

Acceptance and rights in
discretionary *inter vivos* trusts-
pruning the involvement of
trust beneficiaries

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Because the *stipulatio alteri* is applied in a discretionary *inter vivos* trust, once the beneficiary accepts, he becomes a party to the contract and now has a “right” and that means that no amendments can be made without his consent.





True essence of the *stipulatio alteri* does not demand that the third party has to become a party to the contract in order to enjoy protection and a right.

“...although no contract had been made between [the parties] and no technical *delictum* had been committed, yet the law to prevent injustice being done, considered one of them bound to the other in the same manner as if a contract had been made.”

Trademen's Benefit Society v Du Preez 1887

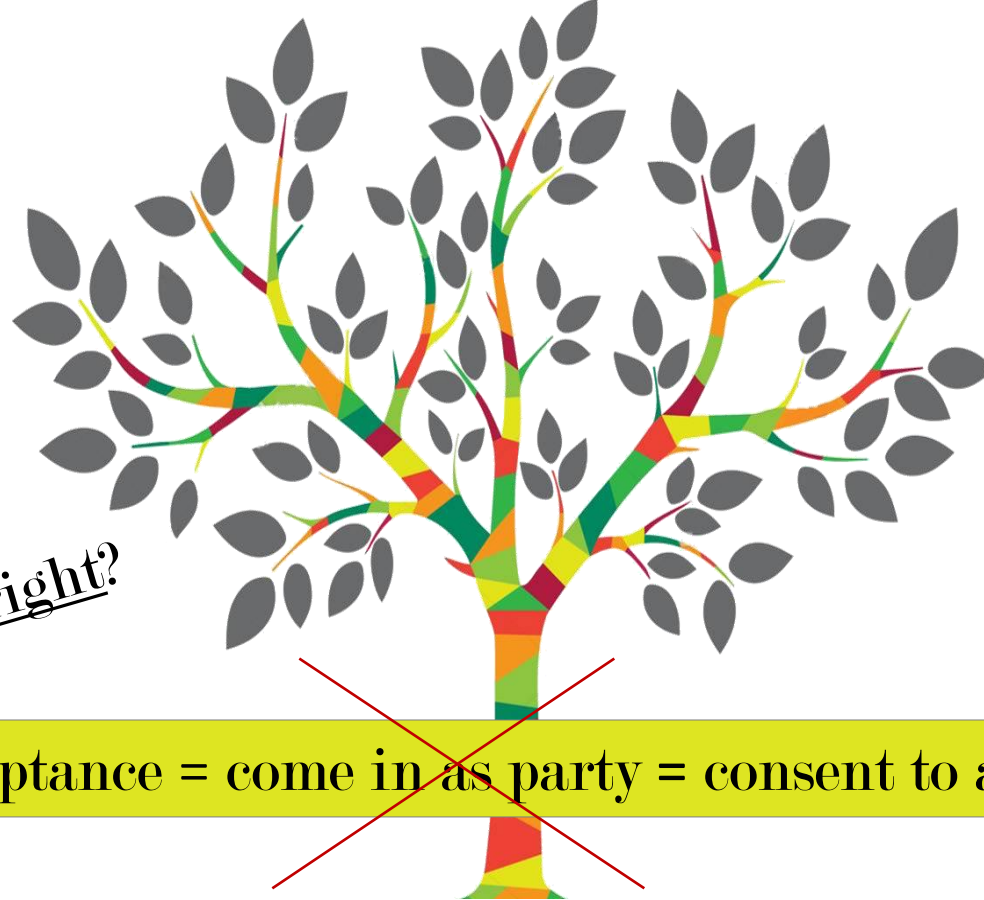
Why? right cannot be forced onto you without your consent

Acceptance = enforceable, right of action to sue

vinculum juris

“If the promise has been made to me [i.e. the stipulator] ... it seems in accordance with the law of nature that by acceptance I am given the right of effecting this, that the right should come to the third party, if he also accepts; so that in the meantime the promise cannot be revoked by the promisor, but I, to whom the promise was made, may remit it. For this view is not in conflict with the law of nature and it is particularly in accordance with the word of such a promise.”

Hugo de Groot



What about the right?

Acceptance = come in as party = consent to amendments

Crookes v Watson 1956

“The *stipulatio alteri* is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two.” Schreiner JA

“A vested right was something substantial; something which could be measured in money; something which had a present value and could be attached.” ITC 76 (1927) 3 SATC 68 at 70.

Vested rights

“Surely a right has accrued on the ensuing acceptance to the third party ... and it would be unfair for it to be taken from him without [his] consent.”
Voet 39.5.43.

Vested right = consent needed for amendments

“A vested right indicates that its beneficiary is the holder of a complete real or personal right. A complete right is one that has all the parts necessary to allow for its full operation and for all consequences flowing from it. A right will not be complete when it is subject to a suspensive condition. However, ownership of the benefit, and the transmissibility and immediate enjoyment of the right are not requirements for its vesting.” Van der Merwe ‘The meaning and relevance of the phrase ‘vested right’ in income tax law. (2000) 12 SA Merc LJ 319.

Contingent right is “something which may ripen into a vested right on the happening of an event, but it must be such that the happening of the event, without more gives the vested interest. A person cannot be said to have a contingent interest in something which another may or may not choose to give him in the future.” *Stern and Ruskin v Appleson* 1951 (3) SA 800 (W) at 805.

Contingent right

Protection?? YES

Acceptance?? NO

“A condition is a term that qualifies a contractual obligation in such a manner as to make its operation and consequences dependent on whether an uncertain future event will happen or will not happen.” Van Huyssteen, Lubbe & Reinecke *Contract: General Principles* (2016) at 279.

A vested right cannot be forced on the beneficiary, but a contingent right is only still a chance to get a right in the future- this automatically flows as consequence from the agreement. He does not need to accept this right and the benefit is not anything substantial yet.

Spes = hope / expectation

“By a future right is meant the expectation or *spes* that a claim may materialise in future. It is to be distinguished from a contingent or conditional right, where the right exists but its continued existence and eligibility is made subject to a condition, resolute or suspensive.” Petrus Nienaber & George Gretton ‘Assignment/Cession’ in Reinhard Zimmermann, Daniel Visser & Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 803.

Protection?? NO

Amend?? YES

“A person cannot be said to have a contingent interest in something which another may or may not choose to give him in the future.”

Stern and Ruskin v Appleton 1951 (3) SA 800 (W) at 805.

Rights in the “pure” *stipulatio alteri*

Automatically from contract

Unique situation with intention to give vested rights to outsider

= benefit

ACCEPT WHAT IS OFFERED

Spes / contingent right

Vested right

When accept?

- Death
- When offered
- Conditions fulfilled
- “While it remains open”
(*Mutual Life v Hotz*)

Cannot be altered without consent (otherwise taxed)

Depends on legal instrument

Received benefit = *stipulatio* comes to an end



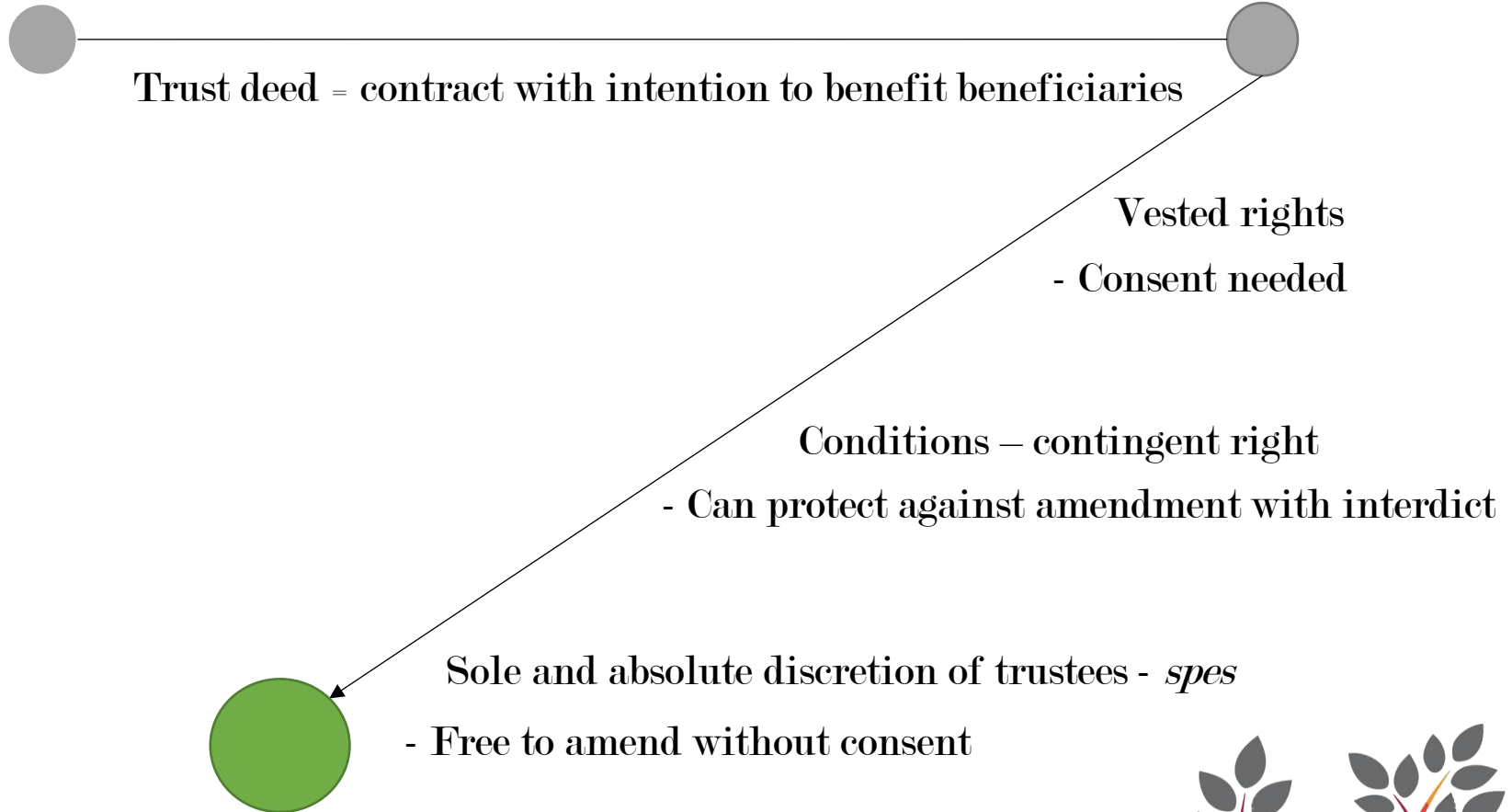
A pure *stipulatio alteri* definition



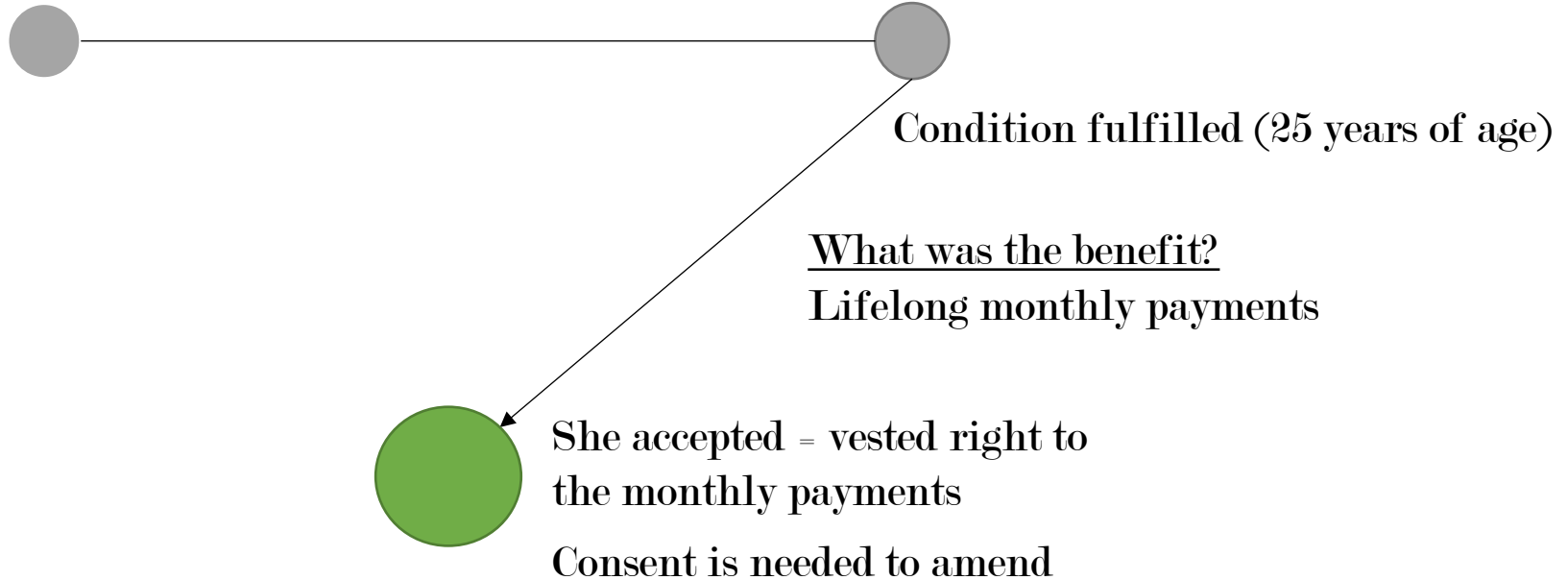
A contract between two parties where one promises to offer a certain benefit to a beneficiary at a certain time. Before acceptance, the beneficiary may have a *spes* or a contingent right depending on the legal instrument at hand. At a certain time, as stipulated or reasonable and if all the conditions have been fulfilled, the beneficiary can accept this benefit and thereby vest his right to that benefit without becoming a party to the agreement but entitled to enforce the action. Now, no amendments can be made that could influence the beneficiary's benefit without his consent. Upon receipt of the beneficiary's benefit, the *stipulatio alteri* comes to an end.

A beneficiary with a contingent right before acceptance, may protect his right to to be given the opportunity to fulfill the conditions set.

Discretionary *inter vivos* trust



Crookes v Watson 1956 (A)

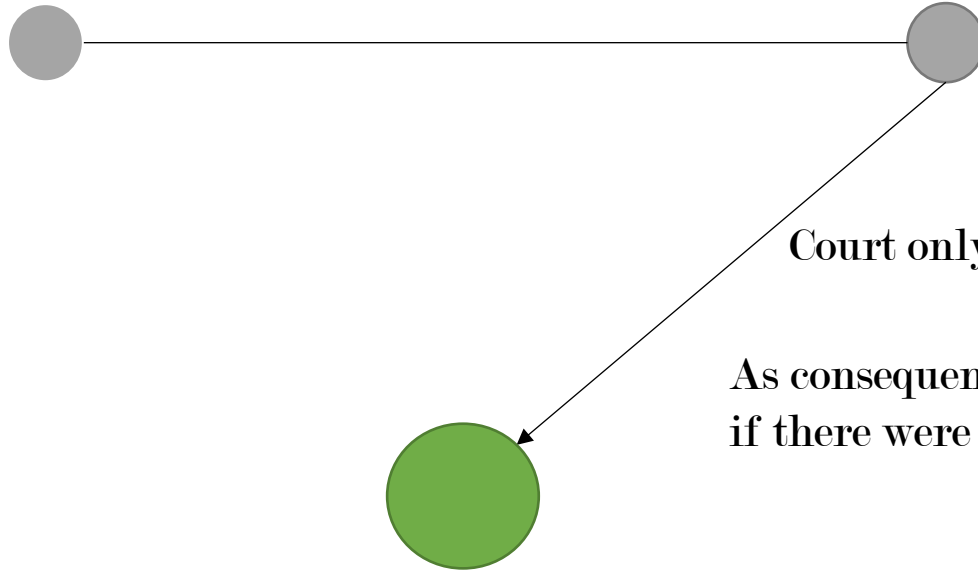


“I can see no reason in law why a contract between a settlor and trustees, which is intended for the benefit of a third party, should not be capable of being amended by agreement between the settlor and the trustees, as long as the third party has not accepted the benefit of the contract. Up to this stage there is no *vinculum juris* as between the beneficiary and the settlor or trustees.”

Centlivres CJ at 288A.

Because the beneficiary now had a **VESTED** right

Hofer v Kevitt 1998 (SCA)



Court only asked: were there acceptance?

As consequence: can amend without consent if there were no acceptance

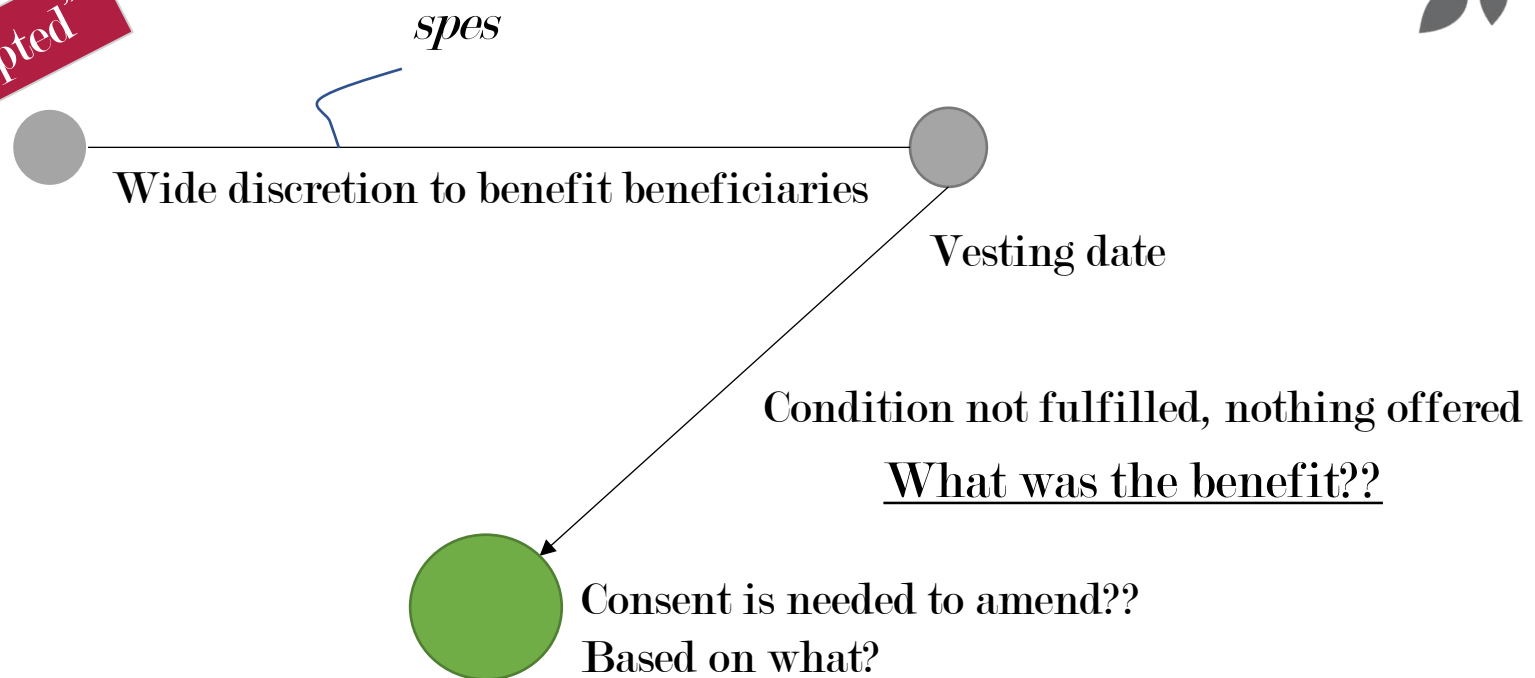
What about the question of the **RIGHTS**?

Conradie J in court *a quo* declared: “I am unable to detect any feature which might serve to distinguish *Crookes*’ case from the present one. I am accordingly bound to follow it.” 406C–D.

Potgieter v Potgieter 2012 (SCA)



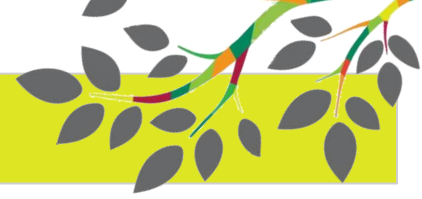
“accepted”



“[T]he appellants enjoyed **no vested right** to either the income or the capital of the trust. They were clearly contingent beneficiaries only. But that does not render their **acceptance of these contingent benefits** irrelevant.... The import of acceptance by the beneficiary is that it **creates a right** for the beneficiary pursuant to the trust deed, while no such right existed before. The reason why, after that acceptance, the trust deed cannot be varied without the beneficiary’s consent, is that the law seeks to protect the right thus created for the first time.”

Potgieter para 18, read in conjunction with para 28.

Zazeraj v Jordaan 2012 (WCC)



“With regard to the amendment of trust deeds, it is established law that beneficiaries of discretionary trusts who have **received conditional benefits ... have vested rights** and the trust deeds cannot be changed without their consent.” para 22.

Joubert v Joubert 2019 (WCC)

“ it is in the very nature of a stipulation alteri that the third party who accepts the benefit of the contract... cannot do so selectively, but **subject also to any limitation** and /or onerous provisions... The founder or trustee ... can exercise [the express power of variation] to the detriment of a beneficiary notwithstanding that such person has accepted their benefits under the trust deed since this is the contract to which the beneficiary became party by ‘accepting’ his or her benefits.” para 53.

Griessel v De Kock 2019 (SCA)

“... when a trustee exercise the discretion by paying he beneficiary either income or capital, the beneficiary thereby acquires a vested right in the money paid over... It follows that **none of the potential beneficiaries can claim rights in perpetuity, and their rights are merely contingent.**” para 16.

Master's Directive 2 of 2017:



- (a) “If the trust deed expressly permits the amendment of the deed by the trustees without the involvement of the beneficiaries, the consent of the beneficiaries who have vested rights [to what?] will not be required, provided the amendment which is made falls within any condition which is set for amendment by the trustees in the trust deed...
- (b) If the trust deed is silent on the involvement of beneficiaries in the amendment of the deed, then the common law rules will apply and the consent of the beneficiaries with vested rights will be required, provided they have already accepted the benefit.”

1. A vested personal right to claim payment or transfer of the benefit will form part of the estate of the beneficiary. It cannot just be taken away.
2. A vested right cannot be conditional, it then never existed in the first place.



“I like the picture of the growing law, developing indefinitely into the future, not losing its roots but ever throwing out fresh branches and deriving its sustenance from any source above or below the ground that can be of use to it.”

Oliver D Schreiner *The Contribution of English Law to South African Law; and the Rule of Law in South Africa* (1967) 105.



THANK YOU

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For more see Van Zyl R “The question of rights, acceptance and amendments of inter vivos trust in terms of the stipulatio alteri” 2019 *South African Law Journal* 136(4)