



## Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn)

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### p. 16 2. The nature of a trust

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### Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the nature of trusts. Trusts arise when the legal and equitable interests in property are divided. Trusts are either express or implied. An express trust can be either private or public. Private trusts are created for the benefit of private individuals or classes of individuals. Public trusts are trusts which will benefit members of the public. Implied trusts are those which are not expressly created. There are three broad types of implied trusts: resulting, constructive, and statutory.

**Keywords:** property, interests, express trust, implied trust, public trust, private trust

### Key facts

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- Trusts arise when the legal and equitable interests in property are divided.
- Trusts are either express or implied.
- Trusts create obligations and rights.
- A variety of different interests can exist in trust property.

### p. 17 Introduction

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It would be difficult to find absolute agreement on the definition of a trust, but in the simplest terms a trust relationship can be identified when the legal title is owned by one person (*the trustee*) and the beneficial interest is held by another (*the beneficiary*). They can be the same people, such as in trusts for land. A key skill

to understanding trust law is to visualize the ownership of *all* property as being potentially divided. In chapter 1 you looked at the development of equity, a fundamental feature of which is the trust. The trust provides for a legal owner to be able to deal with property for the benefit of those who cannot or do not want to deal with it themselves. This is commonly expressed as in Figure 2.1.

$$\text{S (settlor)} = \frac{\text{T (trustee)}}{\text{B (beneficiary)}}$$

**Figure 2.1** The structure of a trust

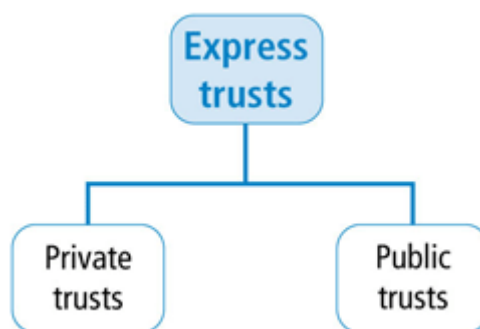
## Categories of trusts

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As a basic introduction, trusts can be broadly categorized as falling into two types: express trusts and implied trusts. This chapter is intended merely to be an introduction and the topics looked at here will be dealt with in more detail in later chapters.

### Express trusts

An express trust can be either private or public. Private trusts are created for the benefit of private individuals or classes of individuals. Public trusts are trusts which will benefit members of the public and will be looked at when we consider charitable trusts in later chapters (see Figure 2.2).



**Figure 2.2** Basic categories of trusts

Express trusts are trusts which are made expressly by a **settlor** (the person making a trust). Express trusts can be **inter vivos** (made during the lifetime of the settlor) or **testamentary** (made through the settlor's will to take effect upon his or her death). After death, the settlor is referred to as the testator/testatrix.

### Fixed or discretionary express trusts

In a fixed trust, the beneficiaries and their interests under the trust are clearly specified. For example, 'to my two children Luke and Katie I create a trust of £20,000'. They each have £10,000 held on trust, as equity presumes equality (application of the equitable maxim).

In a discretionary trust, the property is held on trust by the trustee who has some discretion (choice) over who, within the specified class (see chapter 3), is to benefit, what their share of the trust property will be, or both. For example, 'a trust of £20,000 to my two children, Luke and Katie, as the trustee shall decide', would be a discretionary trust in which there is a discretion as to the share of the property. Under this trust, neither Luke nor Katie has anything more than an expectation in the trust; only when the trustee exercises that discretion will they have a clear interest. However, as this is a trust, the children can require the trustee to exercise that discretion. This is an important distinction between trusts and powers.

An example of a trust in which there is a discretion to choose who is to benefit would be, '£20,000 to be held on trust for such of my nieces and nephews whom my trustee selects'. The beneficiaries are identified as being part of a class who may benefit.

### Bare trusts and protective trusts

#### Bare trusts

Bare trusts are when property is left on trust and the trustee has no discretion or **contingencies**. The trustee's only duty is to hold the property for the beneficiary. The beneficiary of a bare trust will be a sole beneficiary who is *sui juris*: adult and of mental capability. A simple example is a stockbroker who holds the shares on behalf of another.

#### Protective trusts

Protective trusts are trusts aimed at preventing an irresponsible beneficiary from wasting trust property. **Section 33 Trustee Act 1925** simplifies the method by which the beneficiary is given a **life interest** which is **determinable** (can be forfeited) on given events, for example bankruptcy or sale. At this point, the protective trust ends and the property is then held on a discretionary trust for the beneficiary, their spouse, and children, or those who would inherit had the beneficiary died. (See the online resources for further discussion.)

### Classifications of interest under a trust

An important point to understand is that trusts can contain different types of interests. Interests can be either **vested** or **contingent**.

### Revision tip

Understanding what type of interest a person has under the trust is important when considering the powers trustees have in relation to **maintenance** and **advancement**, which are explored in chapter 11. Make sure that you understand the difference between a vested interest and a contingent interest.

- p. 19      ↩ An interest under a trust is said to vest in the beneficiary when the beneficiary has a present right over the trust property. However, this vested interest can be to either a present right to a present interest, or a present right to a future interest. It is important as a vested interest is owned by the beneficiary. This means that if the intended beneficiary dies this interest will pass with his or her estate.

#### EXAMPLE 1

'I leave my home Heath Farm to my husband Dell for life then to my son Luke.' Dell's interest is a *present* right to a *present* interest; it is said to be *vested in possession*. He has the property for his lifetime. This is particularly important when we look at trustee powers. Luke's interest is a *present* right to a *future* interest; it is said to be *vested in remainder*. Luke has the home when Dell dies, but at this time he has the right to expect the trustee to ensure that he has a home (or its value) to take possession of.

This must be distinguished from a contingent interest. A contingent interest is one that is conditional.

#### EXAMPLE 2

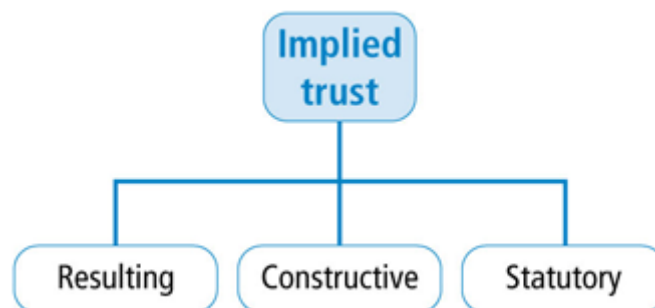
'I leave my home Heath Farm to Dell for life and then to Sumita should she reach 25.'

Dell's interest is the same as in Example 1 but Sumita's interest is contingent. She has no interest until she reaches 25.

Note: students often mistake Luke's interest as contingent. But death is something that will happen, and this is not a contingent interest. Sumita may not reach 25, so her interest is conditional.

## Implied trusts

Implied trusts are those which are not expressly created. There are three broad types of implied trusts: resulting, constructive, and statutory (see Figure 2.3).



**Figure 2.3** Categories of implied trusts

Most courses on trusts will spend a lot of time on implied trusts. This chapter only introduces the broad differences between different types of trusts. You should refer to chapter 9 for a more detailed account of implied trusts and their operation.

### p. 20 **Statutory trusts**

In certain circumstances statutory provisions impose a trust. For example, a trust for land is created under the **Trust of Land and Appointment of Trustees Act 1996** where joint owners hold the legal title on trust for themselves.

Another area of statutory implied trusts is in dealing with intestate estates—when a person dies without leaving a valid will. The **Administration of Estates Act 1925** provides for **settlement** of the estate to family members on the assumed intention of the deceased. The deceased person's **personal representative** will be appointed by the courts; they are called administrators, not executors.

### **Resulting trusts**

Resulting trusts arise either when:

- there has been a failure to validly create a trust, ie it is a failed formalities trust: *Vandervell v IRC* [1967]. This situation has been called an automatic resulting trust because it happens regardless of the intention of the settlor. Indeed, in *Vandervell v IRC* a resulting trust arose contrary to the express intention of the settlor to give away property; or
- property is voluntarily transferred to another or purchased (either wholly or partly) in the name of another: *Tinsley v Milligan* [1994]. This category is based on the presumed intention of the resulting beneficiary. Lord Browne-Wilkinson said in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] that resulting trusts were based on the intention of the parties.

### Looking for extra marks?

There is much academic discussion on the nature of resulting trusts. Read the approach taken by Birks and Chambers, compared to that of Swadling (see the online resources for more details of this further reading and judicial approaches to the issue).

### Constructive trusts

Constructive trusts are based on the presumed intention of the parties. This intention is found by the courts in a variety of situations, increasingly where they feel that it would be unconscionable for a person to deny that another has an interest in the property. Table 2.1 provides some examples of when constructive trusts have been found by the courts. This subject is considered in further detail in chapter 9.

**Table 2.1 Situations where a constructive trust may arise**

FACTUAL SITUATION	CASE
Breach of a fiduciary duty	<b><i>Keech v Sandford (1726)</i></b> : the special relationship as trustee between the claimant and respondent meant that any benefit was held for the claimant
Unauthorized profit	<b><i>Attorney-General for Hong Kong v Reid [1994]</i></b> : where the receipt of bribes which arose from a position of responsibility was found to be held on constructive trust for the state
Receipt of property belonging to another	<b><i>El Ajou v Dollar Land Holdings [1994]</i></b> : when property is transferred to another without consideration then it was held that the recipient holds the property on constructive trust for the real owner
Immoral receipt	<b><i>Re Sigsworth (1935)</i></b> : receipt by killing
Family home	<b><i>Grant v Edwards [1986]</i></b> : where the home is held in the name of one party where the other contributes to the home on the express/implied understanding that they have an interest in the home

### Distinguishing trust, fiduciary, and mere powers

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A trust creates a legally enforceable right for the beneficiary and a legally enforceable obligation for the trustee. However, a power provides for the **donee** of the power to use property in a certain way but this power is not legally enforceable. The language of this area of law leads to confusion as textbooks will talk of a trust power, fiduciary powers, and mere powers.

### Revision tip

Identifying the difference between these categories of interests will be clearer once you have understood the three certainties. However, there is no clear line between them and it is better to see the distinction as a gradual move from having no obligations to having fixed obligations.

### Trust powers

A trustee has powers given to them within the trust, such as the power to invest. There are also dispositive powers, meaning that the trustee can give (appoint) property to beneficiaries from the trust property.

#### EXAMPLE 3

Luke is the trustee of a discretionary trust. He holds £10,000 on trust for such of the settlor's grandchildren that need financial help.

In this situation, Luke has the power to invest the money to generate a greater income for the beneficiaries. It is important that the trust fund works for the trust. He could appoint an agent to look after the money, perhaps a stockbroker or accountant. These are powers under the **Trustee Act 2000**. He also has the power to appoint (give) money to any of the grandchildren he thinks needs it. As the trust is for the grandchildren, the power must be exercised for a beneficiary in that class. Each potential beneficiary can enforce the exercise of the power of appointment but may not receive anything once exercised. This is a power of appointment within the trust—a power to select who shall benefit. This is distinct from the powers discussed in the following paragraphs.

### Fiduciary powers

Fiduciary powers are powers in a different sense. They are not part of a trust but a 'mere' power, ie something that can be done but does not need to be done; something valid but unenforceable. The person who may benefit from the power cannot make the fiduciary exercise the power but can make sure that the fiduciary considers exercising the power, and the donee of the power must not act unreasonably in making the decision to exercise the power (*Re Hay's Settlement Trusts [1982]*). A fiduciary power is a power that is held by a person who is in a fiduciary position, such as a trustee. It is the status of the donee of the power that makes it a fiduciary power.

### EXAMPLE 4

Katie makes the following bequest:

To Dell, my family solicitor, I give my shares in Bestbits plc in the hope that he uses them to help my nieces, Sofia and Lauren; but if he fails to do so then the shares should go to Luke.

There is no clear intention to create a trust but there is a wish (power) that Dell use it in a certain way. The gift over to Luke means that if the power is not exercised then Luke will take the shares absolutely. But should Dell decide to give all the shares to Sofia and/or Lauren then he is acting within his power and there is no breach should there be no shares for Luke to benefit from. Sofia and Lauren cannot make Dell give them any benefit. What they can do is ask him to prove that he has reasonably considered making the appointment. The presence of the gift over is a good indication that it is intended as a power and not a trust.

### Mere/bare power

This is a **power of appointment** given to a person who has no fiduciary obligation. If, in the previous example, Dell had only been Katie's friend, then the power is entirely without an obligation to act reasonably in making the decision, unless it is a moral one. In that case it will be a matter for Dell's conscience but not for the law.

Powers can be further complicated by the range of objects that are within the class of potential people who may benefit from the exercise of the power. A general power can be exercised to anyone in the world, including the donee and donor. This is very similar to a gift in practice and is rarely seen. A special power is exercisable for anyone within a defined class (see chapter 3 for a discussion on this) which is identifiable by the 'is/is not' test. A hybrid power is one which is exercisable except for a class of people.

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### Looking for extra marks?

The distinction between trusts and powers is not always clear. In *McPhail v Doulton* [1971] the High Court and the Court of Appeal considered the provision to be a power of appointment, whereas the majority of the House of Lords found it to be a trust. This is important as under a power the 'objects' of the power cannot enforce the obligation, but by making the disposition a trust the objects (beneficiaries) can ensure the obligation is carried out. This is a move from the beneficiary being both the owner of trust property and the enforcer of the trust obligation to just being the enforcer of the trust. This distinction may be further blurred by the decisions in *Mettoy Pensions Trustee v Evans* [1990] where Warner J saw no reason why the fiduciary power could not be enforced in the same way as a discretionary trust (perhaps because the decision was capricious) and also in *Schmidt v Rosewood* [2003] where it did not seem essential that a person had a proprietary interest to be able to enforce a trust obligation.



### Conclusion

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Understanding the nature of trusts is a question of becoming familiar with the language of trust law. Good trust lawyers will think of property rights in relation to who holds the interest at law and in equity. It is important in reviewing this chapter that you see this as an introduction to the ideas which will be developed in later chapters. Ensure that you feel comfortable with the different types of trust which can be created and the different types of interest which can exist within a trust. The language of trusts can often confuse and therefore overcomplicate the subject; understanding the terms and what they mean will pay dividends.

### Key cases

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CASES	FACTS	PRINCIPLE
<b><i>McPhail v Doulton</i> [1971] AC 424</b>	Money was left for the provision of grants to a large class of objects, including ex-employees and their relatives and dependants.	The test for certainty of objects of a trust required a list (see chapter 3) and it was unclear if all relatives could be so listed. The test for a power required conceptual certainty only, that there were relatives. Lord Wilberforce felt that the nature of this disposition was more akin to a power than a fixed trust so the given postulant ('is/is not') test could be applied and the trust was valid. There are dissenting judgments that should be read to understand the blurred lines between trusts and powers.

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### Key debates

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Topic	The nature of equitable obligations
<b>Academic/author</b>	Pearce and Barr
<b>Viewpoint</b>	A clarification and discussion of the relevant duties and rights of trustees and beneficiary or objects of a power.
<b>Source</b>	Pearce and Barr, <i>Pearce &amp; Stevens' Trusts and Equitable Obligations</i> , 7th edn (2018), ch 21.

Key cases and key debates in other areas will be discussed in detail in later chapters.

### Online resources

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This chapter is accompanied by a selection of online resources to help you with this topic, including:

- Bonus material [\\_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-2-bonus-material?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-2-bonus-material?options=showName)
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- Looking for extra marks quiz [\\_<https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-2-looking-for-extra-marks?options=showName>](https://iws.oup.support.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-2-looking-for-extra-marks?options=showName)
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