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TOPIC 1: CREATION OF TRUSTS AND CERTAINTY OF INTENTION

Introduction and Classification of Trusts

History of Trusts

- Trust developed from the concept of the 'Use'
- Device used in the middle ages in England
- By 1450 much of the land in England held in Use
- Statute of Uses 1535 – Henry VIII – to thwart the Use
- Use upon a Use: Conveyance from A to the Use of B, to the Use of C
- Use upon Use enforced by Chancellor 1635 – formed modern foundation for law of trust

Defining Trust

- The trust is 'an institute of great elasticity and generality; as elastic, as general as contract' (Maitland)
- **Mayo J:** 'The word 'trust' refers to the duty or aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property he will be compelled by a court in its equitable jurisdiction to administer in the manner lawfully prescribed by the trust instrument, or where there be no specific provision written or oral, or to the extent that such provision is invalid or lacking, in accordance with equitable principles. As a consequence the administration will be in such a manner that the consequential benefits and advantages accrue, not to the trustee, but to the persons called cestuis que trust, or beneficiaries, if there be any; if not for some purpose which the law will recognise and enforce. A trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest' (*Re Scott*)
 - This description doesn't recognise that there might be more than one trustee of a particular trust and exercising their powers jointly
 - It also doesn't allude to the fact that there is a species of trust (the bare trust) in which the trustee has no power (or obligation) to administer/manage the assets of the trust (*Herdegen*)
- A trust is not a legal entity (unlike corporations)
 - Trust has no standing in legal actions → Only enforceable in equity
 - The trustee is the party who must sue or be sued, not the trust
 - Eg Bill Smith as Trustee for the Smith Family Trust
 - Trustee has legal title to the assets of the trust

Indicia of a Trust

- Four elements that can be treated as indicia of a trust:
 1. Legal or equitable title to property is vested in the trustee
 2. The trustee's obligation is a fiduciary one
 - Accepted category of fiduciary relationships
 3. The obligation relates to trust property
 4. The obligation is 'annexed' to the trust property (the consequence is that any breach of that obligation attracts proprietary consequences)

Different Types of Trusts

- Express trusts
 - Settlor or testator has expressed his or her intention to create a trust
 - Subject to the requirements of writing, (ie formalities), this intention may be expressed orally or in writing
- Resulting trust
 - Presumed by the courts as a matter of law
 - Resulting trust can arise when an express trust fails, if:

- It is void for uncertainty (see this certainty of objects seminar)
 - It is unenforceable (such as where the creation of the trust does not fulfill applicable statutory formality requirements (*Property Law Act 1958 (Vic) s 53(1)*); or
 - The intended beneficiary predeceases the testator
- Appointed trustee holds the property on trust for the settlor
- Constructive trusts
 - Courts construes trust by reference to the facts

Defining Express Trust

- Jacobs’: ‘The whole relationship which arises between the parties in respect of the property the subject of the trust, and the obligation of the trustee to the beneficiary & the interest of the beneficiary in the property as results flowing from the existence of that relationship’
- Evans: A trust exists when the owner of property is obliged to deal with that property for the benefit of some other person or persons or for some purpose recognised by law
- If an express trust fails, the property could result back to the person who created a trust (minor role for resulting trusts)

Parties to an Express Trust

- Settlor:
 - Person or corporation who creates the express trust
 - Eg. Parents create family trust
 - Testator/testatrix where trust created by will ie testamentary trust
 - Settlor can also be a trustee and a beneficiary
 - Settlor usually has no further rights over the property once established
 - Unless is made a trustee or a beneficiary or retains power to revoke the trust – but this is unusual as often it has tax consequences, as tax office sees that as not really getting rid of the property
 - Various types of property that may be made the subject of a trust: *Trustee Act 1958 (Vic) s 3*
 - Property defined to include real and personal property (TS land, GL land, chattels) including debts, intangible assets (copyrights, patents etc)
- Trustee:
 - May be an individual or corporation
 - Number of trustees limited to 4: *Trustee Act 1958 (Vic) s 40*
 - Has to be unanimous, so trying to get agreement by group of more than 4 is hard
 - Trustee cannot be sole trustee and sole beneficiary
 - Is the legal titleholder of the trust property (subject matter)
- Beneficiaries: two main permissible ‘objects’ of a trust –
 1. Persons as beneficiaries
 - Persons include natural and legal persons (often called the *cestui que trust*)
 - These are called private trusts
 - Settlor can determine beneficiaries (fixed trust) or leave it to the trustee to decide according to some criteria (discretionary trust)
 2. Purpose
 - Only charitable purposes are valid (some exceptions)
 - Benefit of public – can't be for specific individuals
 - These are regarded as public trusts
 - The Attorney-General has standing to enforce a charitable trust

Trustee	One or more persons (including companies) who own or hold the trust property
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Object	One or more persons (including companies) or purpose that will/may benefit under a trust - Term 'object' is most commonly used in discretionary trusts to describe a person or class of persons who may benefit
Beneficiary	One or more persons (including companies) for whom the trust property is held - Object who has a vested interest in the trust - Also called 'cestui que trust' in older cases
Trust property	The property that is held by the trust on trust for others - Any kind of property can be the subject of a trust - Also called 'the subject' or 'the subject matter'
Trust deed	A document used to create a trust, but not essential to its creation - If there is no trust deed, the trustee's duties are determined in accordance with equitable and statutory requirements - Also called 'the trust instrument' or 'the settlement deed'
Settlor	One or more persons (including companies) who create the trust - Term used when the trust is created during the settlor's lifetime
Testator	A deceased person who has left a valid will - Many trust are established under a testator's will, and take operation after their death - Feminine is 'testatrix'
Inter vivos trust	A trust created during the lifetime of the settlor
Testamentary trust	A trust created by the will of a testator - Also called a 'post mortem' trust

Types of Express Trusts

1. Fixed Trust

- Must be carried out according to what the settlor has specified
- Trustee has no discretion
- For example, in a testamentary trust, 'pay income to A for life and then to divide the capital equally between B, C and D on A's death'
 - Beneficiary of a fixed trust has a proprietary interest in trust asset
 - Interest may be 'vested' or 'contingent'
 - A's interest is vested but of limited duration (life interest)
 - B, C and D's interest is contingent – vests on A's death

2. Discretionary Trust

- Share of beneficiaries' interest is determined by the trustee within limits set by settlor
- Beneficiaries have no interest in the trust property unless and until the trustee elects to exercise the discretion, interest is a mere expectancy
- Potential beneficiaries better described as 'objects' of the trust
- For example, S transfers \$100,000 to T, and gives the following instructions:
 - 'T is to hold the money on trust, paying the income earned from investing the money to such of my children as she sees fit from time to time, and upon my youngest child turning 18 paying the whole to such one or more of my children as she sees fit'