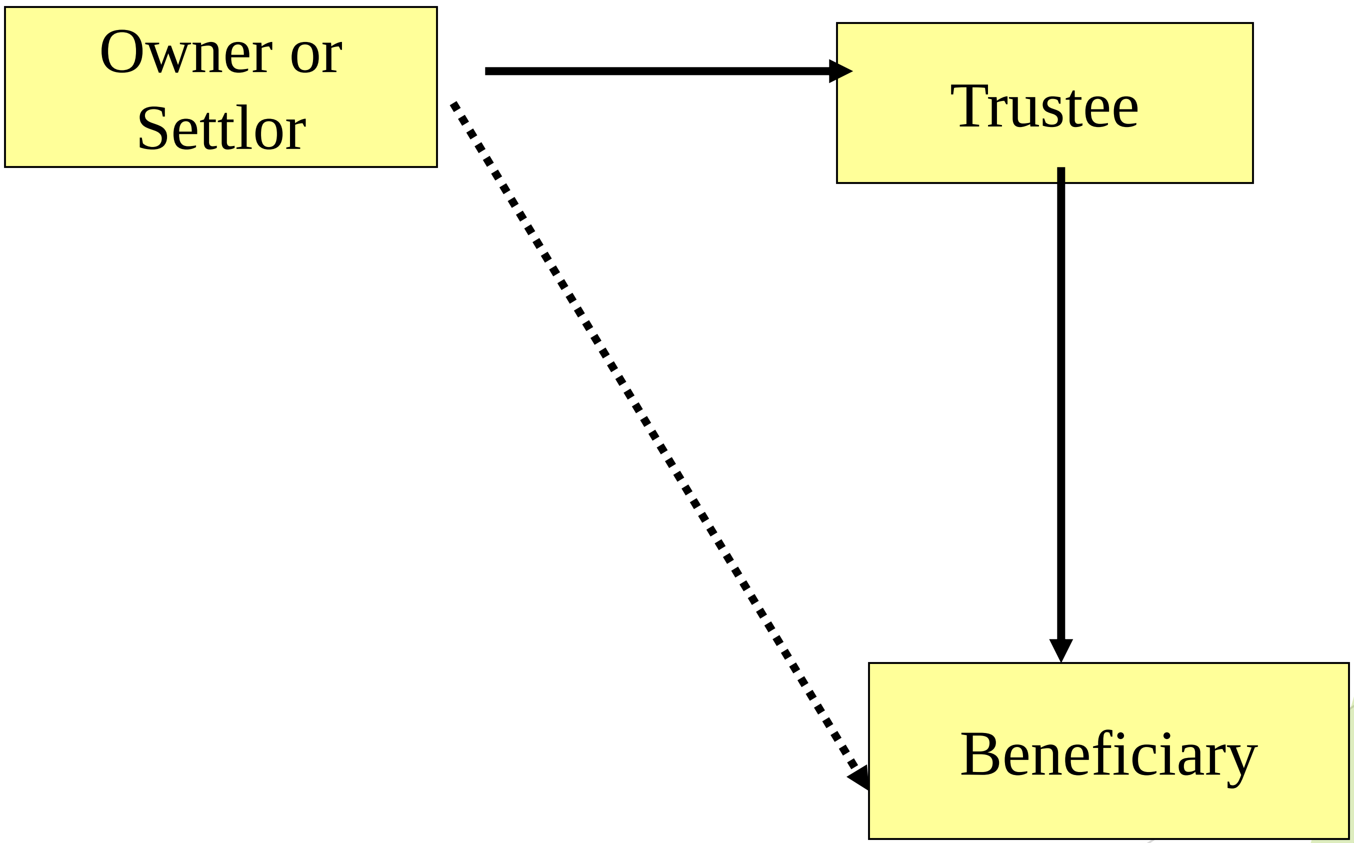
Chapter 4
Trust

Introduction

“ A trust is created when the owner of an asset passes the legal title to another to hold on trust for the benefit of one or more beneficiaries”.


Owner or Settlor
Trustee
Beneficiary

Introduction

General principles of trusts:

1. The absolute owner of an asset is deemed to hold the **legal and equitable (or beneficiary) title**. Under a trust arrangement he is called a settlor.
2. The **settlor** transfers the legal title to a trustee. This is most commonly done by a trust deed or by means of a will. The trustee is bound by the terms and conditions of the Deed or Will.
3. The **trustee** “holds” and manages the assets for the benefit of the **beneficiary**. He thus has a fiduciary duty towards them, who are deemed to have equitable or beneficiary title of the assets.

Purposes of a Trust

- It is to authorize the trustee to **manage the assets** for the benefit of the beneficiary. Reasons:

  i. The trustee has **special skills or knowledge**.

  ii. The **settlor will be away from the country** for considerable of time.

  iii. The settlor may make provisions to appoint the trustee to **manage the asset upon his death**.

- 2. A trustee is needed as a **custodian** to protect the interest of beneficiaries.

Purposes of a Trust

- To **protect the beneficiaries from the creditors** of the settlor, as provided by Para 5, Schedule 10 of the Financial Services Act 2013
- It provides **tax advantages** on investments in certain countries (may not be relevant in Malaysia).

Purposes of Trusts in Estate Planning

- A will may be the most appropriate instrument in passing gifts to beneficiaries upon the death of a testator, in some circumstances the creation of a trust may be more advisable.
- A trustee can be appointed to manage the assets for the beneficiaries and if instructed may transfer to them at a later time.

Purposes of Trusts in Estate Planning

Examples:

i. When the beneficiaries of the estate are minors or young adults who may not be ready or lack the knowledge to manage assets.

ii. When the management of the assets require specialized knowledge or skill.

iii. When there is concern that disputes may arise among the beneficiaries.

Purposes of Trusts in Estate Planning

Assets which are the subject matter of a living trust do not form part of the probate estate and can be dealt with without the need of the Grant of Probate or Letters of Administration from high court.

Purposes of Trusts in Estate Planning

- The trustees may be individuals, professionals or trust corporations, they ought to be given specific instructions as to the management of the assets.
- Such instructions are usually stated in a will or Trust Deed which are the most common and important ways that trusts are created.

How are Trusts Created

1) By means of a Will
2) By a trust deed
3) Statutory law e.g. Para 5 of Schedule 10, FSA 2013
4) By implication
5) By oral instructions

Types of Trusts based on their Characteristics

- A **living (or inter vivos, revocable/non revocable) trust** is one that is created and takes effect during the life time of the Settlor. This trust is usually created by a **trust deed.**
- A **testamentary trust (revocable)** is created by means of a Will in which case it becomes effective upon the death of the testator.

Types of Trusts based on their Characteristics

- A **revocable (living) trust** is one where the Settlor reserves the rights to change or end the trust at any time.
- An **irrevocable (living) trust** is created when the assets are permanently placed in trust and the Settlor cannot reclaim them.

Types of Trusts based on their Characteristics

- When there is class of beneficiaries e.g. all the children of the settlor, a **fixed trust** stipulates a specific proportion to be distributed to them and the trustee has no element of discretion to vary the shares.
- A **bare trust** is the most minimal form of fixed trust whereby the trustee holds the rights and follows the instructions of the beneficiaries.
- A **discretionary trust** allows the trustee to distribute to members within the class of beneficiaries and in whatever proportion he thinks is appropriate.

Types of Trusts based on their Characteristics

- **Express trusts** are those which are created whereby the intentions of the Settlor are clearly spelt out. These are usually done by a trust deed or by a will. These are the most common types of trust for estate planning.

Types of Trusts based on their Characteristics

- **Implied trusts :resulting trusts** and **constructive trusts.**
- **Resulting trusts** are those implied by the law (or the courts), whereby they are not intentionally created by the settlor.
- Example 1: a testamentary trust fails because the lone beneficiary has predeceased the testator (settlor). The asset will "result back" to the settlor or his estate.
- Example 2: a person contributes to a purchase price of a property, he is deemed to have equitable (or beneficial) interest in that property although his name is not identified as the registered owner. His equitable interest will be proportionate to the purchase price of the property.

Types of Trusts based on their Characteristics

- **Constructive trust:** arises by operation of law.

- Example: a person has received money which to his knowledge was paid to him mistakenly, the law will deem him to be constructive trustee. Such a person is said to hold the money in constructive trust for the person who is rightly entitled to it.

Types of Trusts based on their Characteristics

- **A statutory trust** is created by means of Para 5, Schedule 10 of the Financial Services Act 2013. Nominees of a life insurance or personal accident policy receives the policy moneys in such a manner that these moneys are not subject to the creditors of the estate.

Types of Trusts based on their Characteristics

Para 5, Schedule 10, Financial Services Act 2013

- (1) A nomination by a policy owner, other than a Muslim policy owner, shall create a trust in favour of the nominee of the policy, moneys payable upon the death of the policy owner, if-
  (a) the nominee is his spouse or child; or
  (b) where there is no spouse or child living at the time of nomination, the nominee is his parent.
- (2) Notwithstanding any written law to the contrary, a payment under subsection (1) shall not form part of the estate of the deceased policy owner or be subject to his debts.

Types of Trusts based on their Characteristics

The following must be noted:

i) This trust applies to **non-muslim** policy owners only.

ii) Nominees who enjoy the benefit of the trust are **spouse, children and parents** only.

Types of Trusts based on their Characteristics

- A **secret trust** arises when a will states that a particular asset is given to a beneficiary as a gift but the testator has agreed with the beneficiary that the latter is to hold the asset as a trustee for someone else.
- There is no mention in the will, that the asset specified is the subject matter of a trust. Thus the trust, in this case is a secret and takes effect on the death of the testator.

Types of Trusts based on their Characteristics

- A **half secret trust** occurs where the asset is left by will to a “beneficiary” and it states that he is to hold it in trust. The terms or the beneficiaries of the trust are not stated in the will but are agreed between testator and the “beneficiary”.

The Main Components and Features of a Trust

There are **five important components** of a trust:

1) Settlor: a person who intentionally sets up the trust. Only a natural person can create a trust under a will, but a business organisation can create a living trust.

2) Trust Property: consist of rights, tangible and intangible interest in assets held under trust.

3) Beneficiary: a person for whom the trust exists. A beneficiary does not have to be a natural person

The Main Components and Features of a Trust

4) **Trustee**: a person or trust corporation who has been appointed to hold and manage property for the beneficiary. A trustee and beneficiary have a fiduciary relationship (i.e. the trustee must always act in the best interest of the beneficiary).

5) **Terms**: often appear in a trust deed, where it is silent, reference is made to the Trustee Act 1949 for compliance.

Powers and Duties of a Trustee

- A trustee owes a **fiduciary duty** to the beneficiaries
- In express trusts, the powers of a trustee may be specified in the **trust deed, deed of appointment** or **in the will**
- A trustee also has other powers that include **administrative powers** (which are necessary for the administration of the trust) and **dispositive powers** (necessary to pay maintenance and advancement to beneficiaries).
- A trustee who fails to comply with the duties spelt out in the instrument or the Act may tantamount to a **breach of duty/ "breach of trust"**.

Application of Trusts in Estate Planning

i. **Non-probate estate**
ii. **Creditor protection**

Application of Trusts in Estate Planning

- Living (inter vivos, irrevocable) trusts created by Muslims, allow the assets which are transferred by the settlor to be dealt with according to the terms of the trust instrument.
- It is deemed to be a gift given by a Muslim during his lifetime
- It is not part of his estate at the time of his death.

Corporate Trustees

Advantages:

- A trust corporation never dies as a legal entity.
- A trust corporation provides expertise in the managing and administration of trust.
- As a company, professional trustees are unbiased and will carry out its duties with impartiality.