Good Will Drafting and the ‘Rule’ in *Saunders v Vautier*

Beneficiaries busting trusts and what can be done to prevent it

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Introduction

1. Every will that provides for children will – in one way or another – deal with when and how the beneficiary receives their share. This may be at the age of 18 or at some more advanced age.

2. An issue arises when the age provided for the beneficiary to receive their share is an age beyond the age of 18 but that beneficiary wants to access the capital sooner. In many, if not all, cases the will probably gives the executor for a power of advancement.

3. The rule in *Saunders v Vautier* (as it is known) remains good law. It applies where:

   - there is a trust;
   - there is an adult beneficiary;
   - the beneficiary's interest in the trust property is vested and indefeasible; and
   - the beneficiary's interest is in the income and the capital of trust property;

4. Where these circumstances exist, the beneficiary is entitled to require the trustee to transfer the trust property to them absolutely.

5. It is critically important that all will drafters turn their mind to the application of the rule in *Saunders v Vautier*, as recent decisions in the New South Wales and Victorian Supreme Courts show.

Saunders v Vautier (1841) Cr & Ph 240; 49 ER 282

6. The facts were summarised by the court as follows:

   > *Richard Wright, by his will, gave and bequeathed to his executors and trustees thereafter named, all his the East India Stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon until Daniel Wright Vautier, the eldest son of his (the testator's) nephew, Daniel Vautier, should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns absolutely;.*

7. The deceased died in 1832 owing £ 2,000.00 of such stock (worth approximately to $AUD 550,000.00 today, depending on how you calculate it). Upon attaining the age of

21 (the age of majority at the time), Mr Vautier applied to court for an order that the trustee pay the balance out to him.

8. Lord Langdale MR held:

> *I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.*

9. A key distinction is being made here between:

- an interest in trust property that is immediate and vested but payment or transfer it is merely delayed until particular conditions are met (a vested interest); and
- an interest in trust property for which vesting relies on certain conditions being met (a contingent interest).

Adoption and Application of the 'Rule' in Australia

10. The rule has been expressly adopted approved of in Australia. It has also been refined and clarified – it is therefore insufficient to simply rely upon the statement of law in *Saunders v Vauiter*.

11. In *CPT Custodian Pty Ltd v Commissioner of State Revenue Commissioner of State Revenue v Karingal 2 Holdings Pty Ltd* [2005] HCA 53, their Honours held:

> [43] *Saunders v Vautier* is a case which has given its name to a "rule" not explicitly formulated in the case itself, either by Lord Langdale MR (at first instance) or by Lord Cottenham LC (on appeal). In Anglo-Australian law the rule has been seen to embody a "consent principle" recently identified by Mummery LJ in *Goulding v James* as follows:
>
> > "The principle recognises the rights of beneficiaries, who are *sui juris* and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

[47] There is a further consideration. The facts of the present cases do not, in any event, answer the modern formulation of the rule in *Saunders v Vautier*, stated as follows in Thomas on Powers:

> "Under the rule in *Saunders v Vautier*, an adult beneficiary (or a number of adult beneficiaries acting together) who has (or between them have) an absolute, vested and indefeasible interest in the capital and income of property may at any time require the transfer of the property to him (or them) and may terminate any accumulation."

12. Jacobs' Law of Trusts in Australia[1] set out the basis of the rule as follows:

> *It has been said that the principle upon which the rule is based is that any restriction on the enjoyment by a beneficiary who is sui juris of a vested interest is inconsistent with the nature of that interest and must be disregarded. Thus understood, the principle often will involve the denial of the intentions of the settlor or testator… .*

13. In *Beck v Henly [2014] NSWCA 201*, the New South Wales Court of Appeal considered the limitations of the rule. These were:[2]

    a. The rule cannot apply to real property[3] (though this seems to only be relevant where there are multiple beneficiaries of the trust[4]); and

    b. The rule has no application where "special circumstances" exist or there are "good grounds to the contrary"[5].

14. Courts have been careful to not define what "special circumstances" might mean. Generally, you are looking for some factor that means that a convenient and fair division is not possible.[6] Cash and shares are generally divisible in ways that a piece of art or a racehorse is not.

15. Practical considerations above aside, the rule continues to apply in Australia.

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[1] *Jacobs' Law of Trusts in Australia* (8th Edition, 2016) at 23-14.
[2] *Beck v Henly* [2014] NSWCA 201.
[3] *In Re Marshall* (1914) 1 Ch 192, at 200.
[4] The rule was applied in *Batten v Salier* [2023] NSWSC 378 and the presence of real property seems not to have been a barrier in *Falkenhagen v Perpetual Trustee Company Limited* [2017] NSWSC 580. In both instances the beneficiary was the sole beneficiary of the property and the life estate, respectively.
[5] *Re Sandeman's Will Trusts* [1937] 1 All ER 368,
[6] *Beck v Henly* [2014] NSWCA 201 at [41].

Kristic v State Trustees Ltd [2012] VSC 344

16. In *Kristic* the deceased left a will which gave a pecuniary legacy to his sons as follows:[7]

> **I GIVE** the ... sum of **TWENTY THOUSAND DOLLARS ($20,000.00)** ...to each of them my sons **MARK KRSTIC** and **NICHOLAS KRSTIC** as survive me and attain the age of 21 years severally *and absolutely*.

17. The will divided the residue in the following terms:[8]

> **I GIVE** the residue of my estate to such of them my said sons **MARK KRSTIC** and **NICHOLAS KRSTIC** as survive me and attain the age of forty (40) years and thirty-six (36) years respectively absolutely and if both then equally **PROVIDED HOWEVER** if either of my said sons should predecease me or fail to attain a vested interest *leaving a child or children who survive me* and attain the age of 35 years then such child or children will take and if more than one then equally the share which his, her or their father would have taken had he attained a vested interest. (emphasis added)

18. When the deceased died Mark and Nicholas were 24 and 20 and they had no children of their own. Both survived by 30 days.[9] The residue of his estate was worth $ 450,566.00.[10]

19. Mark and Nicholas applied to the court for a declaration that the estate had vested and they would be justified in paying the estate to themselves absolutely.

20. Counsel for Mark and Nicholas argued that since there were no grandchildren who survived the deceased the gift over in favour of Mark and Nicholas' children could never take effect. Since the deceased was survived by children, the residue would be divided in no other way than in favour of the survivor of Mark or Nicholas.

21. Further, if the gift failed because Mark and Nicholas died before attaining the age of 40 and 36, respectively, then the distribution on intestacy would be to Mark and Nicholas' respective estates.

22. McMillan J held:

> [15] The rule in *Saunders v Vautier* operates to override a testator's intention to prevent the beneficiaries from taking their shares until reaching an age beyond

[7] *Kristic v State Trustees Ltd* [2012] VSC 344 at [9].
[8] *Kristic v State Trustees Ltd* [2012] VSC 344 at [7].
[9] *Wills Act 1997* (Vic), section 39.
[10] *Kristic v State Trustees Ltd* [2012] VSC 344 at [5].

majority. The rule has no operation unless all the persons who have any present or contingent interest in the property are ascertained, *sui juris* and consent. In those circumstances, the beneficiaries may put an end to the trust by directing the trustee to transfer the interest in the estate to themselves, notwithstanding any direction to the contrary in the trust instrument.

...

[36] ... The result of applying the ordinary and usual meaning of 'survive' in the gift over provision is that, if Mark and Nicholas fail to attain the age requirements of 40 and 36 years respectively, the residue of the estate would be undisposed of and would pass on an intestacy. The only persons who can take an interest in the deceased's residuary estate are the estates of Mark and Nicholas. This means that between them Mark and Nicholas are the only persons who could possibly have an interest in the residuary estate, whether contingent or vested. Because Mark and Nicholas are the only persons who between them have an interest in the residuary estate, are *sui juris* and consent, in my view, they can require the transfer of the residuary estate and any accumulations to themselves by reason of the application of the rule in *Saunders v Vautier*.

[37] This conclusion means that the intentions of the deceased are overridden. The application of the rule in *Saunders v Vautier* necessarily competes with giving effect to a testator's intentions. This is because vesting of an estate will not be withheld where a person is entitled to it.

23. Her Honour reached similar conclusions in respect of the gift of $ 20,000.00 to Nicholas.

24. The above demonstrates that it was critical to her Honour's reasoning that Mark and Nicholas were the only persons who could ever have an interest in the estate, both were *sui juris* and both consented to the distribution.

25. The court found that the sons were had an indefeasible interest in the trust property, and could call upon the trustee to pay the estate to them absolutely.

26. *Kristic* demonstrates how important it is to look beyond the gift and to consider how the gift really works. It was critical, in this case, to ask what would happen if the gift fails.

Arnott v Kiss [2014] NSWSC 1385

27. In *Arnott*, the New South Wales Supreme Court reached a different conclusion.

28. The case was framed as an application for judicial advice under section 63 of the *Trustee Act 1925*. However, Hallen J ordered that it proceed as an application for construction, which is why Mr Kiss was named as a defendant.

29. The deceased included the following residuary gift in her will:

> 4. My Trustees shall hold the rest and residue of my estate... as follows:-
>
> To divide the rest and residue of my estate equally between my grandchildren, **DANIEL KISS**, **KARRYN KISS**, **BENJAMIN KISS** and **BRENTON KISS** who survive me and attain the age of 45 years. By way of clarification each grandchild shall take this gift as they reach their 45th birthday and need not wait for the remaining grandchildren to attain their 45th birthday.

30. The deceased was survived by her grandchildren (the plaintiffs) and her son, their father (the defendant).

31. Counsel for the plaintiffs submitted the gift had vested because:[11]

- there is no gift over clause in the Will;
- the court will normally construe a Will so as to avoid an intestacy;
- the income was not disposed of in the Will meaning it passes with the corpus;
- there is a power of advancement.

32. Counsel for the Defendants argued the gift had not vested because:[12]

- the gift in clause 4 was a class gift and no interest passes until a member of the class can be identified;
- it was a condition of being a member of the class that the beneficiary have attained the age of 45 years;
- that the gift was contingent was reinforced by the words “by way of clarification”.

33. Justice Hallen held:

[11] *Arnott v Kiss* [2014] NSWSC 1385 at [22].
[12] *Arnott v Kiss* [2014] NSWSC 1385 at [23].

[65] ... The gift is not to the named grandchildren, but the named grandchildren who shall attain 45 years of age. In other words, there is, presently, no named grandchild who completely answers the description which the deceased has given to those who are to be residuary beneficiaries, and, therefore, there is no person in whom the residuary estate has vested.

[66] Accordingly, in my view, the residuary beneficiaries presently are unable to terminate the trust in the Will and the Plaintiffs are not entitled to do so at their behest.

34. His Honour's reasoning was influenced by the fact that despite there being no gift over, an intestacy was still possible should all grandchildren die before attaining the age of 45 and their father would take the whole estate in that case. Further, there was currently no one who was eligible to call on the trustee to distribute the whole of the funds.

35. This outcome was the result of a careful exercise in construction and all construction matters must necessarily turn on their own facts. It does not mean that a similar set of circumstances may not lead to a different result.

36. In this context, it is worth noting that Justice Hallen also discussed a presumption in favour of early vesting as follows:

[41] However, unless there is, in the will, an express intention to suspend, or postpone, vesting, a gift to persons already in existence is construed to vest immediately on the testator's death. In *Duffield v Duffield* (1829) 3 Bligh (NS) 260; 4 ER 1334, Lord Eldon wrote:

> "The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to the vesting estates by the death of their parents, before they are of that age, children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.
>
> In consideration of these circumstances, the judges from the earliest times were always inclined to decide that estates devised were vested; and it has long been an established rule for the guidance of the Courts of

Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession."

[42] In other words, where there is a doubt about the time when a gift shall vest, there is a presumption that the testator intended the gift to be vested, subject to being divested, rather than it remain in suspense: *Hickling v Fair* [1899] AC 15, at 27. <u>This is said to be a presumption in favour of early vesting</u>.

Perpetual Trustee Company (Canberra) Limited v R. Rasker; V. Rasker and North Rocks Deaf and Blind Society for Children [1986] ACTSC 97

37. Betty Jean Lee, the deceased, died and was survived by her son, Rodney Rasker.

38. The Deceased's will relevantly provided as follows:

4. I DIRECT that my residence "Rosehill" be retained for a period of ten (10) years from my death...

...

6. AT THE EXPIRATION OF THE PERIOD OF TEN (10) YEARS my residence shall pass to my said son absolutely <u>provided he is living at that date</u> or in the event of him not surviving such period as to one half share to his wife VIKKI RASKER ... and the other one half share to the children of the marriage ... living at <u>that date</u> in equal shares as tenants in common and if there are no children of the said marriage such one half share shall pass to VIKKI RASKER ....

7. AS TO THE REST AND RESIDUE OF MY ESTATE my son provided he survives me for thirty (30) days shall be entitled to the net income therefrom for a period of ten (10) years at which time the capital shall pass to him and <u>in the event of him failing to survive either period</u> the provisions as to the beneficiaries contained in clause 6 hereof (in the event of the death of my said son) shall apply.

8. IN THE EVENT OF THE FAILURE OF ANY OF THE FOREGOING PROVISIONS of my said Will as to beneficiaries that part of my estate which so fails shall pass to the North Rocks Deaf & Blind Society for Children...

39. For the same reasons as in *Arnott*, Rasker wanted the money and wanted out of the trust. He applied to have the trust collapsed in his favour.

40. Miles J held at 6:

> [I]t appears to me that the better view is that the rule may be avoided either by the creation of an intervening discretionary trust or by provision for gift over in the event of a contingency taking place. Such contingency may include the death of the donee or legatee.

41. His Honour went on to say:

> If Clause 4 of the will stood on its own, I should have little hesitation in ruling that the beneficiary was immediately entitled to the whole of the testator's interest in the residence "Rosehill". Similarly, if Clause 7 made no provision for the residue to pass to the surviving spouse and surviving children (as yet unborn) if any, in the event of the son failing to survive the period of ten years, the son would be immediately entitled to the residue.
>
> ...
>
> I think that the will as a whole confers a contingent interest on the charitable organization named in Clause 8.

42. His Honour also went on to discuss whether the rights of the unborn children should be considered and if their views were to be heard, who should represent them.

Falkenhagen v Perpetual Trustee Company Limited [2017] NSWSC 580

43. The application related to a trust created by deed dated 1 April 1969.

44. The trust provided accommodation to the Plaintiff by way of a life estate and accommodation for the plaintiff with ancillary rights for his wife and his children for their respective lifetimes.

45. The Plaintiff was 77 when the proceedings were commenced. His wife was 72. They had no children and no plans to have children. The Plaintiff went on oath disclaiming any intention to remarry or have children.

46. Lindsay J held:

> [3] The plaintiff cannot avail himself of the rule in *Saunders v Vautier*, even though the remaindermen presently, presumptively known (his wife, prospectively his widow, and more remote relatives) have all purportedly assigned their respective interests in the trust to him, because there remains a theoretical possibility that he might acquire a child (by natural means or adoption), a new wife or more remote relatives whose interests need to be taken into account.

47. Lindsay J ultimately made orders under rule 54.3 of the UCPRs, which allowed the matter to be resolved in a different manner, including undertakings if a beneficiary does arise in the future.

Batten v Salier [2023] NSWSC 378

48. This represents the conclusion of a bit of a saga.

49. The proceedings started with the validity of the informal will ([2013] NSWSC 1895), then moved on to a construction suit ([2015] NSWSC 853) and informal will matters are want to do, and culminates in this vesting application ([2023] NSWSC 378).

50. The words in the will read:

> After my death the rent from 19 must be put aside for him at 18 years [of age] to take what is in the bank both for his studies and whatever else he needs. Roby Angius will look after Shon's interest at 25 years [of age] the Flat will be his

51. The construction suit resulted in the following relevant finding:

> The property at 19/8 Allen Street, Waterloo is to be held by the first defendant on trust for the fourth defendant until the fourth defendant turns 25, at which time the property is to be transferred to him. The income derived from the property is to be accumulated until the fourth defendant turns 18, at which time amount accumulated and future income is to be paid to the fourth defendant as and when it is earned.

52. Lindsay J noted:

   a. The plaintiff was over 18;

   b. He was absolutely entitled to all income, including accrued income in the property;

   c. There is no condition requiring he attain the age of 25;

d. The only persons potentially affected by the plaintiff not attaining the age of 25 entered a submitting appearance.

53. The orders were made in the following terms:

1. DECLARE that the plaintiff is, and has been since he turned 18 years of age in April 2022, entitled to require the termination of the trust created by the will of the deceased (undated, but stated to be dated 27 April 2007 in the grant of letters of administration with the will annexed in solemn form issued on 1 April 2014) in respect of the gift to him of the property at 19 Allen Street, Waterloo, NSW, being lot 19 in strata plan 84149 ("the Property") and the income thereof ("the Trust"), and to call for the transfer to him of the Property, the income (including accrued income), and such, if any, other asset of the Trust.
2. ORDER, pursuant to rule 54.3 of the Uniform Civil Procedure Rules 2005 NSW, that the first defendant transfer the Property, income and any other asset of the trust to the plaintiff.
3. NOTE that no orders are made as to the costs of the proceedings, to the intent that each party pay or bear his own costs of the proceedings, without prejudice to such (if any) entitlement the first defendant may have to recourse to assets of the estate of the deceased.
4. RESERVE to any party liberty to apply in these proceedings for consequential or other relief for the purpose of implementation of these orders.
5. ORDER that these orders be entered forthwith.

<u>Summary of the Cases</u>

54. The decisions in both *Kristic* and *Arnott* involved detailed consideration of who was ultimately entitled to the proceeds of trust.

55. This exploration involves consideration of the drafting of the gift and, critically, the factual matrix surrounding the estate.

56. In *Kristic* the drafting of the gift combined with the failure of the substitutional gift to the grandchildren, the only people who could benefit from the testate or intestate estates were Mark and Nicholas.

57. In *Batten*, the absolute interest in the income and capital and the submission by the only party potentially affected to the orders of the court resulted in the orders being made.

58. In *Arnott*, on the other hand, the contingency was expressed more forcefully and the grandchildren had no direct interest in the intestate estate.

59. In *Rasker*, the thorough gifts over and various contingencies (including providing for what happens if *Rasker* did not survive the 10 year period) prevented the application of the rule.

60. In *Falkhagen*, the possibility that beneficiaries may arise in the future meant that the court was unable to apply the rule. However, alternative approaches were available that had much the same effect.

Application to Good Will Drafting

61. It is no coincidence that most of the cases relating to the rule in *Saunders v Vautier* relate to wills. They must be the most common trust documents in existence, all contain trust property and create interests in the trust property.

62. If a will is drafted without clearly expressing a gift to be contingent on the child attaining a particular age, the result may be, depending on the jurisdiction, that the gift will vest in the minor provided they survive the deceased by 30 days[13] and, in the case of a gift of residue, upon the determination of the residue[14] of the deceased's estate.

63. Of course, the minor is not *sui juris* and thus cannot call upon the trustee to pay their vested interest to them until they attain the age of 18. This has two potential problems. Firstly, the beneficiary can apply to have the trust property transferred to them at 18, and not at the later age specified by the testator. Secondly, there is a critical problem if the beneficiary dies in which case the vested interest would form part of the child's estate and be distributed to the deceased's next of kin on intestacy.

Example

64. To take a simple and unfortunately common example, consider an absolute gift of the estate to an only child, Annie, in a family where Annie's father is estranged. Jill Smith dies suddenly and unexpectedly leaving a valid homemade will which, relevantly, reads:

    4. I give the residue of my estate to my daughter Annie Smith provided she survives me but if she dies before me then to give it to my sister Sally Smith.

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[13] *Wills Act 1969*, section 31C and *Administration and Probate Act 1929*, section 46.
[14] Note that a residuary beneficiary has no interest in the estate beyond the right to due administration until such time as the residue can be determined: *Commissioner of Stamp Duties v Livingstone* (1964) 112 CLR 12.

65. Annie and Sally both survived Jill by thirty days.

66. The gift to Annie has vested because the only condition of the gift if that Annie survives Jill and there is no requirement that she attain a particular age.

67. If Annie were to pass away prior to the age of eighteen she would die without a will and her estate would be administered on the basis of an intestacy with the end result being that Annie's father will receive her whole estate. This result may be repugnant to Annie's and Jill's wishes.

68. The fact that there is a gift over to Sally is of no assistance to Sally because the gift is only contingent on Annie surviving the deceased – a condition has been met by Annie. The estate is now held on trust for Annie according to the trusts in the will until she attains the age of eighteen.

69. Practitioners should also note that an intestacy with no partner in New South Wales would have the same result and result in a minor having assets in their estate.[15]

70. Annie must leave a will if she wants to pass what she received from her mother's estate to anyone other than her father. However, she does not have the power do this herself until she attains the age of eighteen.[16]

71. Annie's only options are to apply to the court for permission to make a will[17], or for someone to apply to the court for a statutory will[18] on her behalf.

72. This procedure applies to any person who lacks testamentary capacity and not just a child. Unfortunately, it can also be an expensive process and discussion of the law and procedure in this area will have to wait for another day. It is enough for present purposes that practitioners be aware that a minor can have a will made for them.

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[15] *Succession Act 2006* (NSW), section 138.
[16] *Wills Act 1969*, section 8.
[17] *Wills Act 1969*, section 8A.
[18] See *Wills Act 1969*, Part 3A.

Application to Will Drafting Practice

73. Practitioners should consider asking the following questions when considering a will:

- Is the same person or class of persons entitled to the capital and income?
- Is the gift vested or contingent?
- If it is contingent, what are the contingencies? e.g. reaching a certain age.
- If the gift appears to be vested, are there other words in the will which could be said to express a contrary intention?
- Who would benefit on intestacy?

74. When drafting a Will, practitioners should take great care to ensure the gift is contingent on the beneficiary attaining a particular age.

75. To avoid all doubt, practitioners could consider including an interpretive clause in their will precedents stating that gifts requiring a person to attain a particular age are contingent on them attaining that age and do not vest before then.

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