

# Completely and incompletely constituted trusts

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Where a trust has scaled through the three certainties and can be validly determined under any of the classes of a trust, it is not fully operative yet. In order for the trust to become fully operative and capable of being enforced, it must be properly/completely constituted first.

As has been made clear above, a trust can be created by will or by inter vivos declaration. Constitution of trusts however has more to do with inter vivos declaration than creation by will. Thus, when a trust is created during the lifetime of a settlor, the rule regarding complete and incomplete constitution of trusts will apply.

## **Completely constituted trusts**

A trust is said to be completely constituted when the settlor has done all that is required by law to properly vest title to the trust property in the trustee, seeing as he must possess the legal title in the trust in order to be able to carry it out. It is only when the trust is complete that the beneficiary too can enforce it.

The rationale behind this is simple. A trust is basically an ordinary transfer of title in property, coupled with the added dimension that the property should be held for a beneficiary. Thus, it must first be properly transferred in accordance with the laws governing transfer of property. There are different laws when it relates to transfer of realty and personalty.

### **Transfer of realty**

The rule, with regard to constitution of realty, is that it must be in writing, as required by s. 7 Statute of Frauds and s. 77 PCL and registered as required by s. 3 Registration of Land Titles Act. This is the requirement with regard to conveyance of legal interest in the property to the trustee.

If the settlor only possesses an equitable interest in the property or if he only wishes to transfer the equitable interest in the property to the trustee, all he needs to do is evidence the trust in writing.

If the settlor is declaring himself as trustee for his own property, there is no requirement for conveyance. His declaration must be in writing though, regardless of whether the interest is legal or equitable.

### **Transfer of personalty**

For transfer of personalty, the rule depends on whether the property is pure personalty (incorporeal) or corporeal property. If the property is corporeal, such as money, a car or other movable goods, mere delivery of the property suffices. There is no requirement for writing. Once delivered, the trust is complete.

If the property is pure personalty, there may be need for some documentation especially when the property consists of shares, stock etc. In such cases, there would be a need to complete the necessary transfer forms that evidence the transfer and registration with the appropriate authority. If the transfer form is not filled, the trust is not complete. See *MILROY v LORD* (1865) 4 DF & J 260.

For other personalty, mere delivery suffices. If the trustee declares himself as trustee here too, the trust is properly constituted upon his declaration.

Failure of the property to vest properly means it will not be enforceable either by the trustee or the beneficiary as "Equity will not perfect an imperfect gift".

### **Covenants to settle**

There are situations where the trustee enters into an agreement to transfer the trust property to the beneficiary. This is a covenant to settle. Where such an agreement exists but was not fulfilled before the death of the settlor, the beneficiary may enforce the agreement, subject to some conditions.

In order to enforce the covenant to settle, the beneficiary must be a party to the agreement and must furnish consideration. This is because such an agreement is a contract and will be subject to the rules of contract. Thus, the rules of privity and consideration apply.

Failure to furnish consideration means that the maxim: "Equity will not aid a volunteer" will have effect. This means that a person that has not furnished valuable consideration has no remedy in Equity.

If the covenant is by deed though, the beneficiary need not furnish any consideration as agreements made by deed not be supported by consideration before they can be enforced at Common law.

## **Incompletely constituted trusts**

Once a trust fails to comply with the rules for valid constitution, it is said to be incompletely constituted. Thus, once there is something left to be done before the trust property can fully vest in the trustee, the trust is not complete.

In the case of *JEFFERY v JEFFERY*, a father made a will in which he left both freehold and leasehold of his estate to his

wife. Later, by voluntary deed, he conveyed freehold of his estate to a trustee in trust for his daughter. He also agreed to convey the leasehold to her but died before he could do so. The court held that that daughter was entitled to the freehold, being properly constituted but that the agreement to convey the leasehold was unenforceable as it was incompletely constituted.

Thus, as Lord Justice Turner declared in *MILROY v LORD*, “there is no equity to perfect an imperfect gift nor will equity construe an imperfect gift as declaration of a trust.”

## Exceptions to the rule

Notwithstanding the foregoing, there are instances where an incompletely constituted trust will be enforceable. They include the following:

### The rule in *STRONG v BIRD*

According to the rule, where an imperfect gift is made *inter vivos* to a donee, it may still be perfected if he is subsequently made executor or administrator of the donor’s estate. Thus, if the gift was made in consequence of an intention to create a trust, the trust becomes enforceable by operation of this rule.

In this case, the facts were that the defendant borrowed 1,000 pounds from his stepmom who lived in his house, on the agreement that he will pay back by allowing her pay rent at a reduced amount. She however paid the reduced amount just twice and paid in full till she died. Before her death though, she appointed the defendant as her executor. On her death, the stepmom’s next of kin sought to enforce the debt owed her estate by the defendant. The court held that appointing the defendant as executor, was indication of the stepmom’s intention to forgive the debt and turn it into a gift since the executor cannot be expected to sue himself for the debt he owes her. It was further held that the fact that the stepmother had stopped payment of the reduced rent in her lifetime was indicative of her donative intention till she died.

The conditions for the operation of the rule are that:

- The donor must have intended to make immediate *inter vivos* gift to the donee. If the intention relates to the future and is not immediate, the rule will not apply
- The donor’s intention to make the gift must have continued till the time of his death. Where however, the donor has taken some steps which is at variance with the expressed intention to make a gift, for example, by lending the property to someone else, the rule will not apply.
- The intention of the donor must relate to a specific item. If the intention is vague and does not relate to some specific items, the rule will not apply

### Donatio mortis causa

This is a gift made in contemplation of death. It is conditional upon the death of the donee and will not take effect otherwise. This gift can be enforced without consideration upon the fulfilment of the following conditions:

- The gift must be made in contemplation of, not expectation of death. This means it must only have been probable, not certain that the donor will die.
- The donor must have parted with dominion of the property. This means that the subject matter of the gift or the means of control must have been delivered to the donee.
- The gift must have been made in such circumstances as to show that it will revert if the contemplated death does not occur.
- The donor must actually die before the gift can be perfected.

### The doctrine of proprietary estoppel

This doctrine, drawing from the general principle of estoppel, will operate to prevent an owner of property who has made an imperfect gift or his personal representatives from denying or asserting the beneficiary’s right to the gift. In the case of *DILLWYN v LLEWELYN* (1862) 4 De. G.F. & J. 517, a father asked his son to occupy a piece of land and the son in consequence thereof, expended large sums of money to build on the land. The father died without executing any document in favour of the son. The son’s claim to get the conveyance to himself on the property was upheld.

### Dispositions under wills

As mentioned earlier, the rule as to constitution of trusts applies more to *inter vivos* trusts than trusts made by will. Thus, when a gift is made by a will, it is eminently enforceable, regardless of absence of consideration or privity.