Classification of trust

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There are several types of trusts. Trying to attempt a watertight classification may be impossible as this area of law did not develop in any organized fashion. As such, trying to impose the imperious order of a watertight classification may be a foolhardy task.

Notwithstanding this, it is possible to adopt a loose categorization of these various types of trusts, strictly for the purpose of achieving an understanding of their nature and incidents.

Trusts may generally be classified according to the nature of their object/purposes, in which case they may be public or private; according to their form of creation, in which case they may be express, implied, constructive, resulting etc.; or according to the efficacy of their creation, in which case they may be completely or incompletely constituted.

Apart from these, there are also other trusts that do not properly fall within any one class. They will be examined under the heading â€˜other types of trustsâ€™. These categories will be treated seriatim below.

Express, resulting/implied and constructive

As mentioned earlier, the trusts that fall into this category depend on their mode of creation. Under this heading, trusts may be created according to the unilateral/clear intention of the settlor/testator or by operation of law. In the first sense, they are express and in the second sense, they may be implied, constructive, resulting etc.

Express trusts

An express trust is created by the clear declaration of the owner of property, either that he is to hold the property for the benefit of another, or that some other person should hold the property for the benefit of a named beneficiary or object. It is express because there is no doubt as to its creation or the intention behind it.

There is generally no need for any formality in creating an express trust. It can be created in writing or orally or any way the settlor decides. The most important thing is that the intention to create a trust be very clear on the part of the trustee. The trust may be created and made to operate during the lifetime of the settlor. Where it is so created, it is called an *inter vivos* trust. However, there are two exceptions where formalities are imposed for the creation of the trust.

- Where the trust is *inter vivos* and the property to be subject of the trust is realty, the law requires that it be evidenced by a written memorandum. See s. 9 Statute of Frauds 1677 and s. 16 Land Registration Law, Kwara.
- Where the trust is not *inter vivos*, but meant to take effect after the death of the settlor, it must be in writing and comply with the requirements of the Wills laws. See s. 9 Wills Act and s. 7 Wills Law, Kwara. This condition would operate notwithstanding that the property is realty or personalty. In effect, the trust, in this instance, must be evidenced in a valid will. Apart from the requirement that the wills be in writing, they are also required to disclose the identities of the beneficiaries.

The essence of these exceptions was to prevent fraud in relation to property. It would be extremely easy for a person to deliberately â€˜misconstrueâ€™ the intention of a â€˜settlorâ€™ and believe that a trust was created in their favour, when in fact it wasnâ€™t. If the settlor is dead or unable (due to health), such person could easily get away with fraud.

However, these requirements will not operate in all situations, for the simple reason that they were made to prevent fraud and Equity will not sit by and watch where they are, absurdly, used as instruments of fraud. This principle was well espoused in the case of BANNISTER v BANNISTER.

In that case, the plaintiff, the widow of the defendantâ€™s brother, inherited two cottages from her husband on his death. She decided to sell the property to her brother in law but agreed to sell for 150 pounds lower than the market rate, on the condition that he would let her live in one of the cottages until her death. In effect, she created a trust in her own favour, with her brother in law as the trustee. After the conveyance, the brother in law reneged on the deal, arguing that the transaction ought to have been evidenced in writing, as per the provisions of the Statute of Frauds. The court, dismissing his argument, held that the requirement of the law cannot be used as an engine of fraud. It held further that even though a particular format was prescribed for the transaction under the law, since the parties had executed the transaction, it will be honoured and non-compliance will not vitiate the transaction.

Where the requirements of the law have not been complied with or where they have only been partially complied with, the trust would not fail, rather a secret trust may result.

Secret trusts

Secret trusts are made when the settlor enters an arrangement with an individual, that they will hold property in trust for some beneficiaries to be disclosed either immediately or at a later time. These trusts are called secret because, where made in a will, they donâ€™t disclose the fact of the trust on the face of the will. Secret trusts may be fully secret or half secret.

Fully secret trusts

In a fully secret trust, there is no indication on the face of the will that the bequest or devise is meant for anyone other

than the stated donee. Thus, the gift appears beneficial on the face. It means that the trust is not apparent and it seems like the testator is simply giving a gift in the will. Whereas, he would have had an arrangement with the donee that the gift should be for some individual, whether disclosed or not. However, there are two conditions for a trust to qualify here.

- The trustee must accept the trust and make a written promise in this regard
- The identity of the beneficiary(ies) must be disclosed to the trustee, before the death of the testator.

See **RE: BOYLES (1884) 26 Ch. D. 531**, where the testator failed to communicate the identity of the beneficiary to the trustee but the trustee later found an envelope amongst the testatorâ€™s personal effects (after his death) that named one Mr. Brown as the beneficiary. The Court held that finding the will in that manner did not amount to communication and the secret trust must fail. However, delivery of a sealed envelope with the names of the beneficiaries amounts to communication even if it was marked â€œDo not open until after my deathâ€.

If either of the conditions is not satisfied, the trust fails and the donee takes absolutely. This means that the intended trustee gets to enjoy the gift as if it was meant for him. The reason for this is that there is no indication that a trust was intended or anticipated. So there is every reason to believe and hold that the gift is meant for the named person.

Half secret trusts

Under this arrangement, the fact of a trust is disclosed on the face of the will. However, the identity of the beneficiary is left undisclosed. Thus, there is partial disclosure of the fact of a trust. This is why it is called a half-secret trust. Clearly, the gift is not beneficial on the face of the will and this fact materially affects the outcome where the trust fails to operate.

Note that the conditions under fully secret trust will also apply fully here. In the case of **BLACKWELL v BLACKWELL**, the testator made a will in which he bequeathed 12,000 pounds to five of his friends, to hold on trust and apply to the purposes indicated by him to them, along with the power to pay 8,000 pounds of the sum to a person indicated by him. Before his death, the testator revealed the identity of the beneficiary to one of the five friends. The court held that this was sufficient communication to allow the trust operate.

Where the trust fails though, the donee cannot take absolutely. Rather, he will be required to hold the gift in a resulting trust for the benefit of the testatorâ€™s estate. This is because it is clear from the will that the property was meant to be held in trust. As such, holding that the donee should take absolutely as in a fully secret trust, would frustrate the otherwise clear intentions of the testator.

Implied/ Resulting trusts

A creation of Equity, resulting trust operates on the presumed or anticipated intention of the settlor. It is implied from the conduct of the parties (settlor, trustee, beneficiaries) and the surrounding circumstances of the case.

It is usually resorted to by Equity in order to ensure that the settlorâ€™s intention to create the trust is not frustrated by fatal non-compliance with established requirements for creating a trust. When it is implied, the donee will hold the gift in trust for the estate of the settlor, and his next of kin by extension.

Thus, a resulting trust will operate where an express trust fails, where a surplus remains after the terms of the trust have been performed or where a half secret trust fails.

Constructive trusts

This category of trusts is imposed by law, irrespective of the intention to create a trust. In this situation, the court compels an individual to hold property for another in order to prevent them from escaping with unconscionable conduct.

Public/charitable and private trusts

This classification is based on the object to which the trust is meant to be used. There are just two categories of trusts under this heading viz. public and private trusts.

Private trusts

When a trust is made with an individual or group of individuals as the object, such trust is private. Examples of private trusts include trusts made in favour of wives, kids, family etc.

Public/charitable trusts

There is very little difference between a charitable and a public trust. While a charitable trust is always a public trust, not all public trusts are charitable trusts. This is because, while the trust may be made for the benefit of the public or a section, it may not qualify as a charitable trust as per the requirements thereunder.

Charitable trusts are also made for the public good. Thereâ€™s no conclusive definition of what a charitable trust is although, it can be recognized as having certain attributes viz.

- It is made for public benefit, either of the community or a good portion. Although, this is not a strict requirement.
- The beneficiaries are not beneficiaries on the basis of their personal relationship with the settlor. This would not

apply to trusts for the relief of poverty though.
- It generally has no human objects or beneficiaries that can enforce. It is generally enforced by the A.G. It may have human beneficiaries in certain cases, but they cannot enforce it.

How to determine a Charitable Trust

The general lack of a satisfactory definition often makes it difficult to determine if a trust is charitable or not. However, the provisions of the Charitable Uses Act 1601, also referred to as the Statute of Elizabeth, has always been used as a guide. The preamble to the Act particularly contained a catalogue of objects regarded as charitable. Though now repealed, the preamble to the Act is saved by s. 13(2) Mortmain and Charitable Uses Act, 1888 which classifies charitable uses as follows:

> The relief of the aged, impotent and poor people, the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans, the relief, stock or maintenance for houses of correction; the marriage of the poor maids; the supportation, aid and the relief or redemption of prisoners or captives; help of young tradesmen, handicraftsmen and persons decayed; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

It will be apparent that this classification has several problems. For one, the majority of the objects are very outdated. They have no relevance in this day and age. Apart from this, the list obviously cannot be exhaustive as it only contains examples of charitable uses and lays no general rule as to how charitable uses can be determined or classified.

This shortcoming was repaired by Lord McNaughten in the case of COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX v PEMSEL (1891) AC 531 when he reduced the classification of charitable uses into the following:

- Trusts for the relief of poverty

Poverty is not necessarily destitution or unemployment. It can include gifts given to those in need or indigent/people of limited means. Charitable trusts under this heading do not have to comply with the rule of being for the benefit of the general public. Even if they are just for the benefit of a very small group of individuals or on personal consideration/affiliation with the settlor, they can still qualify as the alleviation of poverty, no matter how limited, does the public much benefit.

- Trusts for the advancement of religion

The religion must not be immoral or propagate foolish/unfounded ideas. There is no requirement as to the type of religion the trust can benefit, so long as it is devoted to the promotion of spiritual teaching and maintaining of doctrines in the religion. It must not be too narrow though. In the case of IYANDA & ORS. v AJIKE & ANOR. (1948) 19 NLR 11, the testator made a devise of a room in his house to be used as a mosque by his family. The court held that the room was intended to be used privately by the testatorâ€™s family and as such, did not constitute a charitable trust. Conversely, in the case of RE: OBABUNMI PEDRO, where the trust was for the saying of masses for dead people, the court readily held the trust to be charitable.

- Trusts for the advancement of education

Education here goes beyond formal teaching and learning. It extends to the promotion of arts and graces of life. In the case of RE: DUPREEâ€™s DEED TRUST (1945) Ch. 16, the court upheld a trust for chess playing among boys and youth. Other gifts like, educational trust funds, scholarships, public libraries etc. will also be held charitable under this heading.

- Trusts for other purposes beneficial to the community

The essence of this category is to serve as a catch-all for trusts that cannot be expressly provided for under the prior headings. The important requirement to be satisfied here is that the trust benefits the community. They could include trusts that promote the mental and moral improvement of the community. Under this heading, trusts for the welfare of cats and dogs have been held valid. See RE: MOSS (1949) 1 Ch. D 495.

Generally, determining which of these headings a trust falls under and whether it is charitable can be a trying job. The court is enjoined, in making its determination, to place little reliance on the settlorâ€™s opinion as to whether the trust is charitable or not and his motive in creating the trust. See PHILIPS v PHILIPS (1967) 1 NLR 100.

As mentioned earlier, charitable trusts are enforced by the A.G, since they have no human objects generally. Even if they do, it doesnâ€™t fall to the human objects to enforce it. a private individual can also enforce a trust upon application to the A.G for a fiat. **Advantages of charitable trusts**

- The rule against perpetuities is inapplicable to charitable trusts. The rule is simply that interest in a trust property cannot be suspended forever. It cannot continue to be held on trust for eternity. Thus, there must come a time when the beneficiary will be conferred with both legal and equitable interest in the trust and this must be within 21 years of the settlorâ€™s death. The rule will not apply to charitable trusts though. This means that charitable trusts can continue for eternity, if they last that long.
- It cannot be voided for lack of certainty of object
- It benefits a larger percentage of objects than private trusts
- The Cy-Pres doctrine is available to ensure that the trust is enforced. The general rule, when a trust is ineffective or fails for whatever reason, is that it inures in a resulting trust to the estate of the settlor. However, the exception is in cases of trusts that have a charitable intention. In this instance, the trust property will be applied â€˜cy-

presâ€™ to other charitable purposes as nearly as possible to the original purpose of the trust. The doctrine will also be applied when an already effective charitable trust becomes impracticable or impossible to perform i.e. due to change of law, war etc.