

**James Kessler, *Drafting Trusts and Will Trusts: A Modern Approach*, 6th ed. (London: Sweet & Maxwell, 2002). Pp. iv, 470 plus CD-ROM.**

**James Kessler & Fiona Hunter, *Drafting Trusts and Will Trusts in Canada* (Markham: LexisNexis Butterworths, 2003). Pp. xi, 380 plus CD-ROM.**

*Drafting Trusts and Will Trusts* is an established guide for practitioners. In the preface to the sixth edition, James Kessler mentions his interest in co-authoring a series of spin-off trust drafting books adapted to other trust jurisdictions. The Canadian version of the text is one example; James Kessler and Sheena Grattan have written *Drafting Trusts and Will Trusts in Northern Ireland*;<sup>1</sup> and forthcoming is *Drafting Scottish Trusts and Will Trusts* by James Kessler *et al.*<sup>2</sup>

Both of these books include precedents, in print and on CD-ROM, with suitable warnings in the final chapter against the careless use of such resources. The books are generally similar to one another and it seems clear that the “parent” English work was the template from which the other was written. This makes sense, given that the trust law of common law Canada is very close to that of England and Wales. The Canadian text, however, includes many references to Canadian texts and cases, and substantial original text where necessary. This is most noticeably the case in relation to perpetuities, and in relation to income-tax-driven structures such as those which the *Income Tax Act* calls “*alter ego* trusts,” “joint spousal trusts,” and “common-law partner trusts,”<sup>3</sup> each of which rightly gets its own treatment in the Canadian book. Conversely, the Canadian book lacks the chapters in the English text on “interest in possession trusts” and “accumulation and maintenance trusts”; trusts fitting those labels can certainly be created in Canada, but in England the labels refer to taxation consequences. These differences confirm what every trust teacher knows but most prefer to ignore: that trust drafting is enormously influenced by taxation law.

These books take a decidedly progressive approach to drafting. The first three chapters, substantially the same in each book, are called “First Principles”, “Style”, and “Principles of Interpreting Trust Documents”. Their aim is to convince drafters (and perhaps judges too) to abandon “the old intellectual baggage”<sup>4</sup> surrounding the construction of legal documents and, it would seem to follow, their drafting. The discussion here is humorous and sophisticated.

The books are very much in favour of trustee discretion, and there has indeed been an evolution in this direction over the last century. Nineteenth-century trusts left

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<sup>1</sup> James Kessler & Sheena Grattan, *Drafting Trusts and Will Trusts in Northern Ireland* (Dublin: LexisNexis UK, 2004).

<sup>2</sup> *Ibid.*, *Drafting Scottish Trusts and Will Trusts* (West Sussex: Tottel) [forthcoming in 2005].

<sup>3</sup> R.S.C. 1985, c. 1 (5th Supp.), ss. 248(1), 104(4) [*Income Tax Act*].

<sup>4</sup> Citing Lord Hoffmann in *Investors' Compensation Scheme v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 at 912.

relatively little to the trustees' discretion, except perhaps the choice of investments. Beneficial interests were usually fixed. There might have been a power of appointment in relation to capital at the end of the trust, but even this was likely to be held by one of the beneficiaries. Experience since then has shown that it is extremely difficult to foresee the problems that can arise in the life of a trust, such as changes in the law, or severe misfortune striking one of the beneficiaries. The solution has been a widening of trustee discretion. So while the starting point of a trust may be that the income is payable to A and the capital payable to B on A's death, it is now common that there be a power to withhold income—in order to accumulate it or perhaps to pay it to B—, and a power to encroach on the capital during A's life—for either A or B, and perhaps others; thus, the actual payments out of the trust may owe nothing to the starting point that A will have a life interest and then B will take the capital. (In any event, according to modern investment theory, it is not sensible to maintain a hard and fast distinction between income and capital.) Perhaps the most striking example of this trend, in these books, is in the suggested drafting of protective or spendthrift trusts. The common law (outside of the United States) does not allow the spendthrift's interest to be inalienable, so the usual solution has been to make it determinable on certain events, such as the spendthrift's bankruptcy, or his attempt to sell his interest. When it determines, a discretionary trust arises, whose beneficiaries are a class, probably including the spendthrift but also his immediate family; the money can be applied to help the spendthrift, but he has no right to any particular amounts. In this way, the property is kept out of the hands of the spendthrift's creditors. How shall the drafter decide which events should bring an end to the spendthrift's determinable interest? After considering various possibilities, the authors of these books conclude that the best term is one that makes the beneficiary's interest determinable *at the discretion of the trustees*.

Some settlors might think that this takes trustee discretion too far, but it is a logical step in the progression that makes the rights of the beneficiaries rest, more and more, on trustee discretion. The preface to the Canadian book suggests that the authors believe that their approach is the mainstream one in England, while Canadian practice may not have come quite so far in favour of trustee discretion. As the authors say in paragraph 10.1 of each book, "Drafts in this book are based on the premise that the trustees should be trusted—as their name suggests—and they may be given wide powers to achieve the settlor's intention." Of course trustees must be trusted; but just because you trust an employee to close up the store, it does not follow that you must give him the combination to the safe. The choice of trustees becomes especially crucial in the kind of trust these authors recommend. In Chapter 6 of each book, the authors devote some discussion to the choice of trustees, and whether they should be given the benefit of an exemption from liability clause; there is also a discussion of drafting techniques to control discretions, such as making the settlor a trustee. This is important, since courts are reluctant to override trustees who exercise their discretions in good faith.

It is interesting that neither book makes any reference to the principle of *Saunders v. Vautier*,<sup>5</sup> by which fully capacitated beneficiaries can terminate a trust contrary to the settlor's intention. Although it has been abrogated by statute in Alberta and Manitoba, and by judicial decision in most of the United States, the principle remains important; the leading Canadian text devotes most of a chapter to it,<sup>6</sup> and recent cases confirm its vitality.<sup>7</sup> One would have thought that no settlor would want his or her expensively drafted trust or will trust to be collapsed prematurely. On the other hand, the books do devote some discussion to making certain that a beneficiary cannot simply sell his or her interest under a trust for a capital sum, which many settlors would also want to avoid (see c. 4 of each book, and again para. 10.1). It is true that if a beneficiary's interest is made so uncertain that it cannot be sold for a capital sum, then it will also be the case that *Saunders v. Vautier* will not apply. Again, this is achieved by giving the trustees extremely wide powers; the recommendation, effectively, is that the trustees shall have the power to re-settle the property at any time, on such terms as they see fit.

Although the preface to the Canadian book does not mention it, *Drafting Trusts and Will Trusts in Canada* is confined to common law Canada. Of course there are good reasons so to confine it, since divisions in legal education and practice still largely follow the common law/civil law divide. But there are more than purely academic reasons for alerting common law readers to the fact that the civil law of Quebec has a trust. The authors of these books suggest that there are unlikely to be any substantial reasons for a settlor to choose another legal system to govern the trust (see para. 24.3 of the Canadian book, para. 27.3 of the English one). But there are many features of the Quebec trust which could make it more attractive for settlors than the common law trust. To give just some examples: a beneficiary's interest can be made inalienable and unavailable to creditors;<sup>8</sup> the principle of *Saunders v. Vautier* is unknown;<sup>9</sup> and not only is it possible to create a private or non-charitable purpose trust,<sup>10</sup> but moreover such a trust can be created with a perpetual duration.<sup>11</sup> Nor is it clear that a trust needs any special connection to Quebec in order to be governed by the law of Quebec, at least in some provinces. The common law might not allow a settlor to choose that the trust be governed by a legal system to which there was no objective connection, but the common law rules have been displaced by the *Hague Convention on the Law Applicable to Trusts and on Their Recognition* (1 July 1985

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<sup>5</sup> [1841] Cr. & Ph. 240, 41 E.R. 482 (L.C.).

<sup>6</sup> D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at c. 23.

<sup>7</sup> See e.g. *Tod v. Barton*, [2002] E.W.H.C. 264, [2002] 2 W.T.L.R. 469 (Ch), cited in the Canadian book for a different principle; but see *Re Campeau Family Trust* (1984), 18 D.L.R. (4th) 159, 50 O.R. (2d) 296 (C.A.).

<sup>8</sup> Arts. 1212-17 C.C.Q.

<sup>9</sup> *Alkallay c. Bratt*, [2002] Q.J. No. 6120 (S.C.) (QL), (19 December 2002) Montreal 500-05-056412-008.

<sup>10</sup> Art. 1268 C.C.Q.

<sup>11</sup> Art. 1273 C.C.Q.

[*Convention*]) in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Newfoundland and Labrador, and Prince Edward Island. The *Convention* seems to allow a free choice of governing law, and makes no reference to any requirement of objective connection. In Alberta and New Brunswick, the *Convention* clearly does not apply to conflicts within Canada.<sup>12</sup> In the other *Convention* provinces, the issue is debatable (even in British Columbia, which has a *Conflict of Laws Rules for Trusts Act*;<sup>13</sup> that Act only applies where the *Convention* does not apply, but the *International Trusts Act*<sup>14</sup> does not expressly disapply the *Convention* in intra-Canadian situations). It may therefore be that a settlor in, for example, Prince Edward Island is free to choose that his or her trust be governed by Quebec law, even though the trustees, the property and all the beneficiaries are in Prince Edward Island.

One final comment: both books have a chapter on trusts for disabled beneficiaries. The Canadian book mentions the use of discretionary trusts for such beneficiaries, as a way of maintaining access to state benefits that may be means-tested. The chapter does not, however, mention the “preferred beneficiary election,” by which a trust’s income can be taxed at the income tax rate of a beneficiary, even if the income was not paid in that year to that beneficiary. This election was largely abolished in 1996, but it does survive and can benefit certain disabled beneficiaries.<sup>15</sup>

These books will clearly be of tremendous interest and value to practising lawyers who need to draft trusts, and if widely adopted, they may have an influence on the style of trust drafting in Canada. While opinions may differ about the drafting style that favours very wide trustee discretion, everyone should be in favour of clarity and colloquial English usage. These books are also potentially of great interest to the student and teacher of trust law. By opening a window into the world of practice, they provide a welcome perspective that can improve the teaching and learning of trusts.

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<sup>12</sup> *International Conventions Implementation Act*, R.S.A. 2000, c. I-6, s. 1(2); *International Trusts Act*, S.N.B. 1988, c. I-12.3, s. 2.

<sup>13</sup> R.S.B.C. 1996, c. 65.

<sup>14</sup> R.S.B.C. 1996, c. 237.

<sup>15</sup> See Norman C. Tobias, *Taxation of Corporations, Partnerships and Trusts*, 2nd ed. (Toronto: Carswell, 2001) at 113-14; *Income Tax Act*, *supra* note 3 at ss. 104(14), 108(1) “preferred beneficiary”, 118.3(1).