

Topic 1

Creation of Express Trusts

Introduction

An express trust exists when the owner of a legal or equitable interest in property is bound by an obligation to hold that interest for the benefit of others.

To establish a valid express trust, a settlor, trustee, and beneficiary must exist (see below).

An express trust may be created:

1. During the settlor's lifetime (inter vivos) OR
 - a. Constitution is important
 - i. Trustee holds legal title to the trust property; only relevant to trusts by transfer
2. By the testator's will (testamentary)

It is purported that an express trust exists by transfer in which [X] is the settlor, [X] is the trustee, and [X] is the beneficiary.

In order for the express trust to be valid, it must satisfy the three certainties: intention, subject matter and object, as well as be validly constituted and satisfy the formality requirements under PLA s53-55.

The three certainties:

1. Certainty of intention
2. Certainty of subject matter (property)
3. Certainty of object (beneficiary/purpose)

The key issue here is [CERTAINTY OF INTENTION/OBJECT/SUBJECT MATTER]

Parties involved

1. Settlor

- a. The person who creates the trust
- b. Original owners of the property
- c. Get settled on terms of the trust
- d. Depart the scene after establishing the trust
- e. Being a settlor is a way of disposing your property to someone else subject to a management regime
- f. It is possible to be both the settlor and trustee by transferring it to yourself
- g. Advantage is for tax impositions

2. Trustees

- a. A person responsible for managing the property
- b. To discharge their duties in a way that is outlined by the trust
- c. Under fiduciary obligations

- d. Legal and equitable title
 - i. Legal rights of ownership imposed on trustee as they are recognised as the legal title owner
 - ii. They also have an equitable obligation that are personal and annexed to the property
 - iii. But they do not have the value aspect; it's NOT their asset
- e. Trust instrument or deed is the primary source of the trustee's duties or the words used to declare the trust in the case of a verbal agreement OR equitable fiduciary doctrines (caselaw) OR legislation

3. One or more **Beneficiaries** (objects)

- a. There are two main objects of a trust:
- b. *Persons*
 - i. Persons include natural and legal persons
 - ii. These are regarded as private trusts.
 - iii. Settlor can determine beneficiaries (fixed trust) or leave it to the trustee to decide according to some criteria (discretionary trust)
 - iv. If the settlor does not outline how the beneficiaries are precisely, it will be a resulting trust.
- c. *Purpose*
 - i. Only charitable purposes are valid (some exceptions)
 - ii. These are regarded as public trusts.
 - iii. The Attorney-General has standing to enforce a charitable trust.

Structure of an Express Trust

Two main forms:

1. Self-declaration

- a. The settlor owns property, and declares that from then on, the settlor holds it on trust for the object (beneficiary/purpose)
- b. Constitution is not an issue for a trust by SD - the property is already held by the trustee.

2. Transfer

- a. The settlor vests property in a trustee, subject to an equitable obligation to hold the property for the benefit of the beneficiary
- b. The property must be properly transferred to the trustee for the trust to be validly constituted.

3. Sub-trusts

- a. A beneficiary may declare they hold their interest on trust, possibly creating a sub-trust
- b. They will have an equitable title on trust over the property
- c. May be effectively a gift.

4. Multiple beneficiaries

- a. A trust may have one beneficiary or it may have multiple
 - i. **Fixed trusts:** Settlor decides who gets what
 - ii. **Discretionary trust:** Trustee can decide with limits by settlor on how to distribute the property