

2026 Trusts Law Notes

Full Topic List:

Topic 1: The concept of the trust and certainty of intention

Topic 2: Certainty of Subject Matter; Trusts Structures; Trusts and Powers

Topic 3: Certainty of Objects; Quistclose Trusts

Topic 4: Charitable Trusts

Topic 5: Statutory Writing Formalities and Constituting the Trust

Topic 6: Duties and Powers of Trustees

Topic 7: Trustees' Duties Continued (Part I)

Topic 8: Trustees' Duties Continued (Part II)

Topic 9: Defences and limitations on liability; Rights of Trustees

Topic 10: Trustees' Rights and Beneficiary Rights

Topic 11: Remedies

Week 1 - The Concept of the Trust and Certainty of Intention

Overview of Trusts

A trust is a legal relationship in which a trustee holds property on behalf of another person or group of people, known as beneficiaries. Trusts exist in many forms and have different components, but they all involve a division between legal and equitable ownership. In this course, the primary focus is on express trusts, which are trusts that are deliberately created by a person, rather than those imposed by the law.

Essential Components of a Trust

A trust has several necessary components that must be present for it to exist:

1. The first is a settlor, the person who decides to create the trust. Once the settlor has established the trust, they do not have an ongoing role in its administration.
2. The second essential component is the trustee, who holds legal title to the trust property and is the person who is holding the property for another person. The trustee can be either an individual (a natural person) or a legal person, such as a company. The trustee is responsible for managing the trust property in accordance with the trust's terms and has obligations toward the beneficiaries. Must also be understood that if there is no trustee or trustee resigns, court has power to appoint one in its place (Sinnott v Hockin)
3. The third necessary component is the beneficiary or beneficiaries, the people for whom the trustee holds the property. The beneficiaries hold equitable title to the property, which means they have rights to benefit from the trust (such as receiving the income) but do not hold the legal ownership. This division between legal and equitable ownership is a defining characteristic of a trust. In some cases, a trust can be established not for specific beneficiaries, but for a charitable purpose. Charitable purpose trusts do not have direct beneficiaries but must be for a valid charitable purpose.
4. The fourth necessary component of a trust is trust property. A trust must have identifiable property that is held by the trustee for the benefit of the beneficiaries.

The source of a trust is the fiduciary obligation that arises from the trustee's duty to act in the best interests of the beneficiaries. This personal obligation is what gives beneficiaries their equitable property rights. The fundamental legal principle behind trusts is that the trustee has personal obligations regarding the property, and because of these obligations, the beneficiaries acquire enforceable rights over it.

Example of how this works in practice

Typical (although maybe anachronistic) trusts:

- A. Lucas (settlor) appoints Pablo (trustee) to hold his house in Caulfield and \$500,000 on trust for Pauline (beneficiary), Lucas must transfer the property to Pablo.
- B. Maria (settlor) appoints herself (trustee) to hold her farm in Gippsland and \$100,000 on trust for Leo (beneficiary), Maria does not need to transfer the property.
- C. Ning (testator/settlor) appoints Boba (trustee) in her will, and leaves all her property on trust to set up a school in Ballarat (charitable purpose). Ning must transfer the property.

Different Types of Trusts

Trusts come in different types, depending on how they are created and how they function.

1. Express trusts

The primary focus of this course is on express trusts, which are trusts that are intentionally created by a person. Express trusts arise when a person expressly declares an intention to create a trust and follows the necessary steps to establish one.

Express trusts are often used for asset planning, such as ensuring that property is managed for the benefit of certain individuals or structured in a way that the settlor no longer wholly owns it. This includes making sure that a trust is validly created, the necessary steps are taken, and the trustee administers the trust correctly.

In addition to express trusts, two other major types of trusts are resulting trusts and constructive trusts, both described as implied trusts which come about by operation of law.

2. Resulting trusts

These arise where it is presumed that the settlor did not intend to fully part with their beneficial interest in the property. One example is the purchase price resulting trust, which applies when one person pays the purchase price for a property that is placed in another person's name. Unless there is evidence to the contrary, the presumption is that the purchaser retains a beneficial/equitable interest in the property. However, this presumption can be rebutted by evidence of presumption of advancement, which applies in certain relationships (such as parent to child) where the law assumes the opposite - that the payment was intended as a gift.

3. Constructive trusts

Constructive trusts are not created by an express intention or presumed intention but are imposed by the court where necessary to prevent unconscionable conduct. These trusts can arise in situations such as joint venture constructive trusts (where parties have a shared intention regarding property ownership but legal title does not reflect this) or constructive trusts arising from proprietary estoppel (where one person has relied on assurances that they would receive an interest in property and has suffered detriment as a result).

Methods of Creating a Trust

There are two primary ways in which a trust can be created:

1. Trust by Declaration (Self-Declaration of Trust)

- In a trust by declaration, the settlor (person who creates the trust) retains ownership of the trust property but declares that they are holding it on trust for the beneficiary.
- The settlor acts as both the legal owner (trustee) and the person with obligations toward the beneficiary.
- Basically, in a trust by declaration (self-declared trust), the settlor and the trustee are the same person.
- For example, if a person owns a property and declares, "I hold this property on trust for Erin," they are making a self-declared trust, where they remain the legal owner but must act for the benefit of the beneficiary.

2. Trust by Transfer

- In a trust by transfer, the settlor transfers the trust property to a separate trustee, who then holds the property on the trust for the beneficiary.

Consequences of Creating a Trust

Once a trust is validly created, it results in a series of legal and equitable consequences that immediately take effect. These consequences relate to the legal status of the trustee, the rights of the beneficiaries, and the overall operation of the trust.

The Effect of Creating a Trust

When a trust is created, legal title to the trust property is transferred to the trustee, who holds it for the benefit of the beneficiaries. The trustee assumes immediate and binding obligations, while the beneficiaries acquire enforceable equitable rights over the trust property. This means that when a trust is validly created, the beneficial interest passes to the beneficiaries.

The settlor, unless they retain specific powers, ceases to have an ongoing role. The trust is effective as soon as all necessary conditions are met, including compliance with formalities and the presence of the three certainties (intention, subject matter, and objects).

Trust Becomes Locked In Once Created

If a valid trust has been created, the settlor cannot revoke it unless they have expressly reserved a right to do so. The trust is immediately effective, meaning that beneficiaries acquire enforceable rights that cannot be taken away at the settlor's discretion.

Once the trustee has accepted their role and the trust is operative, they must comply with their fiduciary obligations and manage the trust property in the interests of the beneficiaries.

What Happens If a Trustee Rejects Their Role?

A trustee is not obligated to accept their role. If a person named as trustee refuses to act, the legal title to the trust property will revert to the settlor, but the trust itself does not automatically fail. The fact that it does not automatically fail if a trustee does not accept their role is a principle from *Mallott v Wilson*

Instead, the settlor will hold the property on trust for the beneficiaries until a new trustee is appointed (according to this case). The court can step in to appoint a new trustee if necessary, ensuring that the trust continues.

Example: If a settlor transfers property to a trustee with a valid declaration of trust, but the trustee later refuses to act, the property will return to the settlor in trust rather than absolutely.

A Trust Does Not Fail for Want of a Trustee

The court will not allow a trust to fail simply because a trustee is absent/no trustee at the time it is created. If a trustee is unwilling or unable to act, a new trustee can be appointed by the court, a statute, or the terms of the trust deed. This principle ensures that beneficiaries' equitable rights are protected even if the original trustee refuses or is unable to fulfill their duties.

Case Example: Re McGowan & Valentini Trusts

- A husband and wife created a trust and appointed a corporate trustee.
- The trust deed was signed, but the corporate trustee had not yet been incorporated at the time the trust was established.
- Despite this, the trust had been operating for decades, filing tax returns and making distributions to beneficiaries.
- The court ruled that the trust remained valid, despite the initial absence of a trustee, as a trustee could always be appointed later.
- This confirmed that a trust does not fail simply due to a lack of an initial trustee.