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Gift Over Provisions in Wills and Trusts

A tremendous amount of care, time and effort goes into planning estates and trusts. Lengthy, detailed, complex trusts are drafted providing for a whole host of contingencies and circumstances that may arise in the lives of the beneficiaries. Staged releases of capital, prescribed formulas for distribution of income, and detailed delineations of trustee powers and responsibilities can be used to set out how the settlor's property will be governed for the coming years or decades. All of this will be used to ensure that the settlor's wishes will be respected, and that his or her goal of providing for a spendthrift spouse, an adult child with addiction issues, or a financially inexperienced 19-year-old child will be carried out. However, if there is no gift over provision in the trust, the whole scheme is vulnerable to being unwound.

The rule in *Saunders v. Vautier* allows all of the beneficiaries of a trust, if they are *sui juris* (mentally capable and of the age of majority), to modify or terminate the terms of the trust. No matter what carefully considered plans may have been put in place by the testator, the beneficiaries, as the true "owners" of the right of enjoyment in the trust property, are given the right to call in the property. This can jeopardize the settlor's plans for the long term support of persons through the machinery of the trust.

In order to guard against this, a gift over provision can be used to ensure that there are other beneficiaries of the trust. For example, the trust could provide that funds be held until a child's 25th birthday, and that the funds are to be paid to his or her issue if he or she dies before reaching that age. Until the child turns 25, his or her unborn issue have an interest. Thus, the trust could not be collapsed under the rule in *Saunders v. Vautier* without resort to a court to approve the variation on behalf of the unborn beneficiaries.

By considering and including gift over provisions, a drafting lawyer can prevent the beneficiaries from using the rule in *Saunders v. Vautier* to defeat the settlor's intentions for his or her family.