

LAW3ETR
EQUITY AND TRUSTS
EXAMINATION NOTES 2015

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TOPIC 1: THE NATURE OF TRUSTS

1.1 Definition

- "... an obligation enforceable in equity which rests on a person (the trustee) as owner of some specific property (the trust property) to deal with that property for the benefit of another person (the beneficiary) or for the advancement of certain purposes."

1.1.1 Essential characteristics of the express trust

Some basic propositions apply to all express trusts. They include the following:

- (1) The subject matter of the trust vests in the trustee until the time it is transferred to the beneficiary or otherwise disposed of on termination of the trust.
- (2) A trust has no legal personality. The trustee is the person who holds the property on behalf of the trust, and the trust activities are conducted through him.
- (3) A trustee owes fiduciary obligations to the beneficiaries of the trust.
- (4) The conception of the trust as a legal device for separating the management of property from its enjoyment is qualified in an important respect.

1.1.2 The parties to a trust

There are three parties to an express trust:

- (1) The *settlor* who creates the trust
 - If a trust is created by will the settlor will also be testator of the will
 - Once the settlor has created the trust, he typically has no rights in respect of the trust property
 - It is possible for the settlor to retain some influence over the management of a trust after it has been created, for example by expressly reserving a power in the trust instrument to vary or revoke the trust
 - It is in practice rare for trusts to reserve powers of revocation in a trust instrument
- (2) The *trustee* who holds title to the trust property and who must perform the trust obligations
 - A trustee may be an individual or a corporation
 - A trustee does not have to consent to his appointment but if he does not want to act as trustee he must disclaim the trusteeship
 - It is possible for a trust to subsist without a trustee at all, relying on the maxim that 'no trust shall fail for want of a trustee'. If such case, the court will supervise the administration of the trust until trustees are appointed
- (3) The *beneficiary* who benefits from the administration of the trust (the 'object' of the trust)
 - A beneficiary can be an individual or a corporation
 - A trust can also benefit charitable objects or, exceptionally, non-charitable objects
 - There are no limits on the number of beneficiaries of a trust, although if the beneficiaries of a discretionary trust are too numerous or too widely dispersed the trust may be held void for being administratively unworkable

1.1.2 Classification of trusts

There are three basic categories of trust:

- (1) Express trust – Comes into creation through intention by settlor
- (2) Resulting trust – Equity presumes intention
- (3) Constructive trust – Constructed by law

1.2 Express trusts

Express trusts may be either:

- (1) Private – intended to benefit one or more individuals; or
- (2) Public – for 'charitable' purposes as recognised in law

There are two kinds of express trust:

- (1) Fixed trust: beneficiaries and their interest in the trust property is fixed, no discretion for trustee to vary
 - Beneficiary will have a proprietary interest in property where a fixed trust has been created – the interest may be vested or contingent
 - All beneficiaries of fixed trusts have the right to due administration of the trust
 - Can compel the trustee to perform the trust and to compensate the trust for losses caused by a breach
 - Can insist that the trustee perform his duties and distribute property to the beneficiary in accordance with the terms of the trust
- (2) Discretionary trust: trustee has discretion to decide which of a defined class of beneficiaries to give trust property to
 - Although the trustees have a discretion as to which beneficiary, among the class of beneficiaries, is to receive income or capital under the trust, they are under a duty to distribute the trust money
 - The duty to distribute will not necessarily be immediate
 - The trust must not be of indefinite duration
 - The rule against perpetuities prescribes the maximum duration of a trust
 - Where a discretionary trust has been created no beneficiary has a proprietary interest in the trust property or any part of it
 - All objects of discretionary trusts have the right to due administration of the trust
 - Can compel the trustee to perform the trust and to compensate the trust for losses caused by a breach
 - An object of a discretionary trust can only insist the trustee perform his duties; she cannot insist the trustee exercise his discretion in *her* favour
 - ...

1.2.1 Trusts and powers

There are two types of powers:

- (1) Trust power – where trustee has discretion to select beneficiary, but also under an obligation to distribute all property (exhaustive trust)
- (2) Bare power – power to appoint property within class of beneficiary but no obligation to exercise (non-exhaustive trust)
 - Frequently, these powers specify who will receive the property if the trustee does not exercise the discretion
 - The nominated beneficiary's right to the property is known as a 'gift over'

- The presence of a '**gift over**' clause is determinative of a bare power
- E.g. "I leave my house to my trustees to appoint the same to whichever of A, B and C they select; and in default of appointment, to C." C is entitled to the gift over if the trustees do not select amongst the class of beneficiaries.

1.2.1.1 Types of powers of appointment (labels)

There are three basic types of power of appointment, determined by class of objects to whom property can be appointed:

- (1) **General** power of appointment: can appoint property to anyone, including self.
- (2) **Special** power of appointment: power to appoint within a class of objects specified by the settlor
- (3) **Hybrid or intermediate** power of appointment: power to appoint anyone except a specified class.