

Fall 1985

Missouri's Repeal of the Clafin Doctrine--New View of the Policy against Perpetuities

Peter J. Wiedenbeck

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Peter J. Wiedenbeck, *Missouri's Repeal of the Clafin Doctrine--New View of the Policy against Perpetuities*, 50 Mo. L. REV. (1985)

Available at: <https://scholarship.law.missouri.edu/mlr/vol50/iss4/6>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

MISSOURI'S REPEAL OF THE CLAFLIN DOCTRINE—NEW VIEW OF THE POLICY AGAINST PERPETUITIES?*

PETER J. WIEDENBECK**

| | |
|---|-----|
| I. INTRODUCTION | 805 |
| II. DISCUSSION | 808 |
| A. <i>The Claflin Doctrine and its Defects</i> | 808 |
| B. <i>Interpretive Issues in Distributive Deviation</i> | 812 |
| 1. All Beneficiaries Are Consenting Adults | 813 |
| 2. On the Meaning of "Benefit" | 815 |
| 3. On the Exercise of Discretion | 821 |
| C. <i>Trust Purposes, Judicial Discretion and the Policy Against Perpetuities</i> | 824 |
| 1. Preserving the Settlor's Plan | 825 |
| 2. The Broad View of Judicial Authority | 830 |
| III. CONCLUSION | 838 |

I. INTRODUCTION

The General Assembly, as part of its 1983 revision of Missouri trust law,¹ enacted several provisions which empower the courts to authorize deviations from the terms of a private trust.² Most of these provisions concern *administrative* deviation—upon an appropriate showing the court may remove restrictions on the trustee's managerial or administrative powers, such as conferring the power to sell, mortgage, or improve trust property, or broadening the range of permissible trust investments.³ One subsection of the new statutes,

* Copyright 1985, Peter J. Wiedenbeck.

** Associate Professor, School of Law, University of Missouri-Columbia. B.Sc. 1976, University of Toronto; J.D. 1979, University of Michigan. The author gratefully acknowledges the research assistance of Ms. Eva Ensor. The author also wishes to thank Professor William F. Fratcher for his encouragement and helpful comments on an earlier draft. This work was supported in part by a grant from the University of Missouri Law School Foundation.

1. 1983 Mo. Laws 785.

2. MO. REV. STAT. §§ 456.570-590 (Supp. 1984).

3. Administrative deviation is authorized by MO. REV. STAT. §§ 456.570.1, .580, .590.1 (Supp. 1984). Section 456.570.1 authorizes the court, after notice to affected parties and "upon cause shown," to "relieve a trustee from any restrictions on

however, empowers the courts to permit a trustee to deviate from the *distribu-*

his power that would otherwise be placed upon him by the trust or by this chapter." The apparent purpose of this provision is to overturn Missouri's restrictive approach to administrative deviation. The inference could be drawn from conflicting decisions that Missouri courts would never authorize an act not expressly or impliedly permitted by the terms of the trust. MISSOURI BAR, MISSOURI PROBATE UPDATE AND NEW GUARDIAN AND TRUST CODES—1983, 163-64 (J. Borron ed. 1983). In contrast, the majority approach allows the court to direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust "if owing to circumstances not known to the settlor and not anticipated by him compliance [with administrative terms] would defeat or substantially impair the accomplishment of the purposes of the trust." RESTATEMENT (SECOND) OF TRUSTS § 167 (1959). See generally Scott, *Deviations from the Terms of a Trust*, 44 HARV. L. REV. 1025 (1931). Accordingly, it appears that the "for cause" standard of § 456.570.1, which does not explicitly require a change of circumstances unforeseen by the settlor as a prerequisite to court action, is at least as broad as the Restatement rule, and may permit administrative deviation whenever strict compliance with the administrative terms of the trust would defeat or substantially impair accomplishment of the settlor's purposes. Sullivan, *Modification, Revocation and Termination in MISSOURI GUARDIANSHIP AND TRUST LAW 10-5 to 10-6* (1985).

Section 456.590.1 certainly goes farther than the Restatement rule, as it permits the court to confer on trustees any administrative power necessary to conduct a transaction that "is in the opinion of the court expedient." This broad deviation authority is taken directly from English legislation, the Trustee Act, 1925, 15 & 16 Geo. 5, c.19, § 57. MISSOURI BAR, *supra* at 164. The English courts' construction of this statute is discussed in 48 HALSBURY'S LAWS OF ENGLAND *Trusts* para. 913 (4th ed. 1984), and 38 HALSBURY'S STATUTES OF ENGLAND *Trusts* 180-82 (3d ed. 1972). In particular, the "expedient" criterion requires that the deviation be beneficial to the trust as a whole, not merely to the interest of one beneficiary. *Re Craven's Estate*, [1937] Ch. 431 (advance to enable life tenant to become an underwriting member of Lloyd's insurance group denied).

Section 465.580 is responsive to a different administrative problem. It may be impossible to make a trust reasonably productive of income where the corpus is an interest in land of uncertain duration (i.e., a life estate, determinable, or defeasible fee), because the trustee is unable to sell or mortgage the land, grant a long-term lease, or make improvements. In this circumstance, the court is to authorize the needed fee simple mortgage or conveyance, long-term lease, or improvement, unless the owners of future interests in the land would be injured thereby. Sale proceeds are required to be held in trust for the beneficial owners of all present and future interests in the land. This statute was enacted to eliminate a narrow interpretation of the partition statute, MO. REV. STAT. § 528.010 (1978), to the effect that a court may authorize sale of unimproved land in which there are future interests only if the land otherwise does not produce enough income to pay the taxes. See Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 538-42. Application of the new statute, accordingly, is not conditioned on a finding that the present estate in the land is "burdensome and unprofitable." MO. REV. STAT. § 528.010 (1978). Although codified in the trust law, the new statute actually authorizes equitable partition even where no trust is involved (i.e., where the holder of the uncertain-duration present interest is not a trustee). MISSOURI BAR, *supra* at 162. *Accord*, ILL. ANN. STAT. ch. 17, § 1687.1 (Smith-Hurd Supp. 1985) as amended by Act of Sept. 16, 1985, P.A. 84-443, 1985 Ill. Legis. Serv. 575 (West).

Finally, it should be noted that this new administrative deviation legislation will not be used frequently, for the simple reason that Missouri's 1983 trust law revision

tive terms of the trust.⁴ In circumstances where such distributive variation is authorized, the court may alter the *size* of the beneficiaries' interests, change the *time* of payment, or even *terminate* the trust prior to the time specified by the settlor.⁵

In sanctioning judicially-approved early trust termination the new legislation repeals, at least in part, the Claffin doctrine—the judge-made rule in force in most American states that a trust cannot be terminated, even with the consent of all beneficiaries, prior to the date specified by the trust's terms where continuance of the trust is necessary to carry out a material purpose of the settlor.⁶ After a brief discussion of the Claffin doctrine and its defects, this article will examine three interpretive questions raised by the new legislation.⁷ The courts' answers to these questions will determine the extent to which the variation of trusts statute overturns the Claffin doctrine. And in resolving these interpretive issues Missouri courts will be making fundamental choices about the purpose and role of the common-law Rule Against Perpetuities.⁸

included enactment of the Uniform Trustee Powers Act, MO. REV. STAT. §§ 456.500-.540, 456.560-.570, 456.600 (Supp. 1984). Under section 3 of that act, *id.* § 456.520, extremely broad administrative powers are conferred by operation of law, even if the trust was established before enactment. *Id.* § 456.600. Accordingly, expansion of trustees' administrative powers should be required only where the trust instrument expressly limits the broad powers conferred by law. *See id.* § 456.510.1.

4. MO. REV. STAT. § 456.590.2 (Supp. 1984). *See generally* Haskell, *Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HASTINGS L.J. 267 (1967).

5. MO. REV. STAT. § 456.590.2 (Supp. 1984).

6. RESTATEMENT (SECOND) OF TRUSTS § 337 (1959); 4 A. SCOTT, *THE LAW OF TRUSTS* § 337 (3d ed. 1967); G.G. BOGERT & G.T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 1008 (rev. 2d ed. 1983) [hereinafter cited as BOGERT]. The Claffin doctrine received its name from the Massachusetts decision which gave birth to the principle, *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889). Missouri is among the large majority of states that followed *Claffin*. *Thomson v. Union Nat'l Bank of Kansas City*, 291 S.W.2d 178 (Mo. 1956); *Evans v. Rankin*, 329 Mo. 411, 44 S.W.2d 644 (1931); *Owen v. Gilchrist*, 304 Mo. 330, 263 S.W. 423 (1924); *Hamilton v. Robinson*, 236 Mo. App. 289, 151 S.W.2d 504 (1941); *Easton v. Demuth*, 179 Mo. App. 722, 162 S.W. 294 (1914); *cf. Smith v. Smith*, 70 Mo. App. 448 (1897) (early termination refused because it would frustrate purpose of trust, but in addition consent could not be obtained from unascertained principal beneficiaries).

The Claffin doctrine is the analog of the rule that a trust may always be terminated with the consent of the settlor and all beneficiaries. RESTATEMENT (SECOND) OF TRUSTS § 338 (1959). Once the settlor has died he cannot consent. By refusing to terminate a trust where there is any unfulfilled material purpose the courts are, in effect, attempting to infer from the trust instrument and surrounding circumstances whether or not the settlor would have agreed to early termination.

7. *See infra* notes 29-66 and accompanying text.

8. *See infra* notes 80-95 and accompanying text.

II. DISCUSSION

A. *The Clafin Doctrine and its Defects*

*Clafin v. Clafin*⁹ established a uniquely American rule of equity. On the authority of *Saunders v. Vautier*,¹⁰ the courts of England and the Commonwealth nations have consistently held that a trust may be terminated at any time if all beneficiaries consent, without regard to whether premature termination would in some measure frustrate the accomplishment of the settlor's purposes in setting up the trust.¹¹ Of course, if any trust beneficiary is unborn or incapable of giving a legally-binding consent, as in the case of a minor or disabled person, for example, agreement among the remaining beneficiaries will not discharge the trust. Until the Massachusetts court's 1889 decision in *Clafin*, American jurisdictions generally followed the English precedent.¹²

The English approach limits the settlor's ability to restrict or condition the beneficiaries' enjoyment of the trust estate. The original decisions, however, were not founded upon a preference for giving beneficiaries greater control over the disposition of their interests. Instead, they proceed from the view that there is an inherent inconsistency between the equitable absolute ownership granted the sole beneficiary of a trust and the settlor's attempt to withhold possession of the property beyond attainment of the age of majority. This supposed repugnancy was resolved by holding void the settlor's instruction to postpone enjoyment by the sole beneficiary, thereby treating the trust as granting unrestricted equitable fee or absolute ownership interest in the corpus.¹³

The *Clafin* court found itself "unable to see that the directions of the testator to the trustees [to postpone payment of principal and income beyond the sole beneficiary's attaining majority] are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect."¹⁴ In jurisdictions that follow *Clafin* the

9. 149 Mass. 19, 20 N.E. 454 (1889). In *Clafin* the testator's will and codicil provided that his residuary estate should be held in trust, with one-third of the trust fund to be paid to testator's minor son in three installments: \$10,000 at age twenty-one, \$10,000 at age twenty-five, and the balance at age thirty. Upon attaining the age of majority the son brought a bill in equity petitioning the court for an immediate transfer of the remainder of his interest in the trust estate. *Id.* at 21, 20 N.E. at 455.

10. 4 Beav. 115, *aff'd*, Cr. & Ph. 240 (1841).

11. *E.g.*, 48 HALSBURY'S LAWS OF ENGLAND *Trusts* para. 637 (4th ed. 1984).

12. *E.g.*, J. GRAY, RESTRAINTS ON ALIENATION § 114-24 (1st ed. 1883); J. TIFANY & E. BULLARD, THE LAW OF TRUSTS AND TRUSTEES 863 (1862).

13. *Saunders v. Vautier*, 4 Beav. 115, *aff'd*, Cr. & Ph. 240 (1841); *see Clafin v. Clafin*, 149 Mass. 19, 22, 20 N.E. 454, 455 (1889); J. GRAY, *supra* note 12, §§ 105-112a; BOGERT, *supra* note 6, at 412. Accordingly, the English approach to trust termination was founded upon a fallacious reification of the concept of property. *See, e.g.*, B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-28 & nn.2-3 (1977). This is not to deny that the effects of the English rule may make it preferable to the *Clafin* doctrine. *See infra* notes 80-95 and accompanying text.

14. 149 Mass. at 23, 20 N.E. at 456. In perceiving no inconsistency in a re-

courts feel free to give effect to the settlor's intentions, as best they can.

The differing approaches of the English and American courts were nicely summarized by Professor Austin Wakeman Scott.

The American courts have laid emphasis on the idea that the wishes of the settlor should be controlling except where it would be opposed to some definite policy to give effect to his desires. In England, on the other hand, the courts have felt that, although the extent of the interests of the beneficiaries depends upon the intention of the settlor, the control of their interests should be in their own hands, except where the interests of others limit such control. In the United States the courts take the view that the settlor can dispose of his property as he likes. In England the beneficiary of a trust can dispose of his interest as he likes. These different points of view appear in the attitude of the courts of the two countries toward spendthrift trusts. As we have seen, the English courts have consistently held that the settlor cannot make the interests of the beneficiaries of a trust inalienable by them, whereas a great majority of the American courts have permitted the settlor to impose such a restraint on alienation. Similarly the courts in the two countries have reached different results where the question is one of the power of the beneficiaries to terminate the trust. In England the beneficiaries, if they all consent and are all *sui juris*, can at any time terminate the trust, even though the purposes for which the trust was created by the settlor have not been fully accomplished. The trust property belongs beneficially to them alone, and they have power to control its disposition. On the other hand, in the United States the wishes of the settlor in creating the trust are paramount to the wishes of the beneficiaries. Even though the beneficiaries all consent and are all *sui juris*, they cannot compel the termination of the trust if such termination would run counter to the intention of the settlor in creating the trust.¹⁵

Whether the wishes of the settlor or of the beneficiaries *should* be treated as paramount in the matter of trust termination requires an evaluation of competing intergenerational claims to the control of resources. This evaluation will be deferred until Missouri's new resolution of this intergenerational competition is explored.¹⁶

The Clafin doctrine has been the subject of much criticism and the object of some legislative tinkering in other states. A brief review of these criticisms will serve to put the new variation of trusts statute in perspective, by indicating whether Missouri has reformed or repudiated *Clafin*.

Two types of problems arise in the application of the Clafin doctrine. First, it is often quite difficult to determine whether the settlor was possessed of some "material purpose" that would be frustrated by early termination of the trust. Some cases are easy. Clearly, if a beneficiary's interest is subject to

stricted equitable fee, American courts avoided the logical fallacy which trapped their English brethren, *see supra* note 13, but the conclusion that such restrictions are not against public policy may have been too readily accepted. *See infra* notes 85-95 and accompanying text.

15. 4 A. SCOTT, *supra* note 6, § 337, at 2655-56 (footnote omitted).

16. *See infra* notes 80-95 and accompanying text.

a spendthrift restriction, the restraint on alienation manifests an intention to protect the beneficiary from his own improvidence.¹⁷ Similarly, a support trust should not be terminated in advance of the date specified by its terms because it is quite properly inferred that the settlor intended to secure a reliable source of support for the income beneficiary, which could be jeopardized by mismanagement or improvidence if the fund is transferred to the beneficiary.¹⁸ Likewise, a discretionary trust is created because the settlor wishes to rely on the trustee's judgment concerning the beneficiaries' needs and capacities, and that ongoing independent evaluation would be eliminated if agreement among the beneficiaries were sufficient to terminate the trust.¹⁹ Finally, as in the *Claflin* case itself, where there is a trust for the benefit of a sole beneficiary with payment of principal postponed to a designated age beyond the age of majority, it is clear that the settlor desired to keep the principal out of the hands of the beneficiary until the date specified.²⁰

The difficulty in deciding whether early termination would defeat a material purpose of the settlor arises where a trust for successive beneficiaries is created without spendthrift restrictions. Professor Scott described the dilemma as follows:

If the only purpose in creating the trust was to preserve the principal of the trust estate during the life of the income beneficiary so that it might ultimately be enjoyed by the remainderman, it would not defeat the purpose of the trust to terminate it before the death of the life beneficiary if both of the beneficiaries should desire to terminate it or if one of them should acquire the entire beneficial interest. On the other hand, if it was also a material purpose of the settlor to protect the life beneficiary against his own possible mismanagement of the property, the termination of the trust before his death would defeat this purpose, even though the remainderman should consent to the termination or the life beneficiary should acquire the interest of the remainderman.²¹

17. 4 A. SCOTT, *supra* note 6, at § 337.2.

18. *Id.* at § 337.4. A support trust is a trust the terms of which provide that the trustee shall pay or apply *only so much* of the income or principal as is necessary for the education or support of the beneficiary. RESTATEMENT (SECOND) OF TRUSTS § 154 (1959). Thus if *S* transfers \$100,000 to *T* in trust "to pay the income annually to *B*, to be used for his support, and on the death of *B*, to pay the principal to *R*," the settlor has expressed only her motive for the transfer; it is not a support trust. But if the instrument provides that the trustee is "to pay so much of the income annually to *B* as is necessary for his support," then the limitation on *B*'s interest establishes a trust for support. In most states, the beneficiary's interest in a support trust is inalienable—in effect, support trusts are treated as spendthrift trusts by implication—which supplies an additional reason for refusing early termination. *Id.*

19. 4 A. SCOTT, *supra* note 6, at § 337.4. A trust is discretionary if its terms provide that the trustee shall pay to or apply for a beneficiary only so much of the income or principal as the trustee in his uncontrolled discretion shall determine. RESTATEMENT (SECOND) OF TRUSTS § 155(1) (1959).

20. 4 A. SCOTT, *supra* note 6, § 337.3.

21. *Id.* § 337.1, at 2663.

While the prevailing view is that the mere fact that successive interests have been created does not sufficiently indicate a "material purpose" to withhold management from the income beneficiary, resort may be had to other language in the trust instrument and even to extrinsic evidence to demonstrate the existence of such a purpose.²²

The second problem with the Claffin doctrine is that it is frequently ineffectual, if not counterproductive. Absent spendthrift restraint, a beneficiary can always accelerate or anticipate his interest by sale, notwithstanding the settlor's purpose to postpone enjoyment or withhold management. To prevent complete evasion of the Claffin doctrine, American courts hold that a purchaser of the beneficiaries' interests also cannot compel early termination, even though the settlor had no purpose to protect a stranger; instead, the purchaser must await payment according to the trust terms.²³ Where less than all interests in the trust are sold, the purchaser will pay a price discounted for deferral and any actuarial risks, yet these same considerations would control division of the corpus upon agreement of the beneficiaries, were termination permitted. Thus, early termination is denied, but the economic equivalent may be available on sale, even if all beneficiaries do not consent! If the market for trust interests is too thin, however, the beneficiary may have to make a sacrifice sale.²⁴ Accordingly, if the trust is not spendthrift, anticipation cannot be prevented, it is at most penalized.²⁵ For this reason, one commentator has recommended that the material purpose doctrine be limited to spendthrift trusts, because "a decree denying termination in the spendthrift trust cases cannot be circumvented by a sale of the beneficial interest."²⁶

22. *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 337 comments e, f, & g (1959); Bird, *Trust Termination: Unborn, Living and Dead Hands—Too Many Fingers in the Trust Pie*, 36 HASTINGS L.J. 563, 583-85 (1985).

23. The *Claffin* court foresaw this issue, but refused to decide it. 149 Mass. at 24, 20 N.E. at 456; RESTATEMENT (SECOND) OF TRUSTS § 337 comment k (1959). Professor John Chipman Gray, writing shortly after *Claffin* was decided, predicted this extension of the rule. J. GRAY, RESTRAINTS ON ALIENATION § 124n (2d. ed. 1895).

24. *Moxley v. Title Insurance & Trust Co.*, 27 Cal. 2d 457, 472, 165 P.2d 15, 23 (1946) (Traynor, J., dissenting); BOGERT, *supra* note 6, at 419; RESTATEMENT OF PROPERTY § 381 comment a (1944); Bird, *supra* note 22, at 582. In England, there is an established auction market for the sale of future interests, but no similar market has developed in the United States, apparently because many interests in trust are inalienable. J. DUKEMINIER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 550-51 (3d ed. 1984).

25. The existence or amount of the "penalty," however, bears no logical relationship to the extent of disruption to the settlor's plan. For example, it should be possible to liquidate the interest of a sole beneficiary under a trust providing for distribution of principal at age 30 (as in *Claffin*) for an amount approximating the current market value of the trust assets despite the obvious disruption of the settlor's plan, because there are no contingencies and the present value of all future income and principal payments to the purchaser should equal the current value of the corpus (assuming broad investment powers and a competent trustee).

26. Bird, *supra* note 22, at 587 (this recommendation was part of a background study prepared for the California Law Revision Commission, *id.* at 563). Again, the

The practical unenforceability of the material purpose doctrine, as applied to alienable beneficial interests, has another aspect. Because a trustee cannot be held liable for an act or omission in breach of trust to which the beneficiary has consented, the trustee might, with adequate inducement and a written release from all beneficiaries, agree to a voluntary termination of the trust.²⁷ Thus, instead of selling their interests, the beneficiaries can purchase the trustee's consent to termination.²⁸

B. *Interpretive Issues in Distributive Deviation*

With this introduction to the problems inherent in the *Clafin* doctrine, it is now possible to assess the scope of Missouri's new distributive deviation statute. Section 456.590.2 of the Revised Statutes provides:

When all of the adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn, and unascertained beneficiaries, vary the terms of a private trust so as to reduce or eliminate the interests of some beneficiaries and increase those of others, to change the times or amounts of payments and distributions to beneficiaries, or to provide for termination of the trust at a time earlier or later than that specified by the terms.²⁹

Other than naming new beneficiaries, the courts are given *discretionary* power to rewrite the distributive terms of the trust, subject only to two conditions: (1) all adult beneficiaries who are not disabled must consent to the variation;

Clafin court recognized this possible distinction, but observed: "It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect." 149 Mass. at 23, 20 N.E. at 456.

27. 4 A. SCOTT, *supra* note 6, § 342; RESTATEMENT (SECOND) OF TRUSTS § 342 (1959). The beneficiary of a spendthrift trust cannot compel the trustee to convey the trust property to him or to some other person at his direction, and there is some authority that if the trustee does in fact convey the property the beneficiary is precluded by his consent from holding the trustee liable. 4 A. SCOTT, *supra* note 6, § 342.1. Yet this result is criticized by Professor Scott, *id.*, and rejected by the Second Restatement. Compare RESTATEMENT OF TRUSTS § 342(2) (1935) (trustee liable notwithstanding spendthrift beneficiary's consent) with RESTATEMENT (SECOND) OF TRUSTS § 342 comment f (1959) (trustee not liable). If consent bars subsequent liability to the spendthrift beneficiary, even a restraint on alienation can be avoided by offering the trustee sufficient inducement to make the conveyance.

28. Professor William F. Fratcher observed, in commenting on *Thomson v. Union Nat'l Bank of Kansas City*, 291 S.W. 2d 178 (Mo. 1956), that:

The real effect of the *Clafin* rule is to enable the trustee to set its own price for consent to termination. It may not be merely a coincidence that the rise and spread of the *Clafin* rule has been contemporaneous with the rise and spread of trust companies, engaged in the business of administering trusts for profit, which do not like to be deprived of their anticipated fees.

Fratcher, *Trusts and Succession*, 22 MO. L. REV. 390, 393 (1957); see BOGERT, *supra* note 6, at 419.

29. MO. REV. STAT. § 456.590.2 (Supp. 1984).

and (2) the court must be satisfied that the change will "benefit" disabled, minor, unborn, and unascertained beneficiaries. In particular, a finding that the proposed change will not defeat a material purpose of the settlor is *not* required.

Three interpretive issues will determine the extent of the innovation wrought by this statute. First, does a court have jurisdiction to approve a proposed variation where all adult beneficiaries who are not disabled consent and there are no disabled, minor, unborn, or unascertained beneficiaries of the trust? Second, in determining whether disabled, minor, unborn, and unascertained beneficiaries will "benefit," will the court, mindful of the settlor's desires, find the requisite benefit only if the proposed change is consistent with the purposes underlying any restrictions, conditions, or limitations imposed by the settlor? Third, will the courts take into account the material purposes of the settlor in the exercise of their discretion? Each of these issues will be addressed in turn.

1. All Beneficiaries Are Consenting Adults

It could be argued that the new statute allows the courts to approve a trust variation even where there are no disabled, minor, unborn, or unascertained beneficiaries because, in this instance, the statute should be construed to impose only one condition on the judiciary's discretionary authority—consent of all adult beneficiaries who are not disabled. So construed, the legislation would take a long stride toward the English rule of *Saunders v. Vautier*, that the beneficiaries by agreement among themselves may compel termination without regard to the settlor's purposes.³⁰ Unlike the English rule, however, Missouri would require judicial approval of the variation, and a court's discretionary authority to refuse variation could be used to supervise the consensual arrangements of the beneficiaries.

Recall that a trust can be terminated by agreement of all beneficiaries if the settlor's purposes will not be undermined. Thus, where the binding consent of all beneficiaries can be obtained the judicial imprimatur is needed only if (1) the trust is spendthrift, or (2) the beneficiaries want to avoid the loss attendant upon self-help evasion of the Claffin doctrine (sacrifice sale or trustee extortion). There is no apparent reason why the adult beneficiaries should suffer such a loss in circumstances where the court would grant the change if any protected beneficiary were interested in the trust.

The failure of section 456.590.2 to provide explicitly that a variation may be approved where all beneficiaries are consenting adults may be attributable to an oversight in legislative drafting. Section 456.590.2 is derived from English legislation,³¹ the Variation of Trusts Act, 1958.³² That legislation contem-

30. See *supra* notes 9-15 and accompanying text.

31. MISSOURI BAR, *supra* note 3, at 164 (J. Borron ed. 1983).

32. 6 & 7 Eliz. 2, ch. 53. Section 1(1) of the Act provides:

plates judicial approval only on behalf of beneficiaries who are incapacitated, minor, unborn, or unascertained, for the simple reason that under the rule of *Saunders v. Vautier*, if all of the beneficiaries of a trust are in existence and *sui juris*, then upon agreement they are entitled to termination—judicial approval is not required.

While section 456.590.2 seems to assume the existence of some disabled, minor, unborn, or unascertained beneficiary, the judicial power to “vary the terms of a private trust” is not expressly conditioned on the presence of such a beneficiary. This is in contrast to the English legislation, under which the court is granted discretionary power to “approve [the proposed variation] on behalf of” protected beneficiaries.³³ As no reason appears why variation should be denied if all beneficiaries are consenting adults, the ambiguity in the Missouri legislation should be resolved by treating the finding of a benefit to protected beneficiaries, not as a general limitation on the courts’ distributive variation jurisdiction, but as an additional condition on the exercise of that jurisdiction where such beneficiaries are present.³⁴

1.—(1) Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court 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, or
- (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, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
- (c) any person unborn, or
- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary 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:

Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

See generally McClean, *Variation of Trusts in England and Canada*, 43 CAN. B. REV. 181, 227-61 (1965); Harris, *Ten Years of Variation of Trusts* (pts. 1 & 2), 33 CONV. & PROP. LAW. (n.s.) 113, 183 (1969).

33. *Id.* See *Re Viscount Hambleden’s Will Trusts*, [1960] 1 All E.R. 353 (order of variation under the English statute is not necessary because court’s approval on behalf of minors and others ipso facto alters the trust). *But see Re Joseph’s Will Trusts*, [1959] 3 All E.R. 475.

34. The court would then be construing section 456.590.2 as if it stated: “When

If so construed, what standards should be used by the court in the exercise of its discretionary authority to approve an arrangement among consenting adult beneficiaries? It is submitted that the standards should be the same as those applied where there is a protected beneficiary. As more fully explained below, two alternative guidelines for the exercise of judicial discretion seem reasonable. Approval could be granted if the variation secures some advantage for the beneficiaries that was not anticipated by the settlor and the court is persuaded that the settlor, if faced with the question, would have decided that the advantage justifies the resulting interference with some "material purpose" of the trust.³⁵ Under this approach a change would be made only if a discriminating evaluation of the settlor's overall dispositive plan reveals that the change better serves the settlor's priorities and objectives than mechanical adherence to the trust terms. Alternatively, the court could use its discretionary authority to approve those changes which the *court* concludes, based on its own independent evaluation of the needs and capabilities of the trust beneficiaries, are in the best interest of the beneficiaries.³⁶ Under this approach disruption of the settlor's dispositive plan would not weigh against the approval of the variation.

To summarize, adult beneficiaries could submit their desired changes for judicial approval if the Missouri legislation is construed as suggested here. Such an oversight or veto power over the consensual arrangements of competent adult beneficiaries is admittedly paternalistic, and the question becomes whether a judge's paternalism should be substituted for the settlor's own, possibly idiosyncratic, paternalism. Of course, if all beneficiaries are consenting adults and their interests are alienable (i.e., the trust is not spendthrift) they can always have their own way, but the price of individualism will be whatever losses are incurred in evading *Claflin*.

2. On the Meaning of "Benefit"

a. In General

Whether or not the Missouri courts will construe their new jurisdiction to vary trusts as extending to situations where all beneficiaries are in existence and *sui juris*, the core content of the statute is the authority to order modification or termination where such action is in the interest of disabled, minor, unborn, and unascertained beneficiaries. In this situation, the prerequisite to variation is a judicial finding that the change will benefit the persons whose interests the court is charged with protecting. Hence, the scope of the varia-

all adult beneficiaries who are not disabled consent, the court may, upon finding that such variation will benefit the disabled, minor, unborn and unascertained beneficiaries, [if any,] vary the terms of a private trust. . . ." If similar legislation is proposed for enactment in other states, this jurisdictional ambiguity should be avoided by inserting these words.

35. See *infra* notes 62-84 and accompanying text.

36. See *infra* notes 85-95 and accompanying text.

tion power depends critically on what sorts of advantages constitute the requisite benefit. In particular, must the trust as varied implement the settlor's material purposes, on the theory that the settlor's views of what is good for the trust beneficiaries are relevant or persuasive?

The term "benefit" is not defined in section 456.590.2. The Missouri legislation was patterned after the English Variation of Trusts Act, 1958,³⁷ which provides that "the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."³⁸ Accordingly, decisions of the courts of England and of other British Commonwealth countries which have adopted legislation similar to the Variation of Trusts Act³⁹ may provide guidance and a source of authority for Missouri courts in their struggle to define the necessary benefit.

Some cases indicate that a court should explicitly take into account disruption to the dispositive plan and purposes of the settlor as weighing against approval of the proposed variation, but this factor seems to be relevant to the court's exercise of discretion, not to its finding of the requisite benefit. Accordingly, examination of these cases will be deferred to the succeeding section of the article.⁴⁰ There appears to be a clear-cut answer to the relevance of the settlor's purposes in determining whether beneficiaries will benefit. The theory

37. See *supra* note 32.

38. 6 & 7 Eliz. 2, ch. 53, § 1(1), *supra* note 32.

39. Legislation substantially identical to the Variation of Trusts Act, 1958, has been adopted in the Canadian provinces of Alberta, ALTA. REV. STAT. ch. 373, § 37 (1970), British Columbia, B.C. REV. STAT. ch. 413 (1979), Manitoba, MAN. REV. STAT. ch. T160, § 61 (1970), New Brunswick, N.B. REV. STAT. ch. T-15, § 26 (1973), Nova Scotia, N.S. REV. STAT. ch. 323 (1967), Ontario, ONT. REV. STAT. ch. 519 § 1 (1980), Prince Edward Island, P.E.I. REV. STAT. ch. V-1 (1974), and Saskatchewan, SASK. REV. STAT. ch. V-1 (1978), and in the Northwest Territories and the Yukon as well, N.W.T. Ord. ch. 29 § 2 (1963), YUK. REV. ORD. ch. T-5 (1971). Such legislation is also in force in the Australian states of Victoria, Queensland and Western Australia. VIC. STAT. § 63A (19—); QUEENSL. PUB. ACTS § 95 (19—); W. AUSTRAL. REPR. ACTS § 90 (19—); see generally, R. MEAGHER & W. GUMMOW, JACOBS' LAW OF TRUSTS IN AUSTRALIA 1706 (4th ed. 1977).

New Zealand legislation contains an interesting variation on this point. Instead of requiring a judicial finding that the proposed variation "benefit" incapacitated, minor, unborn and unascertained beneficiaries, the statute provides:

the Court shall not approve an arrangement on behalf of any person if the arrangement is to his detriment; and in determining whether any such arrangement is to the detriment of any person the Court may have regard to all benefits which may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs. . . .

N.Z. REPR. STAT. § 64A(1) (19—). See generally LAW OF TRUSTS AND TRUSTEES 421-39 (4th ed., N. Kelly ed. 1972).

The Trusts (Scotland) Act, 1961, 9 & 10 Eliz. 2, ch. 57, § 1, makes similar trust variation authority applicable to Scotland, but the jurisdiction is not conditioned on the finding that protected beneficiaries will "benefit." Instead, the Scottish legislation demands only that the change "not be prejudicial" to the protected beneficiaries.

40. See *infra* notes 62-66 and accompanying text.

of the English legislation is judicial approval *on behalf of* beneficiaries who are unable to give a legally binding consent.⁴¹ If they could make an effective agreement, *Saunders v. Vautier*⁴² would permit them to terminate or vary the trust according to their perceived self-interest and without regard to the settlor's purposes. In acting for such legally incapacitated persons the court ought similarly to base its decision exclusively on the *court's* evaluation of the best interests of the beneficiaries, uninfluenced by the settlor's view of the matter.

One commentator, in discussing the Missouri statute and advocating its adoption elsewhere, observed that its "underlying theory is that the court, upon a determination that the variation will benefit the minor, disabled, unborn, or unascertained beneficiaries, will make the decision that the beneficiaries would have made if they had been competent adults."⁴³ The commentator goes on to note that several English decisions illustrate that the settlor's intentions can be ignored under the Variation of Trusts Act, 1958, and recommends that "a legislature adopting a variation of trusts statute should avoid ambiguity by including language in the statute directing the courts to consider the settlor's intentions before authorizing a variation."⁴⁴ The Missouri statute contains no such direction.⁴⁵

b. Indirect or Non-Pecuniary Benefits

Problems in defining the requisite benefit do not disappear once it is concluded that the court should put aside the settlor's views and assume the perspective of a purely self-interested beneficiary. For the perfectly rational utility maximizer, that mythical creature of the economist, may find that she derives benefit not only from direct financial advantage, but also from much more subjective and inconvenient sources, such as improved familial relations, enhanced social status, and the like. May—or must—a Missouri court take into account indirect or nonpecuniary benefits in granting distributive variation, and if so, how?

Decisions under the English Variation of Trusts Act, 1958, and its Commonwealth progeny indicate that even the existence of financial benefit can present problems. Must a court be *certain* that each member of the protected class (i.e., the disabled, minor, unborn, and unascertained beneficiaries) will derive some financial advantage from the proposed variation, or is it sufficient

41. *Re Druce's Settlement Trusts*, [1962] 1 All E.R. 563, 567 ("The jurisdiction in effect enables the court to contract on behalf of certain beneficiaries, and I do not see why it should not agree to that which in other circumstances they might have agreed for themselves."); Albery, *Modern Developments in Equity Law and Variation of Trusts Act*, 6 REAL PROP. PROB. & TR. J. 504, 510 (1971).

42. 4 Beav. 115, *aff'd*, Cr. & Ph. 240 (1841); see *supra* text accompanying notes 10-15.

43. Comment, *A Proposal for a Variation of Trusts Statute in Washington*, 8 U. PUGET SOUND L. REV. 625, 630 (1985).

44. *Id.* at 632.

45. See *supra* text accompanying note 29.

if the balance of probabilities favor the protected class? In some cases the courts have required adult beneficiaries to purchase insurance or otherwise secure the protected beneficiaries against the risk that, due to an unlikely turn of events, the financial benefits expected to flow from the variation do not materialize (i.e., the protected beneficiaries would have received more under the original terms of the trust).⁴⁶ Nevertheless, the authorities clearly establish that certainty of financial benefit is not required—it is enough if the value received by a protected beneficiary under the proposed variation exceeds the actuarial value of his interest in the trust as of the date of variation.⁴⁷

Any arrangement is capable of being regarded as beneficial under the Variation of Trusts Act, 1958, if it can, on balancing probabilities, be regarded as a good bargain, and the fact that in improbable circumstances, no benefit, or even some loss is possible, does not necessarily deprive the arrangement of that quality.⁴⁸

This observation was made in a case in which the Chancery Division approved the replacement of contingent principal beneficiaries' interests with interests in a discretionary trust.⁴⁹ Accordingly, the court may find financial benefit even where the advantage derived from the variation depends on the exercise of human judgment; the appraisal need not be limited to typical actuarial risks.

Recent cases go further than a probabilistic evaluation of the direct financial results of the variation. Indirect benefits, such as a child receives when his parents have the financial wherewithal to provide a better home,⁵⁰ as well as

46. *E.g.*, *Re Druce's Settlement Trusts*, [1962] 1 All E.R. 563, 565 (insurance against loss of expected succession tax savings due to early death of current income beneficiary); *Re Clitheroe's Settlement Trusts*, [1959] 3 All E.R. 789 (covenant and security to protect possible future wife, an unascertained contingent beneficiary, against loss of discretionary income interest); *Re Bristol's Settled Estates*, [1964] 3 All E.R. 939, 943 (both insurance against loss of tax savings and covenant on behalf of possible future wife); *Dutchess of Westminster v. Royal Trust Co.*, 32 D.L.R.3d 631 (N.S. Sup. Ct. 1972) (insurance payable in the event of birth, to aged parents, of unborn principal beneficiaries); *Re Aitken's Trust*, [1964] N.Z.L.R. 838, 843-44 (covenant and security to protect contingent principal beneficiaries on early termination and distribution of trust corpus); *Re Bryant*, [1964] N.Z.L.R. 846, 849 (same); *Re Beetham's Trust*, [1964] N.Z.L.R. 576, 578 (same); *see also* *Re Robertson's Will Trusts*, [1960] 3 All E.R. 146, 148 (adult contingent beneficiaries insist on insurance).

47. *Re Cohen's Will Trusts*, [1959] 3 All E.R. 523, 524 ("If the court is asked to sanction this sort of scheme, those who seek the court's sanction must be prepared to take some sort of risk, and if it is a risk that an adult would take, the court is prepared to take it on behalf of an infant."); *Re Van Gruisen's Will Trusts*, [1964] 1 All E.R. 843, 844 (variation approved where it was shown that interests of infants and unborn persons in the new trust were actuarially more beneficial than their contingent interest in principal of the old trust); *Re Irving*, 11 Ont. 2d 443, 451-52, 455-58 (1975).

48. *Re Druce's Settlement Trusts*, [1962] 1 All E.R. 563, 565.

49. *Id.* at 567.

50. *Re Irving*, 11 Ont. 2d 443, 454-55 (1975); *Re Kovish*, 18 E.T.R. 133 (B.C. Sup. Ct. 1985); *Re Ridalls*, 24 Sask. R. 16, 14 E.T.R. 157 (Sask. Q.B. 1983) (noting both that the increased value of the estate resulting from tax savings could ultimately be expected to pass to the grandchildren from their parents and that the grandchildren

social and psychological benefits, such as reduced likelihood of family discord, have been found to be advantages that may be taken into account in approving trust variation.⁵¹ In a few cases such non-pecuniary benefits *alone* have been held sufficient to justify a trust variation involving the release of very considerable financial benefits, or have been relied upon in rejecting proposals that would substantially increase monetary benefits.⁵² These decisions have been criticized,⁵³ apparently out of concern that the evaluation of nonmaterial benefits is overly subjective and disruptive of the settlor's plan. Yet an expansive interpretation of the requisite benefit is now firmly established.⁵⁴

would also be better off in the interim as a result of the increased distribution to their parents); *Re Bryant*, [1964] N.Z.L.R. 846.

51. *Re Zekelman*, 19 D.L.R. 3d 652, 654 (Ont. High Ct. 1971) (equalizing interests of settlor's children to eliminate "a very fruitful source of dissention among the members of the family"). *Contra Farrington v. Rogers*, 19 B.C.L.R. 373, 375-76 (B.C. Sup. Ct. 1980).

52. *Re Remnant's Settlement Trusts*, [1970] 2 All E.R. 554, 559 (elimination of religious forfeiture provision which would have increased the share of corpus to be received by settlor's Protestant grandchildren at the expense of their Catholic cousins); *Re C.L.*, [1968] 2 W.L.R. 1275 (release of trust interests of mentally incompetent adult with other sources of support approved despite lack of consideration where adopted children would benefit from large tax savings, because if she were capable of managing her own affairs it is highly probable she would consent to the arrangement); *Re Zekelman*, 19 D.L.R. 3d 652 (Ont. High Ct. 1971); *Re Weston's Settlements*, [1968] 3 All E.R. 338, 342 (per Lord Denning, M.R.) (refusal to approve variation that would permit trust beneficiaries to avoid incidence of heavy capital gains tax, where avoidance required relocation to Jersey, the court noting that "many things in life are more worth-while than money" and that the social and educational disadvantages of the removal from England "would imperil the true welfare of the children").

To the contrary is *Re Tinker's Settlement*, [1960] 3 All E.R. 85, in which the court observed:

I cannot bring myself to think that I would be benefitting the daughter's children if I gave away half of that which will come to the daughter's share, if the son dies under thirty.

Counsel for the applicant has argued that this is a sensible and fair thing to do because somebody has blundered—somebody has forgotten about the son's children—and it would seem very hard that this half of this substantial settlement should go away from his children to his sister and her children. In a broad sense, so the argument runs, it would be beneficial to the sister's children as members of the family viewed as a whole that something which was reasonable and fair should be done. I cannot apply the jurisdiction under the Variation of Trusts Act, 1958, in that broad way. Although it may very well be that one can throw that kind of consideration into the scales beside a financial benefit which has already been established, yet one cannot regard that sort of consideration as a benefit in itself.

Id. at 87.

53. *Jones, The Dead Hand and the Law of Trusts*, in *DEATH, TAXES AND FAMILY PROPERTY* 119, 125-26 (E. Halbach ed. 1977).

54. In addition to the authorities cited in notes 50-52, *supra*, a liberal interpretation of the term "benefit" is supported by *Re Steed's Will Trusts*, [1960] 1 All E.R. 487, 493, and the New Zealand statute expressly authorizes the court to take into account indirect and nonpecuniary benefits, see *supra* note 39. However, it appears that

This expansive interpretation of benefit seems clearly correct, and should be followed by Missouri courts. After all, many things in life *are* more important than money. In deciding whether to grant or withhold consent to a proposed variation, adult beneficiaries will take into account their own personal valuation of any indirect and nonmaterial benefits. The court, acting for disabled, minor, unborn, and unascertained beneficiaries, should do the same. The subjectivity concern—that material and nonmaterial benefits are by nature incomparable, so that the court will be forced to make arbitrary decisions—is groundless. In many other areas (e.g., child custody,⁵⁵ adoption,⁵⁶ guardianship, and conservatorship proceedings⁵⁷) the courts are required to determine what action is in the “best interests” of a minor or disabled person, which demands just such a comparison. Of course, the court cannot know how each protected beneficiary would subjectively value the universe of material and nonmaterial benefits and detriments presented by any proposed variation. To perform the judicial function the court does not need to know—minors and disabled persons cannot give legally-binding consent precisely because we do not trust their subjective preferences. The duty of the court is to decide as a disinterested reasonable person, taking into account all the facts and circumstances of the case, including the social, economic, and family status of the protected beneficiaries, whether the advantages of the proposed scheme outweigh its disadvantages. The comparison of material and nonmaterial benefits is ultimately a matter of judgment, but that judgment is neither arbitrary nor unreviewable.

The concern that taking account of indirect and non-pecuniary benefits may prove disruptive of the settlor’s dispositive plan is valid. Such disruption, however, does not negate the existence of a net benefit. Instead, it goes to the issue whether the court should, in the exercise of its discretion, refuse to so disrupt the plan.

the courts of British Columbia hold that social or psychological advantages cannot override actual financial loss. *Farrington v. Rogers*, 19 B.C.L.R. 373 (B.C. Sup. Ct. 1980). *But see* *Re Tweedie*, [1976] 3 W.W.R. 1, 64 D.L.R.3d 569 (B.C. Sup. Ct.) (where the chance that protected contingent beneficiaries will receive any distribution under the original terms of the trust is minute, the psychological, emotional, and family benefit of lifting a financial burden from a family member is sufficient to justify the variation). *Compare* *Kunater v. Royal Trust Corp.*, 23 B.C.L.R. 287, 291 (B.C. Sup. Ct. 1980) (elimination of contingent principal beneficiaries’ interests in order to provide their parents with greater flexibility in dealing with the fund is not a benefit) *with* *Re Kovish*, 18 E.T.R. 133 (B.C. Sup. Ct. 1985) (early termination of trust with distribution of corpus to settlor’s grandchildren to permit them to invest in a family business approved on behalf of unborn great-grandchildren, contingent principal beneficiaries, who would indirectly benefit if the business prospers).

55. *E.g.*, MO. REV. STAT. § 452.375.2 (Supp. 1984) (requiring court to consider “all relevant factors”).

56. *E.g.*, *id.* § 453.030.1.

57. *E.g.*, *id.* § 475.082.5.

3. On the Exercise of Discretion

Assuming that all adult trust beneficiaries who are not disabled consent and that the court finds any protected beneficiaries will derive a net benefit from the change, still the court is not required to order the variation or termination. Exercise of the jurisdiction conferred by the Missouri statute, like the Variation of Trusts Act, 1958, is discretionary, not mandatory.⁵⁸ In exercising this equitable discretion Missouri courts, like their English and Commonwealth brethren, are likely to consider chiefly two issues. First, is the benefit to protected beneficiaries large enough to justify the variation—that is, is the change a “good bargain?” Second, should approval be denied on the ground that the change would be overly disruptive of the settlor’s purposes?⁵⁹

a. Exacting a Good Bargain

The smallest net benefit—any overall advantage, however minute—could justify a judicial finding that a protected beneficiary will “benefit,” thereby fulfilling the statutory prerequisite to trust variation. Because the court is called upon to act in the interests of persons who are not in a position to protect themselves, more than minimal advantage should be demanded on be-

58. *E.g.*, *Re Van Gruisen's Will Trusts*, [1964] 1 All E.R. 843:

The proviso to s. 1 of the Variation of Trusts Act, 1958, provides that in such a case as this the court shall not approve the arrangement on behalf of the infant and unborn persons, unless it is for their benefit. The proviso does not say that the court must approve it if it is for their benefit. It is negative, not positive. In addition the court has a discretion under the provision in s. 1 (1) that it “may if it thinks fit by order approve” the arrangement. Therefore the court has an overall discretion to approve or not to approve the arrangement on behalf of the infants and unborn persons, provided it is for their benefit.

Id. at 844.

The Missouri statute provides that “the court may . . . vary the terms of a private trust,” MO. REV. STAT. § 456.590.2 (Supp. 1984), while the English legislation provides that “the court may if it thinks fit approve” the variation, 6 & 7 Eliz. 2, ch. 53, *supra*, note 32.

59. *See, e.g.*, *Re Irving*, 11 Ont. 2d 443 (1975):

The court is concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. By way of a brief prefatory summation then, and further to the powers conferred under s. 1 of the *Variation of Trusts Act*, approval is to be measured, *inter alia*, by reference to these considerations: First, does it keep alive the basic intention of the testator? Second, is there a benefit to be obtained on behalf of infants and of all persons who are or may become interested under the trusts of the will? And, third, is the benefit to be obtained on behalf of those for whom the Court is acting such that a prudent adult motivated by intelligent self-interest and sustained consideration of the expectancies and risks and the proposal made, would be likely to accept?

Id. at 450. *Accord* *Kunater v. Royal Trust Corp.*, 23 B.C.L.R. 287, 289 (B.C. Sup. Ct. 1980); *Re Ridalls*, 24 Sask. R. 16, 14 E.T.R. 157 (Sask. Q.B. 1983); *Re Dent*, 18 E.T.R. 252 (Sask. Surr. Ct. 1984).

half of the protected beneficiaries. Instead, the court should exact the best possible bargain.

It is shown that actuarially the provisions for the infants and unborn persons are more beneficial for them under the arrangement than under the present trusts of the will. That, however, does not conclude the case. The court is not merely concerned with this actuarial calculation, even assuming that it satisfies the statutory requirement that the arrangement must be for the benefit of the infants and unborn persons. The court is also concerned whether the arrangement as a whole, in all the circumstances, is such that it is proper to approve it. The court's concern involves, *inter alia*, a practical and business-like consideration of the arrangement, including the total amounts of the advantages which the various parties obtain and their bargaining strength. In this case, the life tenant and her sons obtain very substantial amounts under the arrangement, whilst the actuarial value of the interests of the infants and unborn persons under the trusts of the will is comparatively very small. In these circumstances, the infants and unborn persons are clearly in a strong bargaining position to obtain shares that exceed the actuarial value of their interests under the will, and it is proper that this should be reflected in the shares allotted to them under the arrangement. My only hesitation in this case has been whether their shares adequately exceed such actuarial value, but on the whole I come to the conclusion that they do. If the infants and unborn persons had the capacities of a reasonable person, *sui juris*, would they enter into this arrangement now, and as it at present stands? I consider that they would. I approve the arrangement as asked.⁶⁰

Put differently, the court should exercise the same degree of care and prudence that a reasonable person would exercise in deciding whether to agree to the proposed change. The authorities abroad are all in agreement with this approach,⁶¹ and Missouri courts should demand as much for disabled, minor, unborn, and unascertained trust beneficiaries.

b. Disrupting the Settlor's Plan

Cases under the Variation of Trusts Act, 1958, and its Commonwealth counterparts make it clear that a second factor to be given consideration in the exercise of judicial discretion is the extent to which the proposed variation would frustrate accomplishment of the settlor's purposes in establishing the trust.⁶² The relevance of this factor in jurisdictions which follow *Saunders v.*

60. Van Gruisen's Will Trusts, [1964] 1 All E.R. 843, 844.

61. *Re Irving*, 11 Ont. 2d 443, 449, 450 (1975); *see Re Cohen's Will Trusts*, [1959] 3 All E.R. 523, 524 ("if it is a risk that an adult would be prepared to take, the court is prepared to take it on behalf of an infant"); *Re Druce's Settlement Trusts*, [1962] 1 All E.R. 563, 565 ("[a]ny arrangement is capable of being regarded as beneficial under the Variation of Trusts Act, 1958, if it can, on balancing probabilities, be regarded as a good bargain").

62. *E.g.*, *Re Steed's Will Trusts*, [1960] 1 All E.R. 487, 493 ("the court is bound to look at the scheme as a whole, and when it does so, to consider, as surely it must, what really was the intention of the benefactor"); *Re Burney's Settlement*

*Vautier*⁶³ is open to serious question, and the opinions offer no explanation. In such jurisdictions competent adult beneficiaries are permitted to modify or terminate the trust by agreement among themselves and without regard to the settlor's purposes. Inasmuch as the court is called upon to approve the scheme on behalf of beneficiaries who cannot give a legally-binding consent—that is, to make an agreement which they would be likely to make for themselves if capable—there is no apparent reason why the settlor's purposes should be taken into account.

Although decisions abroad indicate that consistency with the settlor's plan is one factor to be considered, it is not of overriding importance. Some cases suggest that the matter is one of sanctioning a change that will substantially promote accomplishment of the settlor's primary or predominant purpose at the expense of less central (secondary or ancillary) purposes.⁶⁴ Other cases abjure this fictional attempt to divine the settlor's answer to a question never put. In lieu of judicial prioritization of trust goals cloaked in the fiction of the settlor's intent, these cases frankly admit that the approved variation may undermine an important purpose of the trust.⁶⁵ And in the most famous and far-reaching decision the Chancery Division struck out a religious forfeiture clause which was intended by the settlor to deprive grandchildren practicing Roman Catholicism of their interests, giving them instead to his Protestant grandchildren. The court observed that "the arrangement defeats this testator's intention. That is a serious but by not means conclusive consideration."⁶⁶ Accordingly, a court's evaluation may reveal that the interests of protected beneficiaries outweigh the settlor's interest in dead hand control.

Missouri courts, operating under a regime in which the settlor's purposes are paramount (as the Claflin doctrine demonstrates), would naturally be inclined in exercising their discretion to treat disruption of the settlor's plan as weighing *Job SY:(DARBY3)808.JOB aborted by PAGER!* against authorization of trust variation. Indeed, resort to a primary purpose/secondary purpose distinction is almost predictable. Yet too-ready acceptance of the relevance of the settlor's purposes would be unfortunate, for the new trust variation statute

Trusts, [1961] 1 All E.R. 856, 858; *Re Towler's Settlement Trusts*, [1963] 3 All E.R. 759, 761-62; *Re Irving*, 11 Ont. 2d 443, 448-50 (1975); *Re Smith*, [1975] 1 N.Z.L.R. 495, 500 (suggesting changes that "would preserve much more of the scheme of the will").

63. 4 Beav. 115, *aff'd*, Cr. & Ph. 240 (1841).

64. *E.g.*, *Re Bodle's Trust*, [1970] N.Z.L.R. 750, 752; *Re Irving*, 11 Ont. 2d 443, 448 (1976).

65. *E.g.*, *Faye v. Faye*, [1973] W. Austl. R. 66, 73 (protective trust, designed to restrain alienation of income beneficiaries' interests, modified to permit alienation upon consent of two-thirds majority of trustees, even though proposal "designed to interfere with the intention of the settlor"); see LAW REFORM COMMITTEE, SIXTH REPORT, CMD. 310, *Court's Power to Sanction Variation of Trusts*, paras. 21 & 27(3) (1957) (beneficiaries' interests are of paramount importance; although settlor should be heard on an application for variation the court could overrule his objections).

66. *Re Remnant's Settlement Trusts*, [1970] 2 All E.R. 554, 559.

may signify a reordering of social priorities. Automatic adoption of traditional analytic approaches would obscure the fact that the new legislation creates a framework for the resolution of competing intergenerational claims to the control of resources. The relevance, *vel non*, of the settlor's purposes to a grant of trust variation is the central issue in that competition. Facile application of a "material purpose" analysis would therefore amount to a covert resolution of that competition in favor of continuing dead hand control, as the next section of the article will demonstrate.

C. Trust Purposes, Judicial Discretion and the Policy Against Perpetuities

Even if Missouri courts feel compelled to deny a proposed trust variation that would significantly undermine the settlor's plan, the new legislation is still an important innovation, for it is the first recognition in Missouri of general *cy pres* jurisdiction over *private* trusts.⁶⁷ If instead the courts adopt the expansive view of their authority advocated here, then they would be free to vary the trust in accordance with their own best judgment of the needs and capacities of the beneficiaries, which is tantamount to judicial resettlement of private trusts.

Although these two approaches are quite different, they correspond to alternative plausible policy justifications for the common-law Rule Against Perpetuities.⁶⁸ In choosing between these approaches, therefore, Missouri courts

67. By legislation adopted in 1965, Missouri has authorized a *cy pres* reform of either legal or equitable interests that violate the common-law Rule Against Perpetuities. MO. REV. STAT. § 442.555.2 (1978). See *infra* text accompanying note 72; see also Estate of Chun Quan Yee Hop, 52 Hawaii 40, 469 P.2d 183 (1970) (judicial adoption of *cy pres* perpetuities reform); 3 L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 1256, 1411 (2d ed. Supp. 1985); Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 MICH. L. REV. 1 (1963).

68. The productivity rationale (discussed *infra* in text accompanying notes 80-84) and the judicial economy rationale (discussed *infra* in text accompanying notes 90-94) are not the only justifications that have been advanced for the Rule Against Perpetuities. Originally, the Rule served to promote the practical alienability of land, thereby tending to assure that the most important economic resource in an agrarian economy was devoted to its highest and best use. Professor Lewis Simes has ably demonstrated that this traditional justification, which views the Rule Against Perpetuities as the property-law analog to the anti-trust laws, has little force today because the future interests to which the Rule is applied in modern society are nearly always equitable interests in a trust. Under the trust instrument or by operation of law the trustee quite generally has the power of alienation, and in addition, the corpus of most trusts is invested in stocks and bonds with corporate management possessed of full power to make the assets productive. L. SIMES, PUBLIC POLICY AND THE DEAD HAND 40-54 (1955).

Recognizing these changes in the form of wealth and property dispositions since the seventeenth century, some commentators have suggested that the modern purpose of the Rule is to curb trusts. J. DUKEMINIER & S. JOHANSON, *supra* note 24, at 769-70; F. LAWSON & B. RUDDEN, THE LAW OF PROPERTY 185-86 (2d ed. 1982). The problem

will be committing themselves, consciously or unconsciously, to a unique conception of the policy against perpetuities. Thus, the interpretation of Missouri's new trust variation statute necessarily entails some fundamental philosophical choices about the institution of private property. This portion of the article will attempt to illuminate the philosophical dichotomy which now underlies the Rule Against Perpetuities, so that these choices can be made with full awareness of their implications.

1. Preserving the Settlor's Plan

a. *Cy Pres* Revision

The suit for trust variation will be initiated by a beneficiary or trustee⁶⁹ who seeks some advantage that cannot be obtained under the terms of the trust as written. If the court is to effectuate the settlor's purposes in exercising its discretion to grant or withhold approval of the proposed variation, then a judgment must be made as to whether, under the settlor's plan, the advantages sought are sufficient to justify the impairment of other objectives that may be caused by the change. The advantage sought is invariably one not contemplated by the settlor,⁷⁰ and trusts commonly promote a variety of objectives, so the court will be forced to make judgments about the settlor's likely priority of objectives. Occasionally these judgments will have a fair basis in inferences drawn from the trust instrument and the circumstances surrounding its execution. But more often than not the court will be forced to guess at priorities. That guess often amounts to supplying the court's own ordering of objectives

with trusts is the conservative investment policy of trustees—the supply of risk capital, which is essential for innovation and economic growth, may dry up if too much of society's wealth is held in trust. F. LAWSON & B. RUDDEN *supra*; Downing, *The Duration and Indestructibility of Private Trusts*, 16 W. RESERVE L. REV. 350, 365-69 (1965). This is an important concern, but amendment of the prudent investor standard to permit true diversification of trust portfolios, including investments in ventures which, considered in isolation, are highly speculative, would mitigate the problem. And the problem might be eliminated entirely if the settlor or the trust beneficiaries were permitted to specify the risk/return trade-off to be followed by the trustee in making investment decisions. See Note, *The Regulation of Risky Investments*, 83 HARV. L. REV. 603, 616-21 (1970).

For an historical and philosophical review of the doctrinal conflict between the invalidity of restraints on alienation of legal interests in property and the American courts' recognition of spendthrift and Claflin trusts, see Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

69. Any trustee or beneficiary may make application for trust variation under MO. REV. STAT. § 456.590.4 (Supp. 1984). The law is similar in England, although applications by trustees are apparently disfavored. Re Druce's Settlement Trusts, [1962] 1 All E.R. 563, 568.

70. If the advantage sought was specifically contemplated and rejected by the settlor, the application for trust variation has no hope of success in a regime in which disruption of the settlor's plan weighs against approval. Haskell, *supra* note 4, at 283-84, 292.

based on the rationalization that the settlor would have acted as reasonable person.

This is the same analytic approach used under the *cy pres* doctrine in determining whether, when a particular charitable objective becomes impossible or impractical to accomplish, it would be more consistent with the testator's purposes to substitute a similar charitable goal or mandate reversion of the property.

It is seldom that the testator's intention can be definitely analyzed and divided into a particular and a general intention. It is ordinarily impossible to determine what disposition the testator intended should be made of the property if his particular purpose could not be carried out. Indeed, it is ordinarily true that the testator does not contemplate the failure of his particular purpose, and all that a court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter.⁷¹

Accordingly, section 456.590.2 can be viewed as an extension to *private* trusts of the traditional judicial power to alter *cy pres* the distributive provisions of a charitable trust. It should be noted that this interpretation would be consistent with Missouri's perpetuities reform legislation. The distributive variation statute would authorize reformation of equitable interests that do not violate the Rule Against Perpetuities but which fail to effectuate the settlor's purposes for other reasons, just as Missouri's *cy pres* approach to perpetuities reform authorizes reformation, within the constraints imposed by the Rule, of legal or equitable interests that violate the common-law Rule Against Perpetuities.⁷²

Although the analytic approach is the same, the precise scope of private trust variation and charitable *cy pres* need not be identical. Charitable purposes are altered only when the settlor's particular goal becomes "impossible or impractical" of accomplishment.⁷³ The contours of "impractical" are ill-defined, but showing that a change would increase the utility of the gift to charitable beneficiaries is apparently not sufficient, standing alone, to demonstrate that the settlor's specific purpose is impractical.⁷⁴ Where the application for private trust termination is made to secure some overall financial advantage, such as savings in transfer taxes (the goal of most of the English and Commonwealth cases), the conclusion may be that the settlor would have preferred to make a larger gift to his beneficiaries rather than insisting on a par-

71. 4 A. SCOTT, *supra* note 6, § 399.2, at 3094.

72. MO. REV. STAT. § 442.555.2 (1978).

73. RESTATEMENT (SECOND) OF TRUSTS, § 399 and comment q (1959); 4 A. SCOTT, *supra* note 6, § 399.4.

74. BOGERT, *supra* note 6, § 439, at 560, states the issue this way:

The line between impossibility, impracticability, and inexpediency on the one side, and inconvenience or slight undesirability on the other, may be difficult to draw, but it may constitute the boundary between the use of *cy pres* and the refusal to apply that doctrine. The court will not substitute a new scheme merely because the trustee or the court believes it would be a better plan than that which the settlor provided.

ticular order and timing of payout.⁷⁵ In these circumstances it might not appear "impractical" to carry the original terms of trust into effect, merely less advantageous. Thus, it might seem that the private trust variation power has a broader application than the doctrine of *cy pres*. Yet this difference may be more semantic than real, for Professor Scott believed that there is:

a tendency in the more recent cases to permit a *cy pres* application even though it is difficult to say that it is impracticable to carry out the specific purpose, but where it would be so unwise to do so that the testator would presumably not have desired to insist upon it.⁷⁶

While new to Missouri, statutes in a minority of states authorize a limited private trust *cy pres* power. For example, Pennsylvania legislation provides:

Failure of original purpose.—The court having jurisdiction of a trust heretofore or hereafter created, regardless of any spendthrift or similar provision therein, in its discretion may terminate such trust in whole or in part, or make an allowance from principal to one or more beneficiaries provided the court after hearing is satisfied that the original purpose of the conveyer cannot be carried out or is impractical of fulfillment and that the termination, partial termination, or allowance more nearly approximates the intention of the conveyer, and notice is given to all parties in interest or to their duly appointed fiduciaries.⁷⁷

This power has been used most frequently to terminate so-called "nuisance trusts" where the corpus is so small that the benefits of the trust do not justify the costs of administration, or to make an allowance from corpus for a needy income beneficiary who was the primary object of the settlor's bounty where there are minor or unborn contingent principal beneficiaries who cannot consent.⁷⁸ Similar legislation is in effect in New York, California, Kentucky, and

75. Of course, termination would be denied despite the savings if the court were to find that it was a material purpose of the settlor to keep the trust fund out of the beneficiaries' hands, because discretion would be exercised to avoid undue disruption of the settlor's plan. Accomplishment of the settlor's particular purpose (protecting the beneficiaries) obviously would not be impracticable in this circumstance.

76. 4 A. SCOTT, *supra* note 6, § 399.4, at 3124 (footnote omitted). *E.g.*, Matter of Crichfield Trust, 177 N.J. Super. 258, 426 A.2d 88 (1980) (trust providing \$400 annual college scholarship to male graduates of certain high school varied *cy pres* to permit increase in stipend and extension to women graduates).

77. 20 PA. CONS. STAT. ANN. § 6102(a) (Purdon Supp. 1985). Originally enacted in 1947, the official comment to this section states:

Termination of trusts, which have failed in their purpose and which have become oppressive or otherwise undesirable, has been impossible in numerous instances due to inability to secure the consent of persons unborn, unascertained, or not *sui juris*. The purpose of this section is to give relief in such cases. . . . The relief to be given is in the nature of *cy pres*, thus preventing a complete frustration of the conveyer's intention.

Id. official comment—1947.

78. See Wright, *Termination of Trusts in Pennsylvania—Some Current Trends*, 115 U. PA. L. REV. 917, 926 (1967).

A few courts have permitted, without statutory authorization, an allowance to be

Wisconsin.⁷⁹

b. Intergenerational Compromise for Productivity

Discretionary application of a *cy pres* approach to trust variation would be consistent with one widely accepted policy justification for the Rule Against Perpetuities—that the Rule is a simple compromise between conflicting intergenerational claims to the control of resources. Professor Lewis Simes explained this rationale as follows:

[T]he Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy. . . . [O]ne of the most common human wants is the desire to distribute one's property at death without restriction in whatever manner he desires. Indeed, we can go farther, and say that there is a policy in favor of permitting people to create future interests by will, as well as present interests, because that also accords with human desires. The difficulty here is that, if we give free rein to the desires of one generation to create future interests, the members of succeeding generations will receive the property in a restricted state. They will thus be unable to create all the future interests they wish. Perhaps, they may not even be able to devise it at all. Hence, to come most nearly to satisfying the desires of peoples of all generations, we must strike a fair balance between unrestricted testamentary disposition of property by the present generation and unrestricted disposition by future generations.⁸⁰

It may at first seem an odd sort of intergenerational “compromise” that gives the testator or settlor, typically a member of the older generation, complete authority to restrict and control devolution of the property throughout the entire lifetime of his younger-generation beneficiaries and for up to twenty-one

made from principal for a needy income beneficiary where there are unborn or unascertained beneficiaries who cannot consent. In the leading case, *In re Wolcott*, 95 N.H. 23, 56 A.2d 641 (1948), the court authorized an allowance from corpus to the testator's needy wife, the income beneficiary, where the testator's sons, the likely principal beneficiaries, consented, despite the fact that the gift of trust corpus was to testator's issue per stirpes. The court found a primary purpose “not expressed in words, but nevertheless . . . implicit in the disposition made of his estate,” 95 N.H. 26, 56 A.2d 644, to furnish reasonable support to the testator's wife. This finding was held to justify a limited invasion of corpus, either because the trust should be construed to contain an implied invasion power (a theory approved by RESTATEMENT (SECOND) OF TRUSTS § 168 comment d & illustration 5 (1959)), or because literal adherence to the trust terms would prevent accomplishment of the settlor's purpose due to unanticipated changes in circumstances (a theory generally used only to justify *administrative* deviation, see RESTATEMENT (SECOND) OF TRUSTS § 167(1) & illustrations 1-24 (1959)). *Accord McAfee v. Thomas*, 121 Ore. 351, 255 P. 333 (1927) (implicit invasion powers).

79. N.Y. ESTATE POWERS & TRUST LAW § 7-1.6(b) (McKinney 1967); CAL. CIV. CODE § 2279.1 (West 1985); KY. REV. STAT. § 386.185 (1984); WIS. STAT. ANN. § 701.13(3) (West 1981).

80. L. SIMES, *supra* note 68, at 58-59; see also 3 L. SIMES & A. SMITH, *supra* note 67, § 1117, at 13; Downing, *supra* note 68, at 359-60.

years thereafter. The Rule may reconcile competing claims of the transferor and remote generations, but it does so at the expense of the immediate beneficiaries, disregarding entirely their claims for autonomy and control.

The explanation for such a one-sided "compromise" is that the law prefers the wishes of transferors—the older generation—because it is in the best interests of society to maintain incentives to produce, invest, and accumulate income. The unarticulated assumption is that the most productive members of society—entrepreneurs and highly-trained professionals, for example—would be less inclined to work, save, and invest if they are not given control over the disposition of the property they accumulate.⁸¹ The *cy pres* approach to trust variation, by preserving the settlor's plan to the fullest extent possible in unanticipated circumstances, assures the owners of property that their wishes will be implemented, and therefore functions to maintain economic incentives.⁸²

There are two large holes in this productivity-based rationale for the Rule Against Perpetuities and the primacy of the settlor/testator's intentions. First, not all property owners are economically productive, and many beneficiaries could be more productive if they had unrestricted use of the property they receive by donative transfer. Property owners are permitted to control devolution even though they are merely passing on dynastic wealth accumulated by others. And the beneficiary of a spendthrift trust might be a superb venture capitalist, with a talent for fostering the development of important, innovative new technologies, if only she could get her hands on enough capital to invest. The Rule Against Perpetuities, if founded on a concern for economic incentives, obviously reflects a judgment that these cases are relatively unimportant, and that on balance respecting the donor's wishes will do more to foster productivity than could be achieved by giving the donee/beneficiary a free hand.⁸³

The second critique of the productivity rationale may be far more devastating. It must be remembered that the Rule Against Perpetuities is distinct from the principle of free testation. Society could follow the principle of free testation but abolish almost all future interests in property.⁸⁴ If so, the testator

81. Thus the "compromise" view of the policy against perpetuities is primarily concerned with the maintenance of economic incentives. Owners of property are not granted perpetual control over the disposition of their estate because the utility associated with an ability to control property devolution centuries hence (i.e., the additional incentive value of perpetuities) is so highly discounted for deferral that it can be safely eliminated, if doing so is necessary in serving other societal objectives.

82. R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 18.5 (2d ed. 1977). Indeed, it is often suggested that the charitable trust *cy pres* power actually *increases* the incentive to make charitable dispositions (and concomitantly the incentive to produce and accumulate for that purpose) because the settlor is assured that her purposes will be carried out, rather than frustrated by wooden adherence to the specific terms of the trust long after circumstances have so far changed that those terms have become nonfunctional. See *id.* § 18.3; 4 A. SCOTT, *supra* note 6, § 399.

83. While this intuitive evaluation of countervailing economic incentives seems quite sensible, empirical research is needed to prove this hypothesis.

84. An exception would of course be necessary for the reversion following a

would be free to select the objects of his bounty and determine the amount of their gifts, but all donative transfers would have to confer immediate absolute ownership. The economic incentive maintained by the Rule Against Perpetuities, therefore, is only the incentive that inheres in an ability to restrict and control the beneficiary's use of the property. Obviously, abolishing free testation (or high rates of transfer taxation) would deter a person from accumulating an estate greater than that which is necessary to maintain a desired standard of living for the duration of his or her life, but the *incremental* incentive effect conferred by the ability to control beneficiaries' use of property for a period of lives in being and twenty-one years seems far less substantial.

2. The Broad View of Judicial Authority

a. Judicial Resettlement

Missouri's trust variation statute is susceptible to an interpretation that would permit the courts to terminate or vary a trust in a manner that would undermine the settlor's purposes,⁸⁵ and the new jurisdiction could even be exercised where all beneficiaries are in being and *sui juris*, provided they consent.⁸⁶ This broad approach to judicial authority would not permit arbitrary variation or require the courts to rubber-stamp proposals agreed-upon by all competent adult beneficiaries. The standard for the exercise of judicial discretion under a private trust *cy pres* power is maximum effectuation of the settlor's purposes in light of unforeseen circumstances (e.g., overlooked tax saving opportunities or unanticipated future events). Instead, the standard for the exercise of judicial discretion under the broad approach would be a judicial finding that the change is in the best interests of the beneficiaries, even though it may hinder or prevent the accomplishment of some of the settlor's purposes.⁸⁷

This is not to say that the settlor's purposes, as revealed by the trust instrument or inferred from surrounding circumstances, have no bearing on the issue, but rather that they are not binding on the court, merely advisory. Thus, *independent judicial evaluation* of the needs and capabilities of the beneficiaries—including consenting adult beneficiaries—is called for under the

term of years, in order to preserve the commercial leasehold.

85. See *supra* notes 62-66 and accompanying text. But see *infra* note 87.

86. See *supra* notes 30-36 and accompanying text.

87. Adoption of the broad view of judicial authority does not require a corresponding change in the rule that the settlor's consent is necessary to terminate a trust if the settlor is still on the scene. See *supra* note 6. During life the settlor can attempt to control his donees' behavior through non-trust devices (e.g., conditional gifts or periodic gifts combined with threats or promises). Perhaps the same control should be exercisable under a trust during continuance of the settlor's life. Note, however, that § 536.590.2 does not limit the courts' variation power to situations where the settlor cannot consent. Accordingly, perhaps the courts, in the exercise of judicial discretion, should refuse to vary a trust where the settlor is still on the scene but does not consent. That is, in this limited and unusual situation disruption of the settlor's plan should weigh heavily against approval of the proposed change.

broad approach.⁸⁸ This interpretation would, in effect, authorize judicial resettlement of trusts,⁸⁹ and to provide a sound basis for informed judgment would require factfinding concerning the beneficiaries' needs and abilities.

b. Dead Hand Control for Judicial Economy

The broad view of judicial authority under the Missouri distributive variation statute is consistent with an alternative policy rationale for the Rule Against Perpetuities—that the Rule limits dead hand control of property because it is “socially desirable that the wealth of the world be controlled by its living members and not by the dead.”⁹⁰ Permitting trust variation to be guided

88. The Chancery Division, in *Re Towler's Settlement Trusts*, [1964] Ch. 158, [1963] 3 All. E.R. 759, appears to have conducted just such an independent judicial appraisal of a beneficiary's needs and capabilities. The court approved an arrangement on behalf of a minor who was scheduled to receive a large distribution of corpus at age twenty-one, but who had proved to be “alarmingly immature and irresponsible as regards money,” under which the distribution would be delayed until the beneficiary was older, and in the meantime her interest in the trust would be protected from creditors. *See also Re Burney's Settlement Trusts*, [1961] 1 All E.R. 856, 858, in which the court concluded that the interests of contingent beneficiaries of a protected life interest in a trust (that is, the persons who might take income upon forfeiture for alienation of the life income beneficiary's interest) could be eliminated where the financial circumstances of the protected life income beneficiary had so far improved since settlement of the fund in trust that the original purpose of protecting that beneficiary from creditors had become unnecessary and obsolete.

89. *See Re Seale's Marriage Settlement*, Ch. 574, [1961] 3 All E.R. 136 (transfer of English trust to Canada and conforming amendments to comply with Quebec law accomplished by making judicial approval of the revocation conditional on the resettlement); *see also Re Ball's Settlement*, [1968] 2 All E.R. 438, 442 (“if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed”). *But see Re Towler's Settlement Trusts*, [1964] Ch. 158, [1963] 3 All E.R. 759, in which the court extended a trust beyond its scheduled termination date but refused to authorize the transfer of the fund into a new trust as of that date,

Though presented as a variation, it is in truth a complete new resettlement. The former trust funds were to be got in from the former trustees and held in totally new trusts such as might be made by an absolute owner of the funds. I do not think that the court can approve this [under the jurisdiction conferred by the Variation of Trusts Act, 1958]. Alternatively, if it can, I think it should not do so. . . .

Id. at _____, [1963] 3 All E.R. at 762; *accord Re Purves*, 14 D.L.R.4th 738 (B.C. Sup. Ct. 1984). It is submitted that such a distinction between a “variation” (the extension of an existing trust) and a “complete new resettlement” is without substance and merely preserves the fiction that a court cannot write a will or trust for the testator or settlor.

90. L. SIMES, *supra* note 68, at 59. Professor Simes expands upon this view by observing:

I know of no better statement of that doctrine than the language of Thomas Jefferson, contained in a letter to James Madison, when he said: “The earth

only by an objective judicial evaluation of contemporary circumstances shifts the balance, transferring greater control over the use of trust property from the settlor to the living generation, but *not* to the beneficiaries acting alone.

This dead-hand versus living-hand justification of the policy against perpetuities is obviously incomplete, for the Rule sanctions dead-hand control for one full generation and the minority of the next, in derogation of the asserted preference for resource control by the living. The explanation for this apparent anomaly lies not in a concern for productivity, but in a concern that the gift maximize the benefit to the donee. Yet, because many donees are inexperienced in financial management or would tend to waste the principal in a short-sighted splurge of consumption, maximum benefit to the living cannot always be secured by ceding unfettered control of property to the donee.⁹¹ An objective, facts-and-circumstances evaluation of the needs and capabilities of *each* trust beneficiary, devisee, or legatee of property would be necessary to assure that property is applied to the maximum advantage of donees. Such an individualized inquiry would clearly overwhelm the judicial system. Hence, the settlor/testator's dispositive plan is followed for reasons of judicial economy—as an administrable proxy or surrogate for the preferred approach, namely, a disinterested utilitarian evaluation of how the property can be applied to best promote the welfare of each donee.

According to this view, trusts and future interests are tolerated because the donor, who is personally familiar with the weaknesses, strengths, needs, and capacities of his donees, and who is generally not as interested a party as the donees, is presumed to act out of a concern for the best interests of the donees.⁹² And dead-hand control may subsist only for one generation and the minority of the next because restrictions, conditions or limitations that extend beyond that period cannot be founded on an individual determination of the needs and capacities of persons with whom the donor was personally ac-

belongs always to the living generation. They may manage it then, and what proceeds from it, as they please during their usufruct." Sidgwick, in his *Elements of Politics*, also discusses the problem in the following words: ". . . it rather follows from the fundamental assumption of individualism, that any such posthumous restraint on the use of bequeathed wealth will tend to make it less useful to the living, as it will interfere with their freedom in dealing with it. Individualism, in short, is in a dilemma. . . . Of this difficulty, there is, I think, no general theoretical solution: it can only be reduced by some practical compromise."

Id. at 59-60 (footnotes omitted); accord RESTATEMENT OF PROPERTY Introductory Note on the Common Law Rule Against Perpetuities, at 2131-32 (1944).

91. Similarly, a rule requiring that all donative transfers be devoted to the purchase of an inalienable life annuity, although it would secure professional management and protect the donee from his own improvidence, is unacceptable because it is equally inflexible. In many circumstances greater benefit would be obtained by transferring unfettered control of the property, as, for example, where a lump sum is needed to buy a house or cover large educational or medical expenses, or where the donee is a sophisticated investor.

92. A. GULLIVER, FUTURE INTERESTS 14-16 (1959).

quainted. Where the presumption that the donor's limitations are designed to best promote the welfare of donees breaks down, it should not be followed.⁹³ Thus in theory, the plan of the settlor/testator is entitled to no independent respect, its only significance is as a handy substitute for the prohibitively expensive independent evaluation.

It is noteworthy that this donor-as-proxy rationale for the Rule Against Perpetuities is responsive to one of the criticisms of the productivity rationale. It was suggested earlier that the principal economic incentive to accumulate wealth beyond one's own ability to consume is secured by a policy of free testation—determining which friends and relatives shall benefit from one's property and in what amounts. The significance of any incremental incentive that may derive from the donor's ability to control the terms and conditions of the donee's enjoyment of property seems much more questionable.⁹⁴ Under the donor-as-proxy rationale, the idiosyncratic (and, perhaps, misanthropic) desires of the settlor/testator are carried out during the period of the Rule, but in theory they are dispensable—society would substitute a judicial or administrative determination if we could afford it.

Missouri's new trust variation statute may portend a new attitude—that in some circumstances society can and should afford an independent judicial determination of how to best advance the welfare of trust beneficiaries. If the competent adult beneficiaries are unanimous in their dissatisfaction with the settlor's plan, perhaps an independent judicial inquiry is warranted. This, too, may be a situation where the presumption that the donor's limitations are designed to best promote the welfare of the donees breaks down.

Most substantial noncharitable transfers of wealth in modern society are accomplished through the use of trusts. Thus it might at first appear that the broad view of judicial discretion presented here creates the potential for an endless stream of litigation, completely undercutting the judicial economy sought to be obtained by society's acceptance of future interests and trusts. For several reasons the expansive interpretation of Missouri's trust variation statute is not a rejection of the principle that the transaction costs of independent evaluation generally require reliance on the settlor's plan. In most situations the beneficiaries could not obtain judicial reappraisal of the trust. Jurisdiction should not be exercised if the settlor is still on the scene.⁹⁵ And because jurisdiction is conditioned on the consent of all adult beneficiaries who are not disabled, the flood of litigation which reliance on the settlor's plan was designed to avert should not materialize. Finally, even where the unanimity requirement is satisfied, it will often be clear that variation would not be granted, as, for example, where beneficiaries who are demonstrably irresponsible with money seek to terminate a spendthrift trust.

93. *Id.*; A. KALES, *ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS* § 121 (2d ed. 1920).

94. *See supra* text accompanying note 84.

95. *See supra* note 87.

c. Indirect Consequences of the Broad View

If Missouri courts adopt the expansive interpretation of their new distributive variation authority suggested here, an indirect consequence may be the eventual modification of other legal rules. In particular, two common-law rules ancillary to the Rule Against Perpetuities may, over time, change or wither away. These are (1) the rule against perpetually indestructible trusts, and (2) the rule against accumulations.⁹⁶

The rule against perpetually indestructible trusts demands that a trust must be terminable at the consent of all beneficiaries once the perpetuities period of lives in being plus twenty-one years has run.⁹⁷ This rule would be more appropriately designated the "limit on Claffin trusts," for its sole function is to assure that control over trust assets is eventually transferred to the beneficiaries notwithstanding the settlor's purposes.⁹⁸ While the existence of such a rule in jurisdictions that follow *Claffin* is undisputed, the consequences of a violation of the rule are less clear. Violation of the rule does not void the trust or any beneficial interest therein, only the indestructibility feature. The older authorities indicate that a perpetual restriction on consensual termination is void *ab initio*, leaving the beneficiaries free to modify or terminate the trust from the moment of its inception, while the more recent authorities would hold the restraint valid for the duration of the perpetuities period,

96. The number of decisions actually resting on the rule against perpetually indestructible trusts or the rule against accumulations is quite small. This is because most trusts or accumulations that may endure too long involve one or more trust interests that are to remain contingent until termination. As such remotely vesting interests are void under the common-law Rule Against Perpetuities, the question of an interest-holder's right to terminate the trust or accumulation does not arise. Accordingly, these rules come into play only in the rare circumstance where all interests vest within the period of the Rule Against Perpetuities but the trust terms provide for termination at some later date (i.e., postponed distribution of vested interests). The prevailing modern practice of terminating a trust upon expiration of a perpetuities saving clause virtually guarantees the continued scarcity of authority (and, it must be admitted, the minimal practical importance) of the issues discussed in this portion of the article.

97. See generally Downing, *supra* note 68, at 372-91.

98. Professor Gray predicted that the decision in *Claffin* would necessitate the development of such a rule, and speculated that the courts would adopt the period of the Rule Against Perpetuities as the maximum duration of trust indestructibility.

The fact is that the Massachusetts court in *Claffin v. Claffin* introduced a novel idea into the law, that of the inalienability of absolute interests, just as the Court of King's Bench in *Pells v. Brown* introduced a novel idea into the law, that of the indestructibility of future interests. And as the Rule against Perpetuities had to be invented to control the indestructible future interests created by *Pells v. Brown*, so some rule must be invented to control the inalienable interests created by *Claffin v. Claffin*. It is perhaps likely that the same period as that prescribed by the Rule against Perpetuities will be taken, although it would seem quite open to the Court to adopt some other period, if found more convenient.

J. GRAY, THE RULE AGAINST PERPETUITIES § 121i (2d ed. 1906) (footnotes omitted).

merely "lopping-off" any excessive period of dead-hand control.⁹⁹

Designed, as it is, "to prevent the possible undesirable social consequences of the views of persons long removed from the current scene influencing unduly the wishes and desires of those living in the present,"¹⁰⁰ the rule against perpetually indestructible trusts might become a dead letter if Missouri courts adopt the broad view of their trust variation authority. If a trust can be modified or terminated within the period of the Rule Against Perpetuities on the assent of the court and all adult beneficiaries who are not disabled, the living have control of their own destiny at all times.¹⁰¹ Perhaps a bright-line cut-off of the Claflin doctrine is not needed where an individualized judicial determination of the continuing vitality of the trust is readily available. To the contrary, it could be argued that the beneficiaries should not have to bear the cost of securing judicial assent to termination once the perpetuities period has expired, and that such continuing judicial supervision could enforce, beyond the perpetuities period, the "views of persons long removed from the scene." Yet the court would enforce those views only if it found that the proposed change was not in the best interests of the beneficiaries, and in this circumstance, where the views of persons long removed have received contemporary judicial validation, the wishes of the beneficiaries would not seem to be "unduly" influenced.

The common-law rule against accumulations, which holds that a provision in the trust instrument directing or permitting the trustee to retain all or a part of the trust income for a period that exceeds the period of the Rule Against Perpetuities is partially or completely ineffective,¹⁰² is also a close rel-

99. Downing, *supra* note 68, at 383-84. The void-*ab-initio* approach is consistent with the consequence of a violation of the common-law Rule Against Perpetuities, while the lopping-off approach corresponds to the "wait and see" reform of the Rule Against Perpetuities. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 & comments a-c (1983). The American Law Institute has recommended adoption of the lopping-off approach. *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 62 comment o (1959) ("such a provision [preventing consensual termination] is ineffective so far as it is applicable beyond the period [of lives in being and twenty-one years], and is wholly ineffective unless it is severable").

100. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 comment a (1983).

101. This statement assumes that the Missouri courts would construe their trust variation jurisdiction to encompass the case where all trust beneficiaries are competent, consenting adults.

102. RESTATEMENT OF PROPERTY §§ 339, 441(1) (1944). The statement in the text, that the duty or authority to accumulate is "partially or completely ineffective," is intentionally indefinite. The exact consequences of a violation of the rule against accumulations is uncertain, reflecting the same uncertainty that surrounds the violation of the rule against perpetually indestructible trusts. *See supra* note 99. Here, too, the older authorities indicate that the trust term sanctioning an excessive accumulation is void *ab initio*, RESTATEMENT OF PROPERTY § 441(1) (1944); RESTATEMENT (SECOND) OF TRUSTS § 62 comment t (1959); *see* 3 L. SIMES & A. SMITH, *supra* note 67, § 1468, while the more recent authorities would invalidate the accumulation only to the extent that it extends beyond the period of the Rule Against Perpetuities, BOGERT *supra* note

ative of the Claffin doctrine. A trust providing for mandatory or discretionary accumulation of income is necessarily a Claffin trust, there being an obvious "material purpose" to increase the fund. Professor Simes observed that "to the extent that the Claffin doctrine is not in force, the application of *Saunders v. Vautier* will enable the beneficiary to stop the accumulation in nearly all cases [by demanding termination], and thus render it unobjectionable."¹⁰³ The theory is that, if the beneficiary has the power to terminate the trust, continued accumulation resulting from forbearance in the exercise of that power is merely *voluntary saving by the beneficiary*; as a matter of policy the accumulation is not objectionable because it is not enforced by the dead.¹⁰⁴

Professor Simes concluded, on the basis of these considerations, that an independent rule against accumulations is unnecessary if the trust is destructible, either because the Claffin doctrine is not in force or because its duration is limited by the rule against perpetually indestructible trusts.¹⁰⁵ Accordingly, if Missouri's trust variation statute is construed broadly, Missouri courts may similarly conclude that the rule against accumulations is unnecessary, since all trusts would be terminable at any time upon an appropriate agreement among adult beneficiaries.¹⁰⁶

To summarize, Missouri courts may conclude that an expansive interpretation of judicial trust variation authority is sufficient to assure that resources held in trust will be reasonably responsive to changing circumstance that may

6, § 217 at 288; RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.2(1) comments f & g (1983) (using "wait and see" to determine whether accumulation endures too long).

103. L. SIMES, *supra* note 68, at 108; accord W. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 433-35 (1955).

104. L. SIMES, *supra* note 68, at 97-99; see RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.2 comment e (1983); 3 L. SIMES & A. SMITH, *supra* note 67, § 1462. This justification of the rule against accumulations, that it is designed to prohibit control of resources by persons too long removed from the current scene, may call into question the principle that a trustee's *discretionary* authority to accumulate is subject to the rule, RESTATEMENT OF PROPERTY § 439 comment b (1944); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.2 comment g, Illustrations 4 & 5 (1983), because such a power makes the utilization of resources responsive to current conditions (even if not responsive to the whims of current beneficiaries). On the other hand, if the trustee's exercise of discretion is subject to standards or guidelines imposed by the settlor, such continuing, unresponsive dead-hand *influence* may be as objectionable as outright control.

105. L. SIMES, *supra* note 68, at 105-08; 3 L. SIMES & A. SMITH, *supra* note 67, § 1465: "Perhaps it is enough that the courts will hold ineffective a provision for indestructibility if the period of indestructibility is to last longer than the period of the rule against perpetuities." This line of reasoning indicates that the rule against accumulations is redundant.

106. As used here, "appropriate" means deserving of judicial assent under the standards discussed earlier. That is, the arrangement is such that the court could find that (1) protected beneficiaries will "benefit," (2) it is a good bargain for the protected beneficiaries, and (3) it serves the best interests of the adult beneficiaries who are not disabled.

face current and future beneficiaries. Thus, the new trust variation jurisdiction may undercut the utility of the rule against perpetually indestructible trusts and the rule against accumulations. A different result is possible, however. Attention to the justification that underlies the broad view of judicial authority might impel the courts to reexamine and reformulate these rules ancillary to the Rule Against Perpetuities.

Recall that the broad view of trust variation authority is founded upon a unique conception of the policy against perpetuities—that in order to keep transaction costs within reasonable bounds the law adopts the donor's limitations as a surrogate for an independent beneficiary-by-beneficiary determination of how property should be applied to best promote the welfare of the living. This second-best approach to donative transfers ought to be followed only insofar as it is reasonable to assume that the donor's limitations were designed to promote the welfare of her beneficiaries. If conditions and limitations extending beyond one generation and the minority of the next are void because they cannot be founded on an individual determination of the needs and capacities of persons with whom the donor was personally acquainted, why should a Claflin trust or an accumulation endure for a greater period whenever a *single* beneficiary wishes to continue it? Some or all of the vested remainder beneficiaries of a trust may indeed need spendthrift protection, or professional management, or income accumulation extending beyond age twenty-one, but the donor could not possibly know that.

The broad view of trust variation jurisdiction transfers greater control over resources to the living, but it never grants unilateral control to any beneficiary—a change requires unanimous consent by all adult beneficiaries who are not disabled together with judicial approval. The unanimity requirement means that every adult beneficiary holds a veto power over the proposed variation.¹⁰⁷ In the interests of judicial economy this requirement is appropriate

107. The American Law Institute would apply a separate-share rule, treating a trust with multiple principal beneficiaries as so many separate trusts, each independently terminable with the consent of all persons having an interest in either the income or principal of that *portion* of the trust. RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 comment i (1983); Casner, *Discussion of Restatement of Law, Second, Property, Tentative Draft No. 2—Part I*, 56 A.L.I. PROC. 493, 510-11 (1979). Under this approach agreement with another beneficiary would be required to obtain possession of resources held in trust only in the relatively unusual circumstance in which vested income and principal interests are held by distinct persons after the period of the Rule Against Perpetuities has run. For example, if *T* devises property in trust with income to be paid to *S* for life, then to the youngest son of *S* for life, with principal to be distributed to *D*, the life income interest in the youngest son of *S* must vest within a life in being, but the trust may extend beyond the period of the Rule Against Perpetuities. Here, agreement between *S*'s youngest son and *D*, holders of the vested income and principal interests, would be required to terminate the trust after the perpetuities period has run. But if *T* devised the property in trust to *S* for life, then to the children of *S*, with principal to be distributed when the youngest child attains the age of forty, then under the Restatement rule the children could independently demand possession of their separate shares of the trust once the perpetuities period has run.

during the perpetuities period, for it serves to screen out the egregious cases in which the presumption that the donor acted to best promote the welfare of her beneficiaries breaks down. Beyond the perpetuities period there can be no such presumption. The continuance of a Claffin trust may serve the interests of some beneficiary, thereby preventing termination under the trust variation statute, but what warrant is that for tying the hands of the rest?

More consistent with the objective approach of the Rule Against Perpetuities and its underlying rationale would be a simple corollary: a Claffin trust is terminable at the request of *any* beneficiary once the perpetuities period has run.¹⁰⁸ If all vested remainder beneficiaries are satisfied, the trust could of course continue, but disagreement should not stand in the way of individual autonomy once there is no longer any reason to resolve that disagreement by deferring to the settlor's plan.

III. CONCLUSION

Missouri courts will have substantial leeway in construing the scope of their new jurisdiction to permit variation from the distributive terms of a trust. The statute is susceptible to a variety of interpretations, ranging from a limited *cy pres* power over private trusts to an unprecedented grant of jurisdiction to revise settlements to serve the best interests of all beneficiaries whenever the adult beneficiaries agree that the settlor's arrangements are unsatisfactory. Missouri courts will quite properly be guided by the actions of the courts of

Notice that if the separate-share approach is not followed, then by the simple expedient of making the professional trustee, whose interest is in earning management fees from continuance of the trust, a minor beneficiary under the trust, the settlor can virtually guarantee that unanimous consent to termination will not be forthcoming. This device can be used to make a trust indestructible as a practical matter in jurisdictions (including England and the Commonwealth nations) that do not recognize the Claffin doctrine. Downing, *supra* note 68, at 380-81; Cleary, *Indestructible Testamentary Trusts*, 43 YALE L. J. 393, 404 (1933).

108. This reformulation of the rule against perpetually indestructible trusts was advocated by Downing, *supra* note 68, at 379-83, but on the ground that the problem to which the Rule Against Perpetuities is directed is the investment conservatism of trustees. This is also the form which Professor Albert M. Kales, writing in 1920, assumed that the rule against perpetually indestructible trusts would take. A. KALES, *supra* note 93, § 658, at 754-55.

The American Law Institute, in the RESTATEMENT (SECOND) OF PROPERTY, adopts the curiously ambivalent position that (subject to the separate-share rule described *supra* note 107) an agreement among multiple beneficiaries is necessary to terminate a Claffin trust once the perpetuities period has run, but an accumulation extending beyond that time is simply invalid, without regard to the beneficiaries' wishes. Compare RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 2.1 (1983) with *id.* § 2.2(1); see 56 A.L.I. PROC. 520-21 (colloquy between Mr. Richard Wellman and Prof. James Casner). See also RESTATEMENT OF PROPERTY § 441(2) & comment h (1944) (where a *single* person has unrestricted power to terminate an accumulation the period during which such power subsists is not taken into account in determining whether the accumulation may last too long).

England and certain British Commonwealth countries in construing similar legislation. On many questions—including the relevance of indirect or non-pecuniary benefits, insistence upon a good bargain, and the authority to override the settlor's purposes—the decisions from abroad are quite persuasive and deserve to be followed. But in addition, the grant of judicial discretion under section 456.590.2 confers a flexibility which presents Missouri courts with a singular opportunity (an opportunity not seized, thus far, by their English and Commonwealth brethren) to enunciate a unique conception of the policy against perpetuities. Indeed, the scope of judicial discretion must be determined either by adherence to tradition, or by an informed evaluation of the function of the Rule Against Perpetuities. The Supreme Court has observed that “the dead hand rules succession only by sufferance.”¹⁰⁹ With the enactment of broad discretionary authority to vary the distributive terms of a private trust, the time has come to reexamine the wisdom of that sufferance, and perhaps, to loosen the dead hand's grip.

109. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942).

