

**Trust Law Question & Answer
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Follow up Notes

Students are reminded that the material found on the website is a key component to the study process. In particular, the supplementary materials (Item #8 on the list of online materials) for each chapter begin with a review of the examinable content and knowledge expectations. This guides the scope of exam questions. The questions and discussion that follow illustrate the concepts studied in the context of real scenarios and provide an example of how to approach the analysis of a scenario in an exam.

Typo in materials:

P 99 Ontario Variation of Trusts section 1.(1) (d) is missing a line break after "... failed or determined" in the 3rd line. It should read:

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;
- (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. R.S.O. 1990, c. V.1, s. 1 (1); 2006, c. 19, Sched. C, s. 1 (1).

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. R.S.O. 1990, c. V.1, s. 1 (2).

Question: Provide an example of how “d” would arise.

Consider the following:

Jane is the income beneficiary of the trust. She has a power to appoint the capital on her death to one or more of her nieces and nephews. She may do this in her Will (a limited power of appointment). If she fails to exercise the power, the capital will go to her two children. If her children predecease her, their children (grandchildren) will take their parent’s share. If Jane and her children wish to vary the trust, a court would have to approve on behalf of the nieces and nephews, as well as the unborn and minor grandchildren.

Comment on Variation and Amendments:

Question: are amendments different from variation? Can a trust be amended if, for example, the settlor is also the beneficiary as with an Alter Ego Trust.

Answer: It is not different. See Ch 7 Part III A at p 99 on the history of Variation of Trust legislation. The 2nd paragraph states “prior to the legislation there was no means for changing the trust instrument except through Saunders v Vautier or exercise of a right of revocation.”

Alter Ego Trusts will still have future beneficiaries as it is unlikely that the capital beneficiary will be the settlor’s estate. It may or may not have a power to revoke.

As noted, trusts can be drafted to include a power to amend the terms of the trust. Sometimes the power is limited to certain aspects of the trust (e.g. administration powers). Tax consequences are an important factor in both including a power, and when exercising it.

As noted, another strategy for changing a trust is to appoint some or all of the assets into a new trust. The power must be in the original trust to do this. Care is required to ensure the new trust does not go offside a variety of legal rules that might apply, and tax consequences must be considered, both when including a power in the trust, and when exercising it.

Perpetuity Rule and remoteness of vesting

Generally, for a thorough and relatively easy to read review, see Feeney’s Canadian Law of Wills 4th edition. Chapter 18 is devoted to this issue. Chapter 17 deals with postponed gifts, vesting and contingencies. Some highlights follow: [note: the text is concerned with Wills and therefore, the materials are also focussed on Wills and not other trusts. See Waters “The Law of Trusts” chapter 8 part IV for a more general review of the law.]

Para 18.4 “The [common law] rule may be stated as:

Any interest created by a will, is valid if:

- It vests at the date the will takes effect ; or
- It will vest, if at all, within 21 years of the death of the will-maker; or
- It will vest, if at all, within 21 years of some life in being at the time designated for the creation of the trust. “

Para 18.6 “The rule strikes down as void every future interest in property of any kind when the vesting of the interest may not occur within the time prescribed by the rule. “ [emphasis added]

The law also sets out when to start counting the 21 years. This includes: (see par 18.7)

- From the date of death of a testator
- From the date of death of the last life in being. The document may set out who the lives in being will be, or the default rule will refer to those with a connection to the gift. E.g. the testator, a beneficiary

It is important to be able to classify the future interest – vested, vested subject to divestment and vested in interest (with possession deferred).

When trying to determine if there is a possibility of vesting outside of the perpetuity period, there are no presumptions about for example, the childbearing years of a woman.

Examples from Feeney beginning at para. 18.10:

- (i) Gift to a living person (A) will be valid.
- (ii) Gift to the first child (B) of a living person (A) will be valid because the gift vests when B is born and A is a life in being.
- (iii) Gift to unborn child of A (B) when B is 25 will fail because A could die when B is 1 year old and the gift would not vest for 24 years (outside the period)
- (iv) Gift to the first child of A to marry will fail. A is the life in being.
Example of a possibility: A has a child (B) after the testator dies. A dies when B is 5 years old. B doesn't get married until age 30 which is 25 years after A's death (outside the period).
- (v) Class gifts will not fail if the class closing rules (not studied in this course; see ch 14 of Feeney) close the class at the death of the testator. Example: Will leaves residue to testator's grandchildren. "Grandchildren" are a class, but the class will close on the testator's death and the grandchildren alive at that time will be vested.

- (vi) If a class gift is postponed, the class may not close immediately and there is more likely to be a possibility of vesting outside of the period. Examples:
- a. \$5000 to each grandchild at age 25. The Class closing rules close the class on testator's death. Those alive at date of death will take when they are 25. Those born later are excluded.
 - b. Pay income to A for life. Then divide residue equally to all of A's grandchildren who attain the age of 25. A is a life in being. The grandchildren are all born after the testator dies. The class does not close until A dies. At A's death there are 3 grandchildren B, C and D. They are vested, but if one does not reach age 25, the entitlement changes. The people who will take are uncertain. And, it is possible that the gift will vest outside the period, so the gift to B, C and D fails.
- (vii) Limited power of appointment. If the power is limited (e.g. The life tenant A has power to appoint the residue, by A's Will, to one or more of A's children), then the perpetuity period is based on the date of death of the testator, or the date a settlement was made and the relevant lives in being. (para 18.27)
- (viii) General power of appointment. If the power is general, the rule is applied based on the when the general appointment is made. (para. 18.26-27)

Provincial legislation amends the common law rule.

- Manitoba has abolished it (but land owned in another jurisdiction will be subject to the applicable rule in that jurisdiction).
- Ontario provided for a comprehensive revision (para. 18.43 on). Legislation provides for a number of issues, including:
 - Wait and See provisions (wait to see if vests within period)
 - Provides for dealing with intermediate income
 - Introduces presumptions about infertility (can rebut with evidence)
 - Cy-pres modifications of age contingencies allowed
 - Permits splitting classes
 - Reclassifies powers of appointment
- Review your legislation for specific rules