

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Drescher v. Drescher Estate, 2007 NSSC 352

Date: 20071121
Docket: SH. No. 278018
Registry: Halifax

Between:

Gisela Drescher, by her attorney Alex Winkler

-and-

**Herb Shannon and John Hencher, as Executors of the Last Will
and Testament of Erhard Drescher, deceased**

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Judge: The Honourable Justice Robert W. Wright

Heard: November 21, 2007 in Halifax, Nova Scotia

Oral

Decision: November 21, 2007

Written

Decision: December 14, 2007

Subject: Variation/termination of trust - rule in *Saunders v. Vautier* - **Variation of Trusts Act.**

Summary: In 2003 the testator made a new Will whereby he created a discretionary trust in favour of his ex-wife for her lifetime (who was mentally incompetent and living in a nursing home) with a remainder gift of the residue of the estate to the Alzheimer Society. In so doing, he completely displaced his only daughter as the sole beneficiary under his previous Will after their relationship deteriorated over the handling of her mother's care.

Prior to her Alzheimer diagnosis, the mother had executed a Power of Attorney in favour of her lawyer which was enduring and unrestricted in the powers conferred. After the testator's death in 2006, the attorney negotiated an agreement with counsel

for the daughter and with the Alzheimer Society with the objective of securing funding for the ongoing nursing home care expenses. Essentially, the agreement was intended to set up a new trust with a 40% allocation of the estate to the mother (which would provide a guaranteed fixed monthly income of \$3,000 for her lifetime) with the remainder of the estate to be distributed by a 40% allocation to the daughter (to settle her **Testators Family Maintenance Act** claim) and a 20% allocation to the Alzheimer Society (which was also entitled to the remainder of the mother's trust upon her death). The executors of the estate refused to accept the proposed agreement because it did not reflect the testator's intention. The plaintiff by her attorney, supported by her daughter, thereupon brought this application for court approval of the agreement under the rule in *Saunders v. Vautier* or, alternatively, under the **Variation of Trusts Act**.

Issues: (1) Should the rule in *Saunders v. Vautier* be extended to permit the holder of an enduring Power of Attorney to consent to the variation or termination of a trust on behalf of a mentally incompetent person? (2) If not, should the subject trust be varied/terminated under the **Variation of Trusts Act**?

Result: The court was not prepared to extend the rule in *Saunders v. Vautier* to permit the holder of an enduring Power of Attorney to consent to the variation or termination of a trust on behalf of an incompetent person without the approval of the court. The application therefore fell for consideration under the **Variation of Trusts Act**.

In light of all the circumstances, the court was satisfied that (a) the proposed agreement was for the benefit of the mother on behalf of whom the court was requested to consent and (b) the proposed agreement was one which overall was fit for the court to approve. The application was therefore granted.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THE COVER SHEET.
