to the testator's trust, intending that her disclaimer would accelerate the remainder interest to her son, the ultimate heir. The court cited *Brannon* and provided as follows:[25]

> ...upon a premature determination of an interest in a trust, there is a presumption that the subsequent interests are accelerated unless an

---

[19] *Brannon v. British Columbia* (Public Trustee) (1991), 41 E.T.R. 40, 56 B.C.L.R. (2d) 113 (B.C.C.A.). Decision was upheld in, among others, *Re Morrow Estate*, (2002), 2002 CarswellBC 1226 (B.C.S.C.).
[20] *Ibid*. at paras. 5 and 10.
[21] *Ibid*. at paras. 15, 16 and 18 citing, among others, the following cases: *Re Syme*, [1980] V.R. 109 (S.C.); *Jull v. Jacobs* (1876), 3 Ch.D. 703; *Re Townsend* (1886), 34 Ch.D. 357; *Re Flower's Settlement Trusts*, [1957] 1 W.L.R. 401, [1957] 1 All E.R. 462; *Re Young's Settlement Trust*, [1959] 1 W.L.R. 457, [1959] 2 All E.R. 74; *Re Scott*, [1975] 1 W.L.R. 1260, [1975] 2 All E.R. 1033; *Re Chartres*, [1927] 1 Ch. 466.
[22] *Ibid.* at para. 28.
[23] *Ibid.* at para.29.
[24] *McGavin v. National Trust Co*. (1998), 22 E.T.R. (2d) 36 (B.C.C.A.).
[25] *Ibid*. at para. 10.

> intention can be found. The settlors' intention is determined by reference to the trust deed or other document creating the trust and circumstances existing when the trust deed was executed. In this context the settlor's intention means the intention of a reasonable person, placing himself or herself in the settlor's chair, would suppose the settler had in view of the surrounding circumstances.

The court held that the case was on the same footing as *Brannon* and that acceleration was appropriate as the deferral of the disclaiming beneficiary's interest was only to be upheld until the disclaiming beneficiary's interest was determined.[26]

The decision in *Brannon* was followed by the British Columbia Superior Court in the 2006 decision in *Re Creighton*. The court summarized the factors which should be considered in determining whether to infer an intention on the part of the testator to avoid the operation of the doctrine of acceleration:[27]

(a) Does the trust instrument provide for any encroachment upon the capital? This is relevant to whether the testator or settlor demonstrated an intention to preserve the corpus of the trust, therefore deferring its ultimate distribution/

(b) Does the wording of the trust instrument refer to succeeding generations, demonstrating an intention to benefit those generations?

(c) Is the value of the trust property sufficiently large so as to infer that the testator or settlor had concerns for remoter issue beyond providing for the immediate needs of the named beneficiaries? and

(d) Is there a provision for premature vesting in order to protect against the rule against perpetuities?

Both solicitors who draft trust instruments and barristers who litigate the issues arising from them would be well advised to consider the factors identified in *Re Creighton* when providing advice or considering their litigation strategy.

As a final note, it is important to be aware of the interplay between the doctrine of acceleration and class gifts. The historical cases stand for the proposition that the "application of the particular class

---

[26] *Ibid.* at para. 24

[27] *Re Creighton Estate*, [2006] B.C.W.L.D. 4282, 2006 CarswellBC 1060 (B.C.S.C.) at para. 15.

closing rule under the rule of convenience is also accelerated". However, this principle was dependant upon considerations such as whether the gift was vested from the testator's death and what the testamentary document said. The more recent developments in the case law appear to suggest that, again, it is the testator's intention that will be the overriding consideration whether or not the closing of the class is also accelerated.[28]

Recent Developments in the Law of Acceleration

In the 2010 decision in *Clarke v. Di Bella*, the British Columbia Superior Court dismissed the Public Guardian and Trustee's argument that the presumption of acceleration would extinguish future contingent gifts and therefore should not be applied.[29] The beneficiary in this case renounced her interest in a testamentary trust which had been created by her aunt and which trust had a gift over to her children and, upon their death, their issue. The beneficiary intended that the effect of her renunciation would be to immediately vest her children's interest, absolutely, and she argued that there was nothing in the testatrix's Will to rebut the presumption of acceleration. The court, referring to the decisions in both *Brannon* and *McGavin*, supra, upheld the principle that it is the intention of the testator which determines whether subsequent interests are accelerated.[30] The court went on to articulate the following four principles which it considered itself bound to apply with respect to the doctrine of acceleration:[31]

(a) acceleration is presumed unless there is an indication to the contrary;

(b) in assessing whether there is an intention to the contrary, the court must look at both the instrument and the surrounding circumstances;

(c) the instrument must be examined in its entirety, and clauses must not be examined in isolation; and

(d) the intentions must be viewed, as nearly as is possible, from what would be the views of the [Testator], applying an objective standard.

---

[28] See *Brannon*, *McGavin* and *Morrow*, supra notes 19 and 24.
[29] *Clark v. Di Bella*, [2010] B.C.W.L.D. 4133, 56 E.T.R. (3d) 117, 2010 CarswellBC 888 (B.C.S.C.).
[30] *Ibid.* at para. 13.
[31] *Ibid.* at para. 14

The court considered the fact that both the *Brannon* and *McGavin* cases included a "remarriage" clause, which gave weight to the argument that the testator did not intend to avoid or restrict the doctrine of acceleration. The court in *Clark v. DiBella* stated that the presence or absence of such a clause is only one piece of information for consideration; there are many factors which should be considered in the determination of whether the presumption of acceleration has been rebutted.[32]

It is clear from *Brannon*, *McGavin* and *Clark v. DiBella* that each case will turn on its own unique facts.

VARIATION AND RECTIFICATION OF TRUSTS AND WILLS

Changes to a testamentary document can also be made by way of variation or rectification. In these instances, the court is asked to approve a deviation from the testator's expressed intention, as set out in the written document, where the court is satisfied that the intention of the testator will be better achieved if the change or variation is permitted.

Varying a Trust

A trustee has no authority to vary a trust document unless that power is expressly granted by the trustee. The trustee is required to carry out his or her obligations with a view to the express provisions of the trust and in accordance with the *Trustee Act*, R.S.O. 1990, c. T.23 (the "*Trustee Act*"). The *Trustee Act* provides no relief or special power to a trustee. Specifically, section 68 of the *Trustee Act* provides as follows:

> 68. Nothing in this Act authorizes a trustee to do anything that the trustee is in express terms forbidden to do, or to omit to do anything that the trustee is in express terms directed to do by the instrument creating the trust.[33]

Notwithstanding the above, if the trust has been drawn broadly enough, the trustee may be granted the power to encroach upon the capital of the trust or resettle the trust as they see fit.[34] Additionally, an application under Rule 14.05(3) of the Ontario *Rules of Civil Procedure* may be made by a trustee pursuant to s. 60 of the *Trustee Act*, which provides as follows:[35]

---

[32] *Ibid*. at para.17.
[33] *Trustee Act*, R.S.O. R.S.O. 1990, c. T.23, s.68.
[34] Brian A. Schnurr, *Estate Litigation, Second Edition, Volume 2*, Toronto: Carswell, 1994, at p.15-2 ("Schnurr").
[35] *Trustee Act*, supra note 33, s.60.

> 60. (1) A trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the court on any question respecting the management or administration of the trust property or the assets of a ward or a testator or intestate.

An application under s. 60 will allow a trustee to request the opinion, advice and direction of the court with respect to the management and administration of the trust. In Ontario however, this section is still restrictive to trustees as it does not contemplate the request by a trustee for an enlargement of his or her administrative and management powers.[36]

Although a trustee may have limited authority to vary a trust, the beneficiaries of the trust have a greater ability to vary or terminate the trust. A variation can be achieved by a number of means, some of which require court approval while others require only the consent of the interested parties. In essence, varying a trust can be akin to the beneficiaries of the trust accelerating their gift at their direction.

Although the courts retain the inherent jurisdiction to aid in the preservation of a trust and to support the administration of the trust, this power is rarely invoked.[37] The two most common methods of varying a trust are the application of the rule in *Saunders v. Vautier*, or by way of an application to the court pursuant to provincial variation of trust legislation.

1. The Rule in *Saunders v. Vautier*[38]

The leading case with respect to the variation of a trusts is *Saunders v. Vautier*, a decision affirmed by the English Chancery Court wherein the Court held that a trust can be varied or wholly collapsed if the beneficiary or beneficiaries of the trust can demonstrate that they are all in agreement to vary or terminate the trust, and further that they are all (a) *sui juris* (i.e. adults of full mental capacity) and (b) absolutely entitled to the trust property, meaning that all beneficiaries are ascertained and together their interests account for all interests in the trust property.[39]

---

[36] Schnurr, supra note 34, at p.15-3.
[37] Ibid.
[38] Carmen Theriault, *Widdifield on Executors and Trustees, Sixth Edition*, Toronto: Carswell, 2002, at p. 16-1 ("Widdifield"); *Saunders v. Vautier* (1841), 4 Beav. 115, 49 E.R. 282 (Eng. Rolls Ct.), affirmed (1841), 1 Cr. & Ph. 240 (Eng. Ch. Div.), as cited in Widdifield; Schnurr, supra note 34, at p.15-2.
[39] Ibid.

The rule in *Saunders v. Vautier* was recently affirmed by the Supreme Court of Canada in *Buschau v. Rogers Communications Inc.*, in which the court succinctly articulated the rule as follows:[40]

> 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.

In Ontario, if this two part test can be met, the beneficiary or beneficiaries of the trust will not require court approval to vary the trust. This is true even if the variation will result in a departure from the settlor's original intentions.

However, as many trusts provide a benefit to minor or unborn beneficiaries, it is often difficult to obtain the consent of all the interested parties to the variation and apply the rule in *Saunders v. Vautier*. Accordingly, resort may be had to provincial legislation.

2. The Ontario *Variation of Trusts Act*

With the exception of Quebec and Newfoundland, all Canadian provinces have enacted legislation which permits the court to approve a variation of a trust, thereby extending the scope of the common law rule provided in *Saunders v. Vautier*. In Ontario, this power is granted to the courts under the *Variation of Trusts Act*, R.S.O. 1990, c. V.1 (the "*Variation of Trusts Act*"), which provides as follows:[41]

> Jurisdiction of courts to vary trusts
>
> 1.(1) Where any property is held on trusts arising under any will, settlement or other disposition, the Superior Court of Justice may, if it thinks fit, by order approve on behalf of,
>
> > (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting;
> >
> > (b) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons;

---

[40] *Buschau v. Rogers Communications Inc.,* [2006] 1 S.C.R. 973 (S.C.C.) at para. 21, as cited in Widdifield. In this case the beneficiaries of a pension plan attempted to vary the plan and the court ultimately found that the rule did not apply.

[41] *Variation of Trusts Act*, R.S. O. 1990, c. V.1.

(c) any person unborn; or

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

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

Benefit

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

In essence, the *Variation of Trusts Act* allows the adult capable and consenting beneficiaries of a trust to apply to the court to approve the variation on behalf of beneficiaries or potential beneficiaries who cannot provide their own consent.

The Role of the Court

Section 1 of the *Variation of Trusts Act* sets out four categories of persons for whom the court can approve the variation of a trust. The court cannot approve a variation on behalf of adult capable beneficiaries unless they fall within one of the following enumerated categories:

(a) Persons with an interest in the trust who cannot consent by reason of infancy or other incapacity;

(b) Beneficiaries whose interests are unascertainable;

(c) Unborn persons; and

(d) Persons with an interest that arises on the determination of an existing interest which has not yet failed or been determined.[42]

[42] See the recent decision of the Ontario Superior Court in *Kidd v. Canada Life Assurance Co.*,(2010) 82 C.C.P.B. 42, 2010 CarswellOnt 911, 2010 C.E.B. & P.G.R. 8379, 54 E.T.R. (3d) 225, 83 C.C.L.I. (4th) 136, 2010 ONSC 1097 (Ont. S.C.J.) with respect to the extension of s.1(1)(b) of the *Variation of Trusts Act* to the spouses of beneficiaries of a pension plan. A synopsis of this case is outside the scope of this paper.

In the leading Ontario case of *Re Irving*, the court listed the following three criteria which should be considered when determining if an application for variation should be approved:[43]

(a) Whether the proposed variation retains the basic intention of the testator/settlor of the trust;

(b) Whether the proposed variation benefits all persons on whose behalf the court is being asked to provide consent; and

(c) Whether the benefit to the class of persons on whose behalf the court is being asked to consent is such that "a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept".

The above-noted test was affirmed by the Ontario Court of Appeal in the 1990 decision in *Finnell v. Schumacher Estate*.[44]

The Intention of the settlor or testator

Justice Pennell in *Re Irving*, supra, after reviewing several English authorities, noted that the intention of the settlor in considering a variation to a trust is of significant importance in Ontario:[45]

> The right of a testator to deal with his own property as he sees fit is a concept of so long standing and so deeply entrenched in our law, that it can neither be ignored nor flouted arbitrarily. It can never be pretended that the Court has the power to make a new will in the guise of approving an arrangement under the *Variation of Trusts Act*.

However, in the 1990 decision of *Lafortune v. Lafortune Estate*, Justice Sutherland of the Ontario Superior Court of Justice, in response to the trustees' argument that the proposed arrangement did not preserve the substratum of the trust and therefore could not be considered a variation, stated that the "language of s.1 of the Act includes no reference to the intention of the testator".[46] Justice Sutherland held that the emphasis of the court should be on "acting judicially" and that the court in *Re Irving* had

---

[43] *Irving, Re* (1975) 11 O.R. (2d) 443 (H.C.), 1975 CarswellOnt 581 at para. 24.
[44] *Finnell v. Schumacher Estate*, (1990) 37 E.T.R. 170, 38 O.A.C. 258, 74 O.R. (2d) 583, 1990 CarswellOnt 479 at paras. 16. and 18
[45] *Ibid.*, at para. 14
[46] *Lafortune v. Lafortune Estate*, (1990) 40 E.T.R. 299, 1990 CarswellOnt 507 (Ont. S.C.J.).at paras. 30, 31 and 69.

placed too much weight on the testator's intention.[47] With respect to the argument that the substratum of the trust should be maintained, Justice Sutherland again held that *Re Irving* was too restrictive in holding that the spirit of the *Variation of Trusts Act* was to preserve the trust as much as possible.[48]

Although no consensus has emerged in the academic texts or jurisprudence as to the importance of the settlor/testator's intention in variation applications, taken together, it is clear that this intention cannot be ignored but the purpose of the legislation places more significance on the benefit to the class of beneficiaries for whom the court is being asked to consent.[49]

The Benefit

Section 1(2) of the *Variation of Trusts Act* requires that the proposed variation benefit those on whose behalf the court is being asked to approve the arrangement. The test to be met is that of "a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept".[50] A "benefit" can be economic or non-economic and the following things have been held to constitute a suitable benefit for the purpose of this section: tax savings, an increased flexibility for the trustee to administer the trust, and various social or family benefits.[51] The leading Ontario case which considers the requirement for a "benefit" is *Finnell*, supra, which confirms the proposition that the overriding consideration for the court is the benefit to those on whose behalf the court will approve the arrangement. The proposed arrangement provides a benefit for every member of the relevant class of persons.[52]

The Doctrine of Acceleration versus Variation of a Trust

In *McGavin v. National Trust Co.*, supra, the court considered the interplay between the doctrine of acceleration and variation of trusts legislation and, in particular, whether disclaiming an interest in a trust was akin to a variation. [53] In this case, the court held that the disclaimer did not amount to a variation of a trust under the provincial variation legislation since (a) the petitioners were not applying

---

[47] *Ibid.* at paras. 71 and 82.
[48] *Ibid*. at para. 86
[49] *Finnel v. Schumacher Estate*, supra note 43, at para.19.
[50] *Supra*, note 42 at para. 24.
[51] With respect to an analysis of the law on "benefits", see B. R. Dietrich, "*Variation of Trusts – An Update*", September 18, 2006, Ontario Bar Association, Institute of Continuing Legal Education, Toronto: Ontario Bar Association.
[52] Supra, note 43 at para. 28.
[53] *McGavin v. National Trust Co*., supra note 24, at paras.26 and 27.

for the court's approval of an arrangement under the Act and (b) the terms of the trust were not being amended.[54]

In contrast, however, the 2003 Saskatchewan decision in *Re Kist* provides an example of the common law doctrine giving way to the statutory regime. In that case, the Public Guardian and Trustee successfully argued that an acceleration following the disclaimer of the life interest was contrary to the variation of trust legislation and would result in a detriment being suffered by the testator's grandchildren.[55]

The Ontario case of *Genova v. Giroday*, supra followed the decision in *Re Kist*. It was the court's position that, in order to effect a change to the testamentary trust, the son, who had released his rights and brought an application to have the trust wound up, should have properly brought an application pursuant to the *Variation of Trusts Act*.[56] The court further held that the effect of the variation of trust legislation may result in a rebuttal of the principle of acceleration in circumstances such as these where the testator's intention is clear.[57]

Procedure for Varying a Trust under the Variation Act

The practice in Ontario to vary a trust pursuant to the *Variation of Trusts Act* is to bring an Application before a judge of the Superior Court. The consenting parties will normally execute a Deed of Arrangement (the "Deed") which sets out specifically how the language of the trust instrument is to be changed, including additions, deletions and substitutions in the text of the instrument. The Deed is typically negotiated in advance of the Application with [58] either or both of the Children's Lawyer and the Public Guardian and Trustee, as necessary, whose role is to consider the benefit of the proposed variation to minor, incapable, unborn and unascertained beneficiaries. In Toronto, an Application to vary a trust is brought on the Estates List. It is unnecessary to review the procedure in detail in this paper as there are many excellent texts and resources devoted to this subject:[59]

---

[54] *Ibid.* at para. 36.
[55] *Re Kist*, [1993] 8 W.W.R. 107, 114 Sask. R. 53, 1993 CarswellSask 354 at paras. 9 and 27.
[56] *Genova v. Giroday*, supra note 12, at para. 8.
[57] *Ibid.* at para. 11 with reference to variation of trust legislation in various provinces.
[58] The variation itself is generally introduced in the Deed of Arrangement by including the following language: "Subject to the approval of this Deed of Arrangement by a Judge of the Superior Court of Justice on behalf of (all named incapacitated beneficiaries) the parties hereto hereby vary and amend the terms of the said [will or trust] as follows:". Schnurr, at p.15-11.
[59] Schnurr, supra note 34, at chapter 15.

Variation of Charitable Trusts

Section 1 of the *Variation of Trusts Act* does not include corporations or charitable organizations as a category of persons for which the court can approve a variation to a trust. However, the court is still able to assist with a variation of a charitable trust.[60]

The Ontario case of *Re Robinson* suggests that the court can use its inherent jurisdiction to vary a trust for charitable purposes and, moreover, that the court's inherent jurisdiction is broader in the context of charitable bequests.[61] In this case, the testator left a sum of money to a municipality on the condition that it be used for a cemetery and that the graves and markers never be moved. After the cemetery land was expropriated, the residual beneficiaries applied to the court to have the remaining funds paid to them. The court held that the bequest was charitable and that the court could interpret the trust in such a manner as to give it effect.[62]

In the 2003 decision of the Ontario Superior Court in *Re Stillman Estate*, an Application was made by several charitable beneficiaries under a Will, to permit the trustee to depart from the terms of the Will to create a trust under which the income from the residual trust would be distributed to the charitable beneficiaries and to allow the trustee to encroach on the capital of the trust.[63] The court confirmed that it has "inherent jurisdiction in matters relating to charities", and proceeded to make an order pursuant to the doctrine of *cy-près*, even though "such a variation may involve a departure from the intentions of the testatrix and may override her express directions in the Will".[64] Caution is warranted, however, as the extent to which this decision could be applied to a strict variation of a charitable trust by the court, absent the opportunity to apply *cy-près* or characterize the variation as merely administrative, is uncertain.

Some authors have suggested that the exclusion of charitable organizations from the *Variation of Trusts Act* should be interpreted to mean that the courts have no jurisdiction to vary a charitable trust.[65] Notwithstanding this, section 13 of the *Charities Accounting Act*, R.S.O. 1990, c. C.10, may provide

---

[60] The trust variation statutes of Manitoba and Alberta deal specifically with the variation of trusts affecting charitable purposes and institutions. See Widdifield, supra note 38, at p.16-4.
[61] *Robinson, Re* (1976), 15 O.R. (2d) 286 (Ont. H.C.), 1976 CarswellOnt 443.
[62] *Ibid*. at paras. 9 and 14.
[63] *Stillman Estate, Re* (2003) 5 E.T.R. (3d) 260, 2003 CarswellOnt 5329.
[64] *Ibid.* at paras. 3, 18 and 27.
[65] Willson A. McTavish and Ronald R. Anger. *Variation of Trusts: The Official Guardian's View*. (1989), 9 E. & T.J. 132 at p.147, as cited in Widdifield at p.16-4.

sufficient authority to vary a charitable trust upon obtaining the consent of the Public Guardian and Trustee as well as the consent of every other person who would have been required to be served to obtain a court order or judgment for a variation application.[66]

The Act of Rectification

Rectification is an equitable remedy by which the court can correct a mistake in the language of a document, such as a Will, in order to give effect to the true intentions of the maker of that document. When dealing with a Will, rectification may be carried out in circumstances where the testamentary document fails to substantively achieve the testator's intention.[67]

Rectification of trusts is seen less frequently in jurisprudence than rectification of Wills. In *Taylor v. Montgomery*, the British Columbia Court of Appeal allowed the rectification of a testamentary trust. The testator's Will attempted to create a spousal trust but failed to provide for the disposition of income during the spouse's lifetime.[68] The trial judge added words to the testator's Will which, in effect, provided for the trust property to be divided among the testator's children upon the spouse's death.[69] In considering the testator's Will as a whole, the court of appeal upheld the trial judge's decision that the testator intended to benefit his children with the trust property upon his wife's death and his wife's appeal to have the fund vested in her absolutely was dismissed.[70]

Recent Developments in the Law of Rectification

The court's power to rectify includes the power to add and delete words and punctuation in a testamentary document in order to give effect to the testator's intentions.

In *Binkley Estate v. Lang*, Justice Harris rectified a Will after determining that a typographical error had occurred in documenting the testator's instruction.[71] The court held that the testatrix, a capable and intelligent woman, had intended to make three legacies of $2,500 each. Her solicitor inadvertently recorded each legacy as $25,000 when the testatrix made minor changes to her Will the year before her

---

[66] Schnurr, supra note 34 at p.15-4.
[67] *Binkley Estate v. Lang* [2009] 50 E.T.R. (3d) 44 at para. 14. T.G. Youdan, Case Comment: Re Rapp Estate (1992) 42 E.T.R. 229
[68] *Taylor v. Montgomery*, (1990) 39 E.T.R. 49, 1990 CarswellBC 554.
[69] Ibid. at para. 6.
[70] Ibid. at para. 15.
[71] *Binkley Estate v. Lang*, supra noe 67.

death.[72] In ordering that the will be changed to reflect the lesser amount for the legacies, the court noted that:[73]

> Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct... [and] [t]he court's task in a rectification case is corrective, not speculative, and is utilized with abundant caution.[Emphasis added]

In *Balaz Estate v. Balaz*, the court was asked to rectify the testatrix's secondary Will and in particular to delete the clauses of that Will that granted the Estate Trustees the power to make loans to beneficiaries, to invest in real property or to incorporate one or more corporations.[74] It was argued that these powers could be interpreted by the Canada Revenue Agency as tainting the spousal trust which the testatrix intended to confer upon her husband by the secondary Will.[75] The court accepted the evidence of the lawyer who drafted the secondary Will that he was instructed to create a trust for the lifetime of the testatrix's husband and that subject powers were included inadvertently and without the testatrix's knowledge or approval. The court rectified the secondary Will by deleting the offending clauses thereby giving effect to the testatrix's testamentary wishes.[76]

In the 2009 decision of the Ontario Superior Court in *Lipson v. Lipson*, the court reviewed the jurisprudence which gives rise to the court's power to rectify Wills by both adding or deleting words. The court noted that, before a court can exercise its discretion to correct an error in a Will, it must be satisfied as follows:[77]

(a) that upon a reading of the Will as a whole, it is clear on its face that a mistake has occurred in the drafting of the Will;

(b) that the Will does not accurately or completely express the testator's intentions, as determined from an examination of the Will as a whole and in light of surrounding circumstances;

---

[72] *Ibid*. at para. 33.
[73] *Ibid*. at para.14.
[74] *Balaz Estate v. Balaz* [2009] O.J. No. 1573 (S.C.J.), 2009 CarswellOnt 2007 at para. 1.
[75] *Ibid.,* at para. 5.
[76] *Ibid*. at paras. 11 to 13.
[77] *Lipson v. Lipson* [2009] 52 E.T.R. (3d) 44 at para. 42.

(c) that the testator's intentions must be revealed so strongly from the words of the Will that no other contrary intention can be supposed; and

(d) that the proposed correction must give effect to the testator's intentions.

In the Lipson case, the testator had intended to execute two Wills: one which dealt with all of his property except the shares he held in certain private corporations and a second to deal exclusively with those shares. The testator, having not read either Will before executing them, and without the benefit of speaking to the solicitor who prepared both draft Wills, failed to notice that both Wills contained revocation clauses and neither dealt with the corporate shares. The court held that it was clear on the face of both Wills that a mistake had been made and therefore it exercised its discretion to rectify the documents. In this instance, the court was able to give effect to the testator's intentions by omitting certain words from the testator's secondary Will.[78]

By contrast the recent 2010 decision of the Ontario Superior Court in *Robinson Estate v. Robinson* offers an example of an unsuccessful rectification application. In this case, Justice Belobaba stated that the application for rectification brought by the deceased's long-time partner "test[ed] the limits of the court's power to rectify a will".[79] The testatrix, who at the time of her death owned property in Spain, England and Canada, executed two Wills: one in Spain to deal with her European property (the "Spanish Will"), and one in Canada to deal with her Canadian property (the "Canadian Will"). Some years later, the testatrix requested that her Canadian solicitor revise her Canadian Will. In doing so, however, the solicitor included a clause revolving all prior Wills. Having no knowledge of the addition of this routine clause to her Canadian Will, the testatrix approved and executed the revised Canadian Will.[80] Upon the testatrix's death, an application was made to the court by the Canadian solicitor for advice and directions with respect to the interpretation of the revised Canadian Will, and in particular, what meaning should be ascribed to the revocation clause.[81] In addition, an application was made by the testatrix's long-time partner (and beneficiary of her Estate) for an order rectifying the revised Canadian Will to delete the revocation clause.[82]

---

[78] *Ibid.* at paras. 71 and 73.
[79] *Robinson Estate v. Robinson*, [2010] ONSC 3484, 2010 CarswellOnt 4576, at para. 1.
[80] *Ibid.* at para. 3.
[81] *Ibid*. at para. 4.
[82] *Ibid*. at paras. 4 and 9.

In advancing his rectification application, the applicant tendered evidence that the testatrix had always intended to have two Wills and that the revocation clause in the revised Canadian Will was inserted by mistake by her solicitor.[83] The testatrix's Canadian solicitor gave evidence in support of the rectification application, albeit without any supporting documents, that he did not believe the testatrix had directed her mind to the revocation clause and therefore had not meant to revoke her Spanish Will.[84] However, the testatrix's stepdaughter opposed the application and argued that the language of the revised Canadian Will was clear and unequivocal.[85]

Justice Belobaba, while acknowledging that the affidavit evidence provided by the applicant partner could easily and correctly lead to the conclusion that the testatrix never intended to revoke her Spanish Will, held that this was not a proper case for rectification.[86] In reaching this decision, Justice Belobaba reiterated the circumstances in which Canadian courts have and will correct errors in testamentary instruments, as follows:[87]

(a) where there is an accidental slip or omission caused by a typographical or clerical error;

(b) where the instructions of the testator have been misunderstood, or

(c) where the instructions of the testator have not been carried out.

In reviewing the relevant case law, Justice Belobaba could not conclude that the case at hand was akin to "most will-rectification cases" where a solicitor failed to properly document or implement the wishes of the testator.[88] The court distinguished the case at bar from the English decision in *Wayland (Deceased), Re* (1951), [1951] 2 All E.R. 1041, [1951] W.N. 604, 95 S.J. 804 (Eng. P.D.A.), in which the testatrix's English Will contained a revocation clause which arguably revoked her Belgium Will. In contrast to *Robinson*, though, the English Will also contained express language that it was intended to deal only with the testator's property in England.[89] Similarly, the court was able to distinguish the case from that of *Phelan (Deceased), Re* (1975), [1975] 3 W.L.R. 888, [1972] Fam. 33, 115 S.J. 710 (Eng. P.D.A.) in which rectification was granted where the testator mistakenly believed that he needed to execute

---

[83] *Ibid*. at para. 6.
[84] *Ibid*. at paras. 15 and 16.
[85] *Ibid*. at para. 7.
[86] *Ibid*. at paras. 21 to 23, and 28.
[87] *Ibid*. at para. 24.
[88] *Ibid*. at para. 25.
[89] *Ibid*. at para. 34.

four separate Wills for four separate assets and all of the Wills contained a pre-printed revocation clause. Here, this anomaly was put as evidence before the court as to the testator's intention, which was found to be beyond doubt.[90]

Robinson Estate makes it clear that the court will more readily consider rectification where the evidence admitted for the purpose of determining the testator's intention is that of the solicitor who drafted the Will or made the error and who can give direct evidence of the testator's intentions, such as was the case in the decisions in *Binkley, Lipson* and *Balaz* above.[91] The court in *Robinson* held that that the testator knew and approved of the contents of the revised Canadian Will, however did not understand that the revocation clause would have the effect of revoking both the prior Canadian Will and the Spanish Will.[92] This case further stands for the proposition that Canadian courts will not use rectification to correct a testator's mistaken belief about the legal effect of the words used in a testamentary document that the testator has himself or herself reviewed and approved.[93]

There is currently no legislation, provincial or federal, which gives the court the power to rectify a Will absent solicitor error, and this may be an area for future legislative reform.[94]

CONCLUSION

While there are still several issues which remain to be adjudicated on the subject of post-mortem alterations to Wills and trusts, recent developments highlight the importance of carefully considering the consequences of disclaimer, release and surrender of a gift to ensure that the beneficiary's ultimate goal is achieved.

---

[90] *Ibid.* at para. 35.
[91] *Ibid.* at para. 26.
[92] *Ibid.* at para. 37.
[93] *Ibid.* at paras. 30 and 33.
[94] *Ibid.* at paras. 42 to 44.