The constitution of trusts – settlors constituting trusts by "vesting" title without "transferring" title

Article

Accepted Version

50-word summary:

This article argues that – although textbooks suggest the contrary – settlors may constitute trusts they have declared by vesting property in trustees without the settlor first owning the trust property and then transferring its title to the trustees: indeed, the settlor need not have owned the trust property at any stage.

The Constitution of Trusts – Settlors Constituting Trusts by "Vesting" (賦予) Title without "Transferring" Title

David Wilde*

Introduction

The suggestion here is that a significant point about the constitution of trusts is overlooked in the standard textbook treatments of the topic: that settlors may constitute declared trusts by "vesting" property in the trustees *in other ways* than by first owning and then "transferring" title over the property to the trustees. And unduly narrow statements of the law in the books – both student and practitioner – implying the contrary, create a risk that judges and legal advisers may feel constrained to see what *ought to be* perfectly valid trusts as failing. Moreover, these unacknowledged means of constituting trusts are of considerable practical significance.

There are, of course, two basic ways for a settlor to create an express trust. A settlor may declare that they are to hold property they already own on trust personally. We are not concerned with these "self-declarations" of trust, which require no further step of "constitution". Or a settlor may declare that some other nominated trustee, or trustees, will hold the property on trust, and vest title to the property in them: the vesting of the title in such trustees being called "constitution" of the trust, bringing it into existence.[1] This "declare and constitute" mode of trust creation is our concern here. And for present purposes, the crucial word to note in the description of constitution just given is "*vesting*" title in the trustees to constitute the trust – which is intended to include a procuring of vesting. The textbooks instead talk about the settlor "*transferring*" title to the trustees to constitute the trust. In context,

* Associate Professor of Law, University of Reading.

[1] For the situation where a settlor declares that they will be one of a body of trustees, see *T. Choithram International SA v Pagarani* [2001] 1 W.L.R. 1 (P.C.), esp. 11-12.

"transfer" naturally means – and is seemingly intended by the writers to mean – that the settlor must own the relevant property, then pass that title to the trustees; subject to the trust, of course. This article will seek to demonstrate that, while such a transfer of title from settlor to trustees may be the traditional way of constituting a trust, it is not the *only* way of doing this, as the books suggest.

How have the textbooks missed this point? The apparent explanation is that, by tradition, the books adopt as a framework for considering the constitution of trusts Turner L.J.'s list of three ways of giving – by outright gift, by *transfer* to trustees, and by a self-declaration of trust – in *Milroy v Lord.*[2] The judge spoke only about "transfers" to trustees rather than vesting property in trustees more widely. Consequently, it is suggested, vesting by other means has been neglected.

The present writer has challenged previously the apparently widespread belief that, in the declare and constitute mode of trust creation, the only way to establish a valid trust is for the settlor to own property, declare a trust over it, then transfer that title to the trustees.[3] The focus then was the moment of declaration – arguing that both principle and case law support the view that the settlor does *not* necessarily have to own the trust property at the time of declaring the trust. The focus here is the moment, and process, of constitution – again arguing that, at this point also, the settlor does *not* necessarily have to own the trust property. It is essentially a continuation of the same general argument: that the traditional, standard way of declaring and constituting a trust – own the relevant property, declare a trust over it, and transfer title to the trustees – is *not* the only way.

The law according to the textbooks

To cite one recent example of the textbook treatment of the constitution of trusts – which is entirely representative. In the new edition of *Hanbury and Martin*[4] – a classic, highly respected academic text – the chapter on the constitution of trusts tells the reader, "[I]t is necessary both to declare the trust and to *convey* the property to the trustee".[5] Turner L.J.'s list of three ways

---

[2] (1862) 4 De G. F. & J. 264, 45 E.R. 1185, at 274.

[3] David Wilde, "Valid Trust Declarations Over Property Not Owned by the Settlor or Over Unascertainable Property" (2020) 26 T.&T. 168.

[4] Jamie Glister and James Lee (eds), *Hanbury and Martin Modern Equity*, 22nd edn (Sweet & Maxwell 2021), ch. 5.

[5] Para. 5.001, emphasis added.

of giving from *Milroy v Lord*, mentioned above, is then recited, with the book saying of "transfer" to a trustee:[6]

> "X may *transfer* the property to A to hold on trust for B. Provided the legal title is correctly *transferred* to A, according to the type of property concerned, A will become legal owner; and provided that an intention to create a trust in favour of B is sufficiently manifested, B will become the equitable and beneficial owner. A will hold on trust for B."

The chapter proceeds to deal with the consequences of invalid or incomplete "transfers".[7] It adds that an existing equitable title of the settlor can be the subject matter of a trust declaration and constitution by "assignment" or "transfer" to trustees.[8] It then proceeds to state the requirements for a valid "transfer" of a legal or equitable title in respect of various types of property.[9] And that, basically, is the coverage. No mention is made of any other method by which a settlor might constitute a trust, with the clear *implication* that constitution can only be by the settlor owning then transferring title to the trustees.[10] Finally, this appears to be *all but explicitly stated*: "If a settlor has neither *conveyed* the property to trustees nor declared himself a trustee, no trust is created".[11] Another recent edition, of Hudson's latest text, is even clearer on the point:[12] "A trust can only come into existence if the settlor is the owner of the property which is to be settled on trust … [T]he settlor must have had a property right in the property *at the time* they purported to declare the trust. The settlor must then transfer the legal title in the trust property to the trustees …"

Given the content of the textbooks, it is unsurprising to find a widespread belief that for a settlor to validly declare and constitute a trust, the settlor must own the relevant property, declare a trust over it, then transfer that title to the trustees. For example, expressing this "must

---

[6] Para. 5.004, emphasis added.

[7] Paras 5.006-5.012.

[8] Para. 5.013.

[9] Paras 5.014-5.016.

[10] The only other type of constitution mentioned is the difficult and questionable one of fortuitous vesting, which is not specifically concerned with *the settlor* vesting the property in the trustees at all. Para. 5.015, citing *Re Ralli's Will Trusts* [1964] Ch. 288 (Ch.): "It has been held that the trust may be constituted where property is vested in the trustees, even though it reached them in a capacity distinct from their office as trustees of the trust in question".

[11] Para. 5.020, emphasis added.

[12] Alastair Hudson, *Principles of Equity and Trusts*, 2nd edn (Routledge 2021), para. 5.2.1, emphasis in the original.

own, declare, transfer" understanding of the law, Harman J. said in the Court of Appeal in *Kasperbauer v Griffith*,[13] "I have never met a case where A can declare trusts affecting property of which A is not the owner. Trusts can be declared over property of which you can dispose." For those who believe they have never met such a case, some introductions are in order.

Constitution of trusts by vesting without transferring

The case law appears to recognise at least four ways for a settlor to constitute a declared trust, without conforming to the "own, declare, transfer" model.

Vesting by creation of property in favour of trustees

A settlor can constitute a declared trust by *creating the trust property in favour of the trustees* without the settlor ever owning the item. As an example, a case that should be familiar to trust lawyers is *Fletcher v Fletcher*.[14] The settlor executed a deed covenanting with trustees that £60,000 was to be paid to them by his estate at his death for beneficiaries; *and the deed was understood as also declaring and constituting an immediate trust, in favour of the beneficiaries, of the benefit of the covenant made with the trustees*. It was held the surviving beneficiary could enforce the trust of the covenant to recover the sum. Wigram V.-C. said:[15] "One question made in argument has been whether there can be a trust of a covenant the benefit of which shall belong to a third party; but I cannot think there is any difficulty in that." The trust property, the covenant, was a chose in action *created* by the settlor through the act of making his promise by deed to the trustees. We can say the benefit of the chose in action was *vested* in the trustees by that act of creation. But it was an item that the settlor did not own at the time of declaring the trust; and it was not owned by the settlor and then *transferred* by him to the trustees in order to constitute the trust. Indeed it would have been impossible for the settlor to have ever owned the chose in action: one cannot own a right against oneself.[16]

---

[13] [2000] W.T.L.R. 333 (C.A.) at 347. See also the leading judgment of Peter Gibson L.J. (at 343). These statements were obiter. They were the basis of a suggestion that a man could not create a secret trust over the death benefit from his occupational pension scheme, the destination of which he could direct, because it was not an item of property he owned or would ever own to transfer. This was obiter since the man was found anyway not to have had the intention to impose a trust.

[14] (1844) 4 Hare 67, 67 E.R. 564.

[15] (1844) 4 Hare 67, 67 E.R. 564, at 74.

[16] The point was noted by R.H. Maudsley, "Incompletely Constituted Trusts" in Roscoe Pound, Erwin N. Griswold, and Arthur E. Sutherland (eds), *Perspectives of Law* (Little, Brown 1964), 248. Accepting the "must own, declare, transfer" understanding of the law, he said – given the settlor did not fit this description – that the

Nor is this an isolated instance. Another example can be found at the heart of one of the most celebrated trust litigation sagas. When Guy Anthony Vandervell gave shares to the Royal College of Surgeons, with a view to dividends being paid to them, he, as settlor, notoriously procured the grant by the college of an option to purchase the shares to Trustees Ltd. This option was ultimately understood by the House of Lords to be upon an (inferred) express trust declared by the settlor, for such objects as were to be subsequently defined by either the settlor or the trustee company – the obvious gap in the beneficial interests of these trusts in the meantime then leading to an automatic resulting trust for the settlor, with unfortunate tax consequences: *Vandervell v I.R.C.*[17] The property settled on this express trust, recognised by the House of Lords – the option – was *created* in favour of the trustee company. Lord Upjohn, delivering the leading judgment, remarked on the special nature of the trust property, making clear it was *not* a transfer of anything owned by the settlor (in the context of considering whether the presumption of resulting trust could apply to the option – a matter it was ultimately unnecessary to decide, given the finding that an express trust was, inferentially, declared over it by the settlor):[18]

> "The grant of an option to purchase is very different from a grant of a legal estate in some real or personal property without consideration to a person nominated by the beneficial owner.
>
> The grantee of an option has not, in reality, an estate in the property. Of course, he has an interest in it which can be measured by saying that he can obtain an injunction preventing the grantor from parting with the property except subject to the option and in this case having regard to the express terms of clause 2 from parting with the property at all; and that he can enforce the option against all subsequent owners except purchasers for value without notice. Essentially, however, an option confers no more than a contractual right to acquire property on payment of a consideration, and that

---

trust of the covenant could only come about through the settlor procuring a declaration of trust by the trustees: "I say with some trepidation, it seems to me that a trust of this nature should be created, if at all, by the obligee [trustee] and not the obligor [settlor]…" However, he acknowledged this simply did not fit the facts of *Fletcher v Fletcher*, continuing, "[T]here was evidence of the fact that the trustee did not enter into the arrangement intending to be a trustee of a promise, for he did not know about it, and wished to decline the trust as soon as he did hear about it".

[17] [1967] 2 A.C. 291 (H.L.).

[18] [1967] 2 A.C. 291 (H.L.) at 314-15.

> seems to me a very different thing from the ordinary case where the doctrine of a resulting trust has been applied."

Sometimes when a settlor creates the trust property in favour of the trustees, it will be fair to say, at least in the ordinary use of language, that the settlor *did* own the trust property at the time of declaration and then *did* transfer the property to the trustees to constitute the trust. For example, if a settlor landowner grants a lease over it in favour of trustees, we can say that the settlor owned the land out of which the lease was carved and that the settlor transferred rights in the land to the trustees. But it is nevertheless still true that the settlor never owned and did not transfer the *specific* trust property – the leasehold title. The settlor would typically be advised to procure a declaration of trust by the trustees in such a situation: to ensure a declaration of trust is made by a title holder. However, the suggestion here is that this precaution is not essential to the validity of the trust: cases like those above demonstrate it is enough that the settlor has declared the trust and secured the vesting of the trust property in the trustees.

Vesting by purchasing property in the name of trustees

A settlor can constitute a declared trust by *purchasing the trust property in the name of the trustees* without the settlor ever owning the item. When legal advisers are involved, the settlor will, again, typically be advised to procure in the transfer of title a declaration of trust by either the vendor of the trust property or the trustees: to ensure a declaration of trust is made by a title holder. But the case law in this area again indicates this is not essential to the validity of the trust. If a settlor simply declares a trust and purchases the trust property in the name of the trustees, without procuring any other declaration of trust, there will be a valid trust notwithstanding that the settlor did not own the trust property at the time they declared the trust and notwithstanding that the settlor did not own the trust property and transfer it to the trustees in order to constitute the trust. A good example is *Muggeridge v Stanton*.[19] The settlor created a trust. It contained a provision that she could add income from the trust back into the trust fund. She used some trust income to buy consols in the names of the trustees without informing them; but she also used some *other* money to do the same. The Court of Appeal in Chancery held that all of the investments bought were subject to the trust. In respect of the money that was *not trust income*, the court held the settlor had effectively declared (by conduct) that the investments purchased in the names of the trustees with it were to be held on the same trusts.

---

[19] (1859) 1 De G. F.& J. 107, 45 E.R. 300.

Lord Campbell L.C., delivering the leading judgment, said:[20] "With regard to the surplus money… there was equally a declaration of trust with regard to the whole of the vestments *(sic)*."

The same result was reached in the similar case of *Re Curteis' Trusts*.[21] That decision was cited with approval by Lord Upjohn while delivering the leading judgment in the House of Lords in *Vandervell v I.R.C.*[22] He explicitly treated the trust in *Re Curteis* as an (inferred) express trust. Some books suggested it was instead a presumed trust[23] – although there had been nothing of substance in Bacon V.-C.'s judgment in *Re Curteis* to support this. Any presumed trust analysis has now been pronounced incorrect by Lord Briggs J.S.C. giving the judgment of the Privy Council in *Gany Holdings (PTC) SA v Khan*.[24]

In *Kaki v Kaki*,[25] a settlor purchased a lease in the name of some of his children, stipulating it be held on a family trust. The professionally advised declaration of trust by the trustee children, outwardly anticipated by all, did not materialise due to family discord. The trust was nevertheless upheld, based on the settlor's own prior declaration of its terms.

One suspects that purchase in the name of trustees – without the professionally advised precaution of procuring a declaration of trust by either the vendor or the trustees during the transfer of title – may well be a very common occurrence.

Purchase in the name of trustees may, of course, be by way of *exchange* rather than the simple payment of purchase money. An important example is the constitution of trusts affecting required employer contributions into occupational pension trust funds for employees. Employees are regarded as the settlors of such employer contributions, the employees having effectively purchased them by exchanging their labour in return for them. In *Brooks v Brooks*,[26] Lord Nicholls, delivering the leading judgment in the House of Lords, held regarding such

---

[20] (1859) 1 De G. F.& J. 107, 45 E.R. 300, at 118.

[21] (1872) L.R. 14 Eq. 217 (Ct Ch.).

[22] [1967] 2 A.C. 291 (H.L.) at 313.

[23] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts*, 19th edn (Sweet & Maxwell 2015), para. 9.034 (but cf. now their 20th edn, 2020, para. 10.034). And also David Hayton, Paul Matthews, and Charles Mitchell (eds), *Underhill and Hayton Law Relating to Trusts and Trustees*, 19th edn (LexisNexis 2016), para. 25.44 (but cf. now Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees*, 20th edn (LexisNexis 2022), para. 26.41).

[24] [2018] UKPC 21, (2018) 21 I.T.E.L.R. 310, at [17]-[20].

[25] [2015] EWHC 3692 (Ch), esp. [53]-[54].

[26] [1996] A.C. 375 (H.L.) at 394-95.

contributions: "The company was not the settlor, because the provision it made for the [employee] by the scheme was in his capacity as an employee. This provision was in the nature of deferred remuneration". The employee, as settlor, never owns the sums involved and does not transfer them to the trustees in order to constitute the trusts affecting them.

Vesting by exercising a power to direct another to transfer property to trustees

A settlor can constitute a declared trust by *exercising a power to direct another to transfer the trust property to the trustees* without the settlor ever owning the item. A simple example is the beneficiary of a trust directing the trustee to transfer the legal title to the trust property to a second trustee to hold on a trust for a second beneficiary, declared by the original beneficiary as settlor. Returning to *Vandervell v I.R.C.*, Lord Upjohn delivering the leading judgment in the House of Lords treated the following as straightforward:[27]

> "I do not think that any questions of the principles of law to be applied give rise to any difficulty or are in doubt … I believe all your Lordships and the judges in the court below are at one upon the general principles.
>
> So I will be as brief as I can upon the principles. Where A … directs a trustee for him to transfer … the legal estate in property to B otherwise than for valuable consideration it is a question of the intention of A in making the transfer whether B was to take beneficially or on trust and, if the latter, on what trusts. If, as a matter of construction of the document transferring the legal estate, it is possible to discern A's intentions, that is an end of the matter..."

Of course, the settlor here, as beneficiary of the original trust, was equitable beneficial owner of the trust property; may have had the right to call for the legal title;[28] and has in a sense transferred the beneficial ownership as the substance of the second trust.[29] So it could legitimately be seen as a form of "transfer" in the ordinary use of language. But it is not a transfer in the direct sense the textbooks generally seem to assume: the specific item held on the second trust – the legal title to the trust property – was not owned by the settlor at the time of declaring the second trust; nor was it owned and transferred by the settlor to the trustee so as constitute the second trust.

---

[27] [1967] 2 A.C. 291 (H.L.) at 312.

[28] Under the rule in *Saunders v Vautier* (1841) 4 Beav. 115, 49 E.R. 282.

[29] Although, note, this is a transfer to the second beneficiary not a transfer to the second trustee.

Not every exercise of a power to direct the destination of property necessarily exemplifies this point clearly. For example, if the holder of general power of appointment over trust property, often treated as akin to ownership, appoints it to new trustees on trusts the appointor declares, it might be argued that the effective settlor is the original settlor who conferred the power and settled the trust property initially; with the donee the power being merely an instrument playing out that original settlor's scheme: and that original settlor *would* usually have owned the property, declared a trust over it, and transferred the title to trustees to constitute the original trust – in the conventional manner. However, the general point remains valid.

Accordingly, with respect, the Court of Appeal was wrong to believe – under the influence of the "must own, declare, transfer" view of declaring and constituting trusts – that a settlor cannot validly declare and constitute a trust over the property to be received by a nominee for the receipt of the settlor's pension death benefit, who the settlor has power to select, because it is property the settlor never owns, in *Kasperbauer v Griffith* mentioned above.[30] Lord Oliver made clear delivering the judgment of the Privy Council in *Baird v Baird*,[31] "In essence, the power to appoint the 'death-in-employment benefit' is no different from any other power of appointment". Such powers can, of course, be exercised to declare new trusts if that is within the terms of the power.[32] And trusts of nominated pension death benefits appear to have been routinely declared in practice, through the nomination of trustees to receive such property, often on the terms of so-called "bypass" trusts, set up as "pilot" trusts, for tax reasons – although it has recently been more common for occupational pension trust schemes not to confer any power to direct a nominee for a death benefit, but only a right to express wishes to the trustees, who then make a discretionary decision, again for tax reasons.[33]

---

[30] [2000] W.T.L.R. 333 (CA). Nor would this be a *secret* trust arrangement, as was suggested to the court: a pension nomination is not testamentary, given it is a nomination of property that neither the nominator nor the nominator's estate ever owns (*Re Danish Bacon Co. Ltd Staff Pension Fund Trusts* [1971] 1 W.L.R. 248 (Ch.), esp. 255-57; *Baird v Baird* [1990] 2 A.C. 548 (P.C.), esp. 556-57, 561) and nor therefore is any trust attached to the property testamentary – so there is no need to comply with Wills Act 1837, s. 9, or to use the secret trusts doctrine to rescue the trust from non-compliance with that section.

[31] [1990] 2 A.C. 548 (P.C.) at 557.

[32] Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts*, 20th edn (Sweet & Maxwell 2020), paras 3.054-3.064.

[33] Alexandra Braun, "Pension Death Benefits: Opportunities and Pitfalls" in Birke Häcker and Charles Mitchell (eds) *Current Issues in Succession Law* (Hart 2016), esp. 244-45.

Vesting by authorising trustees to collect property due to the settlor

A settlor can constitute a declared trust by *empowering trustees to collect property which the settlor has become entitled to receive*, the trustees taking it into their ownership, in their capacity as trustees, as the trust property, without the settlor ever owning the item.[34] An example is *Re Bowden*.[35] The settlor, about to enter a nunnery, in 1868 empowered nominated trustees to receive any property she might inherit from her father at his death and declared a trust over such property. After her father died in 1869, the trustees collected what the settlor was left under her father's will and held it on the declared trust. The settlor's claim, decades later, that there was no trust, so that she was personally entitled to the property, was rejected. Bennett J. said:[36] "Under a valid authority, unrevoked, the persons appointed trustees under the settlement received the settlor's interest under her father's will, and, immediately after it had been received by them, as a result of her own act and her own declaration, contained in the voluntary settlement, it became impressed with the trusts contained in the settlement." Again, this could perhaps be called a "transfer" in the ordinary use of language. But, again it is not a transfer in the direct sense the books seem to envisage: the settlor did not own this property at the time of declaring the trust; and the settlor did not own this property and transfer it to the trustees in order to constitute the trust. The property in *Re Bowden* could only be seen as in any sense owned by the settlor if we say there was a brief moment when it passed from the ownership of the deceased's personal representatives[37] and was received into the settlor's ownership by her agents before the declared trust took effect – involving the sort of *scintilla temporis* ("spark of time") reasoning repeatedly rejected in various contexts at the highest level over recent years.[38]

Nor should it be thought this is a rare, exceptional situation. The trusts affecting individual employee contributions into occupational pension trust funds are routinely

---

[34] One text, at least, does recognise empowering collection as a valid way to constitute a trust: Simon Gardner, *An Introduction to the Law of Trusts*, 3rd edn (OUP 2011), para. 4.1.

[35] [1936] Ch. 71 (Ch.). Followed in *Re Adlard* [1954] Ch. 29 (Ch.).

[36] [1936] Ch. 71 (Ch.) at 75.

[37] *Attenborough & Son v Solomon* [1913] A.C. 76 (H.L.).

[38] *Abbey National Building Society v Cann* [1991] 1 A.C. 56 (H.L.); *Ingram v Inland Revenue Comrs* [1999] S.T.C. 37 (H.L.); *R. v Waya* [2012] UKSC 51, [2013] 1 A.C. 294; *Southern Pacific Mortgages Ltd v Scott* [2014] UKSC 52, [2015] A.C. 385; *Balhousie Holdings Ltd v Revenue and Customs Comrs* [2021] UKSC 11, [2021] 1 W.L.R. 2164.

constituted by employers deducting them from salaries and paying them to trustees, without the employees as settlors ever owning the sums.[39]

It would be ironic indeed if *Milroy v Lord* – the case identified above as specially influential in encouraging the "settlor must own, declare, transfer" view of the constitution of trusts – had itself upheld a trust within this trustee collection category, *and therefore not involving any (direct) transfer from the settlor*. This is a possible understanding of one decision in the case and it appears to be adopted in *Parker and Mellows*;[40] although ultimately it may not be the best interpretation of the judgments. The settlor, by deed, purported to transfer shares and their future income to a trustee on trust for beneficiaries. The shares were transferable only by entry in the books of the company; but no such transfer was ever made. The case is best known, of course, for the failure of the intended trust of the shares as incompletely constituted: exemplifying the general rule that "Equity will not perfect an imperfect gift". But there was also a less noted decision about dividends arising from the shares following their failed transfer. The settlor gave the trustee power of attorney authorising him to receive the dividends. The trustee collected these and (apparently with one exception) paid them to the principal intended beneficiary, sometimes via the settlor. *Parker and Mellows* appears to say that the trustee collected the dividends on trust for the beneficiary:[41] "It was held that the settlor should be treated as having made a perfect gift of the dividends to the beneficiary … The settlor … had given the intended trustee power of attorney to collect the dividends and so must have inevitably intended them to be held for the beneficiary …" However, the judgments may well suggest instead that the dividends were treated as collected on behalf of the settlor and then subsequently given as gifts by the settlor, or with the settlor's authority, to the intended beneficiary. Turner L.J. said in the leading judgment:[42] "Although the Plaintiffs' case fails as to the capital of the bank shares, there can, I think, be no doubt that the settlor made a perfect

---

[39] In the case of automatic enrolment of jobholders into pensions, with opt out, under Pensions Act 2008, the jobholder's decision whether to participate in a trust arrangement as "settlor" is a constrained one and, if they do choose to, the immediate source of the authorisation to collect is statutory (s. 33) – demonstrating again the special nature of occupational pension trusts, which has to be taken into account in descriptions of trusts law.

[40] A.J. Oakley (ed.), *Parker and Mellows: The Modern Law of Trusts*, 9th edn (Sweet & Maxwell 2008). The book gives the usual "must own, declare, transfer" account of the law (ch. 5); but nevertheless states this understanding of *Milroy v Lord*, which is apparently at odds with that account.

[41] Paras 5.011-5.012.

[42] (1862) 4 De G. F.& J. 264, 45 E.R. 1185, at 277, emphasis added.

gift to Mrs. Milroy … of the dividends upon these shares, *so far as they were handed over or treated by him as belonging to her* …"

Many "transfers" to trustees are technically purchases in the name of trustees

As a final point, it is perhaps worth noting that many "transfers" by settlors to trustees in order to constitute trusts – where the use of the word "transfer" by the textbooks could certainly *not* be objected to – are nevertheless, as a matter of legal technicality, not the sort of simple title transfers the books seem to assume. One of the most common forms of transfer to trustees to constitute declared trusts is bank transfers of funds. We might speak about a transfer of title to money here; but technically what is actually involved is an exchange-purchase through the banking system, within the "purchase in the name of trustees" category of vesting identified above. The credit balance in the settlor's account is a chose in action the settlor holds against their bank; and after the transfer, this has been exchanged for a credit balance in the trustee's account amounting to a *different* chose in action they hold against their bank. Once again, the specific property received by the trustee to be held on trust was never owned by the settlor and was not the subject of a transfer of title from settlor to trustee in order to constitute the trust.[43]

Conclusion

This article has identified several situations where a settlor can constitute a trust they have declared by vesting the trust property in trustees, but without the settlor owning the relevant property and transferring its title to the trustees. The identified situations are: creating property in favour of trustees; purchasing property in the name of trustees; exercising a power to direct a transfer of property to trustees; and authorising trustees to collect property due to the settlor. Without claiming that these categories are exhaustive, it is suggested that they are sufficient to demonstrate that a settlor *can* constitute a declared trust by vesting the trust assets in trustees without the settlor owning the property and then "transferring" title to them. The textbooks are therefore misleading insofar as they suggest the contrary. The use of the word "transfer" to describe the constitution of trusts is habitual and deeply ingrained.[44] But it is suggested that "vest" – with due explanation of its wider scope – would be preferable.

---

[43] See further David Wilde, "Valid Trust Declarations Over Property Not Owned by the Settlor or Over Unascertainable Property" (2020) 26 T.&T. 168, 171.

[44] Ben McFarlane, *The Structure of Property Law* (Hart 2008), 228, uses it even in a searching reappraisal of trusts law.

The confusion over the constitution of trusts is a peculiar one. The books give a "must own, declare, transfer" account. Yet transactions inconsistent with it are routinely and blithely undertaken, without anyone doubting their validity for a moment – the operation of occupational pension trust funds has been a recurring example here. Apparently, the inconsistency goes generally unnoticed. So that, incongruously, when other proposed transactions are examined, the general mindset remains the "must own, declare, transfer" orthodoxy of the books – leading to error. Hopefully the examination of the case law here provides a corrective. Left unchecked, the widespread confusion the books help to engender is liable to lead to incorrect decisions by the courts.[45] And the confusion undoubtedly leads to practitioners believing they must adopt unnecessarily complex forms of trust creation, causing needless delay and expense – or perhaps even abandoning proposed trust arrangements in favour of suboptimal alternative legal forms. Particularly helpful would be a recognition that in the case of purchase in the name of trustees, or directing a transfer of property to trustees, the only declaration of trust required is one by the settlor (before or at the time) – although a recorded acknowledgement of acceptance of the trust by the trustees would often be a sensible practical precaution, of course.

The confusion here is one worth dispelling.

---

[45] A recent example is *Parker v Financial Conduct Authority (R. v Moore)* [2021] EWCA Crim 956, [2021] 4 W.L.R. 121, at [73], where one reason the Court of Appeal held an express trust failed, following a settlor's purchase in the name of a trustee, was that the trust did not conform to the "must own, declare, transfer" orthodoxy. Tellingly regarding prevailing understandings, the only substantial note on the case to date does not query this: Jian Jun (JJ) Liew, "*Parker v Financial Conduct Authority* - a Missed Opportunity?" (2021) 35 T.L.I. 185. (The court felt it necessary to overcome the trust's perceived failure by finding a constructive trust on the same terms. The court's additional reason for finding the express trust failed – because it was a declaration of trust over land that did not comply with Law of Property Act 1925, s. 53(1)(b) – also looks incorrect on a conventional view of that provision; given that later signed written evidence was in existence. Although, admittedly, the present writer is on record as not sharing that conventional view. On the case generally, see David Wilde, "Formalities for Declaring Trusts of Land" [2021] Conv. 264, esp. 274-75.)