



Chapter 2: Creation of Trusts



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2.1 Introduction

In Chapter 1 we looked at a few types of trusts created during a settlor's lifetime and a scenario in which a couple might like to create a trust during their lifetime for a disabled child to ensure provision was made for him.

Provision for a disabled person is one reason a person may want to create a trust, and in this chapter we will look at **other more common reasons why a person may want to create a trust.**



CONTINUE

2.2 Reasons for creating trusts

2.2.1 Why create a trust?

It may seem to some people that creating a trust will add a layer of complication, cost, and in many cases, taxation. So why do it?

The reason for creating a trust is that, along with additional complication and costs, trusts introduce more options for dealing with wealth of any size and planning for the future. Whether it is tax planning, preserving wealth for specific beneficiaries or future generations, protecting wealth, dealing with beneficial interests in property, or even hiding the identity or existence of certain beneficiaries – there are many day-to-day reasons why a person may want to consider creating a trust.



The use of trusts to hide ultimate beneficial owners is becoming more challenging as HM Revenue and Customs (HMRC) seeks to force disclosure of beneficial owners. The introduction of the Trust Registration Scheme is a prime example of this.

We will explore the reasons for creating trusts in a little more detail below.

2.2.1.1 Tax planning

Historically, wealth could be placed into trust and generation after generation would benefit from the assets in the trust whether in specie (e.g. a parcel of land or house) or from the income the trust assets generated. However, the capital was preserved. Eventually individuals could have very little personal wealth but live in and enjoy palatial estates and have a steady income to support their lifestyle.

Over the years HMRC has reduced the ability to pass wealth from generation to generation without attracting immediate and ongoing tax liabilities specific to the type of trust. HMRC

has also introduced legislation to restrict tax planning to what can be considered within the spirit of the law. Anything too aggressive may well be seen as evading tax and that may attract the unwelcome focus of HMRC.

Trusts can still be used to mitigate tax by using acceptable tax planning practices and it is a very good way of using existing tax exemptions to preserve and protect wealth for future generations and reduce the impact of tax on death.



Alarm

Advising on creating trusts to reduce tax or as part of tax planning for an individual is high risk. Specialist tax advice should be sought if suggestions are introduced that go beyond the practitioner's knowledge. Introduction of anti-avoidance legislation, gift with reservation rules, pre-owned asset tax and the impact of inheritance tax (IHT), capital gains tax and income tax are all relevant considerations, and if a mistake is made the cost to the client can be significant which can result in claims being made against the firm.

2.2.1.2 Vulnerable persons

We have already seen an example in Chapter 1 (see 1.3.3.2 (c)) in which a couple wanted advice to protect wealth for their disabled son.

Another example is when parents wish the survivor of them to leave the remaining estate to their children. If their children are minors, a trust is a perfect solution and depending on the age the child will become entitled, can also be tax effective.

We will look at the different types of trusts that can help with this situation in more detail later in this chapter (at 2.5).



2.2.1.3 Protecting wealth

A trust can be created to ring-fence assets for the benefit of a beneficiary, which will terminate on the beneficiary becoming bankrupt or getting into financial difficulty (e.g. an

alcoholic or gambler), or on the beneficiary or any other person attempting to deal with the trust property.

This is known as a protective trust. They tend to be used in circumstances in which the settlor would like to benefit the beneficiary, but because of the beneficiary's lifestyle or inability to manage finances, a trust is created for the benefit of the beneficiary that will automatically end on any of the above circumstances. If a termination event is triggered the trust will normally convert into a discretionary trust in which the beneficiary may remain, albeit within a class of discretionary beneficiaries.

2.2.1.4 To hide the identity or existence of the beneficiary

Historically, trusts of this nature would be created by someone who wanted the gift or reason for the gift to remain secret. In some circumstances a person might leave money to a mistress or an illegitimate child; these trusts are known as secret or half-secret trusts. There is a distinction in how they are created and we will look at this in more detail later in this chapter (see 2.5.2).

2.2.1.5 Ownership of land

This is a common type of trust and quite often created without trustees even realising they are entering into a trust arrangement. When land is owned by more than one person the land will always be held as either joint tenants or tenants in common. The legal owners will hold the property on trust, usually for each other either wholly (joint tenants) or in divisible shares (tenants in common).

Even when property is held in one person's name, that person can still hold the property on trust for themselves and other beneficial owners. This is common in circumstances in which person A buys the property for themselves and a partner but for financial reasons the partner is unable to sign the mortgage and therefore become a legal owner.

2.2.1.6 Care home fees

With the increasing cost of care and focus of local authorities on recovering that cost from individuals for whom care is provided for, it is not uncommon for individuals to feel that taking steps to ring-fence assets from being used to pay those care costs is a good idea.



Alarm

You should be aware that deliberately diverting assets with the sole purpose of avoiding care costs is known as deprivation of assets and must be avoided. Local authorities have the power to investigate and undo transactions that are undertaken for this purpose. They can go back many years, and a lawyer's note made at a client meeting can be extremely instructive as to the real reason assets were placed in a trust.

In contrast, a transfer of assets into a trust, whether during the settlor's lifetime or on death, intended to be for tax planning reasons but which also happens to be effective to ring-fence those assets for care costs, is perfectly acceptable. Although if the transfer was close to the settlor going into a care home, a local authority may still question the real motivation behind the creation of the trust.



Do you think it is right that individuals are not free to dispose of their wealth during their lifetime to deliberately avoid those funds being applied to pay for their care later in life?

CONTINUE

2.3 How to create a trust

Trusts can be created in many ways:

EXPRESS	STATUTORY	IMPLIED
The settlor intentionally creates a trust whether in writing or orally. An obvious example is the creation of a will trust or the modern example given by Sasha with the property sharers at 1.3.		

EXPRESS	STATUTORY	IMPLIED
Trusts that are created by operation of the law. An example is a trust for a minor that can arise in an intestacy.		

EXPRESS	STATUTORY	IMPLIED
Resulting and constructive trusts. • Resulting trusts can arise when the purpose of a trust ends or fails, and the remaining trust assets result back to the settlor of their estate. • Constructive trusts are an equitable solution to avoid an unfair situation arising.		

There are three requirements that must be present for an express trust to be valid (***Knight v Knight [1940]***). These are **certainties of intention**, **subject matter** and **objects**. The exception to the three certainties rule with respect to express trusts is in relation to purpose trusts in which the courts have held that in very limited circumstances a trust may exist (see 2.5.3) and charitable trusts.

We look at the three certainties in more detail next.

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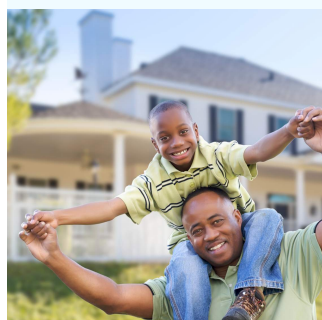
2.4 The three certainties

2.4.1 Certainty of intention

The requirement of certainty of intention refers to whether the settlor or testator actually intended to create a trust or whether they intended to make a gift or retain ownership of the property in question. The essence of the trust is that the trustee is under an enforceable and imperative obligation. This obligation must be apparent from the words (spoken or written) used to create the trust. The use of phrases such as “to be held on trust” or “to be distributed” are clear illustrations of imperative wording. In looking at whether an imperative obligation has been created, courts take into account the ordinary meaning of the words, the context in which they are used and any relevant surrounding circumstances.

An example of perfect certainty would be “To X and Y on trust for Z” but the intentions of a settlor or testator are not always that clear.

The situations in which problems about certainty of intention might arise include:



Anna leaves property to Boris in her will, stating that she wishes him to use it to support Fred.	Ayesha tells Debbie that she will help Debbie's children with their university fees and other expenses, and that she has put aside £50,000 for this purpose.
Did Anna intend Boris to have an enforceable obligation to carry out this purpose or was the property a gift to Boris, merely in the hope that he would support Fred?	Has Ayesha declared herself a trustee in favour of Debbie's children or is she free to change her mind and use the money for a holiday instead?

It is important to determine whether Boris and Ayesha are trustees, because if they are, they will have enforceable obligations towards Fred and to Debbie's children. Particular difficulties with intention arise where a testator has used words in their will that indicate a hope that the recipient of a gift will use it in a particular way (precatory words) and where the evidence of a trust comes from conduct and spoken words rather than a written document.

2.4.1.1 Precatory words

Words which express hope, expectancy or desire that the trustee will do something are known as precatory words. The example at 2.4.1 with Anna and Boris involves precatory words. Questions about whether precatory words have been used usually arise where the

disposition is in writing, but there is no reason why the issue could not also arise where the evidence of the supposed declaration of trust is spoken words.

The Court of Equity at one time leaned in favour of creating a valid trust from precatory words. It is thought this was because an executor was entitled to any undisposed of property in a will. This could be defeated by finding a valid trust. This incentive to find a trust no longer applies and, as a result, the older authorities are unreliable. **Lambe v Eames [1871]** is regarded as the turning point in the treatment of precatory words. James LJ referred to the “*cruel kindness*” of some of the earlier cases in which a trust had been found when, in his view, the intention to create a trust was absent.

The modern approach is that precatory words cannot create a valid trust unless an imperative intention can be deduced overall. It is a question of interpreting the actual words used, to decide whether they create a legal obligation or a merely moral obligation.

In **Lambe v Eames** property was given to a widow absolutely to be at her disposal “*in any way she may think best for the benefit of herself and family*”. It was held that there was no clear wording showing a trust intention.

Again, **Lindley LJ in Re Hamilton [1895]** found no trust where a testator had given legacies to his two nieces and added: “*I wish them to bequeath them equally between the families of O and P in such a mode as they consider right.*” There was simply no imperative obligation to which the nieces were subject.

In **Re Adams and the Kensington Vestry [1884]** there was a gift of property “*in full confidence that she will do what is right as to the disposal thereof between my children, either in her lifetime or by will after her decease*”. It was held that the wife took absolutely. The words “*in full confidence*” were merely aspirational and did not impose a legal obligation, only a moral obligation.

It is a question of construction of the whole instrument to find an imperative intention. This is demonstrated further by **Re Harding (Deceased) [2007]**.



A will contained the words

"it is my wish that everything I possess be taken over by the Diocese of Westminster to hold in trust for the Black community of Hackney, Haringey, Islington and Tower Hamlets".

It was argued that the words ***"it is my wish"*** were precatory and did not impose an obligation to use the property in any particular way. Lewison J held, however, that there was a trust. It was relevant that the words ***"in trust"*** immediately followed the identification of the recipient of the gift/trustee, and there was nothing else in the deceased's will to displace the ordinary meaning of the words used.

2.4.1.2 Interpretation of documents

When interpreting the written word, the court is concerned with the **objective meaning** of the words used. It will **not** accept an argument that the subjective intention of those involved should prevail.

This rule was applied in ***Shah v Shah [2010]***. The case involved a dispute about the ownership of shares in a family company.



Following a family dispute about the ownership of the shares, the appellant wrote to his brother saying,

“This letter is to confirm that out of my shareholding of current £12,500 in the above company I am as from today holding 4,000 shares in the above company for you subject to you being responsible for all tax consequences and liabilities [arising] from this declaration and letter.”

A signed transfer document was enclosed with the letter. The appellant later denied that he had declared himself trustee of his shareholding. He argued that his intention had been to transfer shares in the future rather than to create an immediate trust, and this was evidenced by the inclusion of the stock transfer form. The court rejected this interpretation of the facts. The words used in the letter clearly created a trust. The reference to the disposition having immediate effect was consistent with a trust rather than a gift because the transfer of the legal interest would not be immediate. The letter also used the term ***“holding”*** rather than ***“assigning”*** or ***“giving”***. As Arden LJ concluded ***“One of the ways of making an immediate gift is for the donor to declare a trust.”***

Another case where the court insisted on applying the objective meaning of the words used was ***Webb v Oldfield [2011]***. Clause 2 in the will stated that the share of one of the beneficiaries should be protected by the executors – the reason for this was that the beneficiary had addiction problems. However, clause 3 stated that the residue was to go to

the beneficiaries absolutely and in equal shares. The issue was whether the effect of clause 3 was that the gift was absolute, despite the words of clause 2. As in ***Shah v Shah***, the court emphasised the need to give effect to the words the testator had actually used, rather than the words she ought to have used. The court commented that this was not a claim for rectification and therefore it could not alter the meaning of the document to achieve the desired result. Although the beneficiary's mother clearly had intended there to be some protection for his share, she had not created either a discretionary or a protective trust. The word "trust" did not appear in clause 2 and no details were given of how the trust for this beneficiary was to be structured. Therefore, the clause in the will which gave the residue to the beneficiaries absolutely and in equal shares prevailed.

The court must also be mindful of self-serving evidence of subjective intention, adduced without corroboration (***Thandi v Sands [2014]***). In ***Thandi v Sands*** Mr Singh, the registered proprietor of 16 properties in Coventry, was made bankrupt in 2011. His father, Mr Thandi, relied on a deed of trust dated 2003 to support his claim that he (the father) was the owner of the properties in equity and that these properties never formed part of his bankrupt son's estate. The judge was highly suspicious in that the deed of trust had been produced "like a rabbit out of a hat" to indicate that the son's apparent wealth was merely illusory. The deed of trust was no more than a sham.

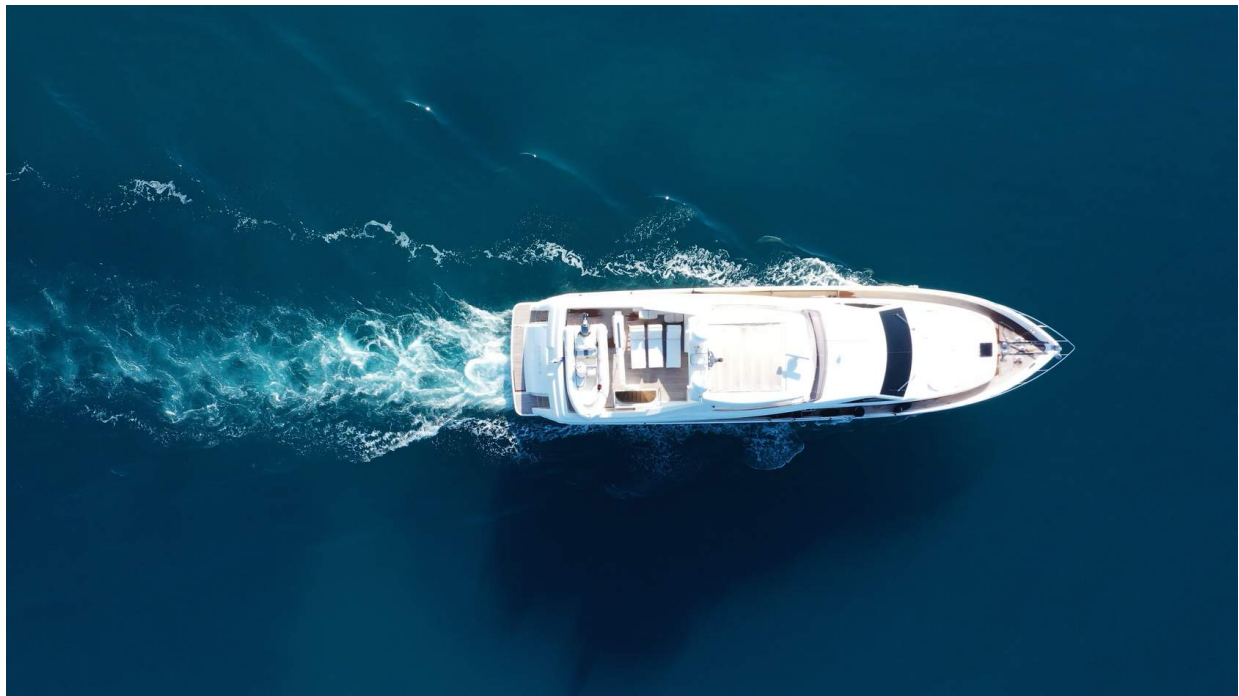
In ***Singha v Heer [2016]*** the Court of Appeal emphasised that just as the word "trust" does not have to be used in order to create a trust, equally, use of the word "trust", does not automatically create a valid trust. Here, the letters written between former partners were construed by the court to determine whether there had been a valid declaration of trust. Although the words "on trust" were used, the language of the letters was, overall, inconsistent with a trust.

2.4.1.3 Finding intention to create a trust from words or conduct

Subject to some special requirements in which the subject matter of a trust is an interest in land or an equitable interest, a trust does not have to be created in writing. As a result, many of the cases considering the intention to create a trust are concerned with the interpretation of informal words or behaviour rather than construction of a written document.

As with the construction of documents, the courts are looking for a clear intention to create an imperative obligation. It is not necessary that the settlor knows that what they have created amounts to a trust. If they have created the kind of legal relationship that amounts to a trust, then it is a trust.

A good example of a case in respect of the inference of an intention to create a trust can be seen in ***Rowe v Prance [1999]***. The claimant argued that she was beneficially entitled to a half-share in a yacht in which she and the defendant had lived. The defendant had on occasions used the word “our” when referring to the yacht.



He had suggested to the claimant that her “security” was her interest in the yacht. It was held that the defendant had made himself a trustee of the yacht for the claimant and himself. The use of the word “our”, and the suggestion to the claimant that her security was in the yacht, showed that the claimant was to have a beneficial interest. In the absence of evidence to the contrary, the equitable maxim “equality is equity” would be applied. This gave the claimant a half-share in the yacht.

Other examples of words or conduct that were held to create a trust include:

- making a variety of statements such as *"this money is as much yours as mine"*, a man telling his mistress on more than one occasion that she could share his bank account (***Paul v Constance [1977]***);
- in ***Ong v Ping [2017]***, the background circumstances and correspondence were sufficient to lead a reasonable person to believe that a valid declaration of trust had been made;
- a father opening a bank account for his son using the proceeds from his deceased wife's insurance policy (***Sumir Singh Dhingra v Surjit Singh Dhingra [1999]***); and
- the unilateral segregation of property by a mail-order company placing money sent by customers in a separate bank account (***Re Kayford Ltd (in Liquidation) [1975]***).

There will be no intention to create a trust if the kind of obligation the alleged settlor wishes to create is inconsistent with the existence of a trust. In ***Azam v Iqbal [2007]*** a customer sought to reclaim a sum of money he had paid to a money transfer facility or "hawala" that had been placed in receivership. The court held that an intention that money paid to the hawala would be held on trust for the customer until the transfer was completed was inconsistent with the way in which the service operated. The essence of the hawala was that funds of several customers were consolidated, in order to take advantage of better exchange rates for larger transfers. Thus, there could be no obligation to keep each customer's funds separate. The relationship was akin to that of banker and customer, not trustee and beneficiary.

Where the subsequent actions of the alleged settlor are inconsistent with the existence of a trust, it is likely that there was no intention to create a trust. In ***Hilton v Cosnier [2018]*** there was an alleged oral declaration creating a life interest in a house, with remainder to the settlor's grandchildren. This was inconsistent with a subsequent gift of the house where the alleged settlor made clear to the recipient, his daughter, that he expected to be giving her something of value.

The background of the person alleged to have created the trust may also be relevant. Informal words or conduct might be sufficient in the case of someone with limited education and no legal knowledge (***Paul v Constance***). It is less likely to be sufficient where the person has experience of legal matters. In ***Margulies v Margulies [2000]*** the court failed to find

that a father had intended to create a trust for his son. The son had previously been excluded from the father's will. The court felt that as the father was used to instructing solicitors, he would have made the appropriate arrangements had he wished the son to benefit from his estate.

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2.4.2 Certainty of subject matter

The subject matter of the trust is the property that is held by the trustee for the benefit of the beneficiaries. There are two aspects to certainty of subject matter – the subject matter as a whole (i.e. the trust fund) must be certain, as must the beneficial shares to be carved from the trust property.

2.4.2.1 Certainty of subject matter as a whole

The subject matter of the trust (i.e. the property to be held on trust) must be identified with certainty. Gifts of the following all failed for this reason.

- In ***Palmer v Simmonds [1854]*** “*the bulk of my residuary estate*” had no clear meaning and failed to identify a clear, certain part of the estate. There was conceptual uncertainty in the description of the trust property.
- In ***Re Kolb's Will Trusts [1961]*** the terms “*first class*” and “*blue chip*” investments were deemed too subjective and void for uncertainty.
- In ***Re Jones [1898]*** “*such parts of my estate as she shall not have sold*” made it impossible to determine the property subject to the trust.

2.4.2.2 The trust of whatever is left

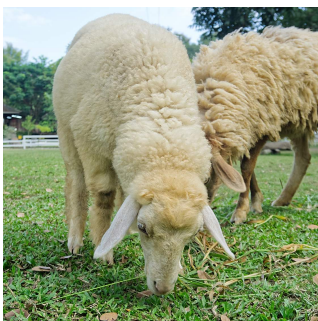
The trust of whatever is left has caused difficulties in construction and provides a possible source of confusion. Some cases suggest that the requirement of certainty must be satisfied at the time that the original instrument takes effect, that is, in the case of a will, on the testator's death.

In ***Sprange v Barnard [1789]***, for example, a widow left shares to her husband for his sole use and that on his death "the remaining part of what is left" was to be divided between her brothers and sisters. The court held that he was absolutely entitled to the shares and, as there was uncertainty as to what might be left (if anything) the residue could not be ascertained. No obligation binding on the husband had been created and he was absolutely entitled to the property. Compare ***In the Estate of Last [1958]*** where a testatrix left property to her brother on terms that anything left at his death would be left to specified persons. Here, the brother was deemed to hold merely a life interest in the property and any property not disposed of in his lifetime was, indeed, held on trust. Where the facts of the case permit, therefore, it is open to the court to find that property is to be held on trust for X for life, remainder to Y. This construction will not be open if property is given to the first beneficiary absolutely.

2.4.2.3 Tangible and intangible property

Difficulties arise where trusts are claimed out of homogeneous bulk, that is, out of a mass of property comprising substantially identical parts.

Compare the following two examples.



"I declare that two sheep from my flock of 50 rare breed sheep are held on trust for you."

"I declare that £500 of the money in my bank account is held by me on trust for you." There is £750 in the account.

In each of these cases, the settlor of the trust does not separate the trust property from their own. There are still 50 sheep in the flock in the fields, and still £750 in the bank. The case law discussing this problem should be considered carefully.

In ***Re London Wine Co (Shippers) Ltd [1986]*** a trust was claimed of a number of cases of wine held in a warehouse. LW Ltd was a wine merchant which ran its business on the basis that wine ordered by customers was held on trust by the company from the date of each customer's order until delivery to the customers. The cases representing each customer's order were not physically separated from the rest of the company's stocks until delivery. An express trust had certainly been intended by the company (the company's circulars referred to the customer as "the beneficial owner"). The subject matter had not, however, been removed from the company's general stock and, therefore, there was insufficient certainty of subject matter.

In the case of physical, **tangible** property, separation from the bulk is necessary. The outcome is different, however, where the property is indistinguishable in the form of a homogeneous mass (a tank of oil or a vat of wine). Here, a trust of a proportion of that mass appears to be unproblematic. Provided that the mass itself is sufficiently identifiable and the beneficiary's proportionate share is not uncertain, a trust of part of a fungible mass without segregation of any specific part for the beneficiary will not fail for lack of certainty of subject matter. The same approach may not be of application in the case of bottles of wine, for example, where property is not identical and problems may arise if some bottles are broken or the wine is corked. In other words, it matters what type of property is the subject matter of a trust.

A trust of **intangible** property is treated differently. In ***Hunter v Moss [1994]*** the Court of Appeal held that there could be a valid trust, by oral declaration, of 50 shares of a holding of 950 held by the person declaring the trust. Even though the 50 shares had not been separated from the rest of the holding, the trust did not fail for uncertainty of subject matter as all the shares were the same and indistinguishable from each other. Support for ***Hunter v Moss*** can be found in ***Re Lehman Brothers (International) Europe (in Administration) [2012]***, a complex case concerning the collapse of Lehman Brothers, where securities claimed by affiliates had been pooled in unsegregated accounts to be used where required. The Supreme Court confirmed the Court of Appeal decision that, when an investment bank breached its regulatory obligations to hold clients' assets "on trust" for them by mixing all of its clients' assets in one enormous fund, then those regulations could be interpreted to mean that the single, enormous fund was held as a trust for all of those clients in proportion to the size of their contributions to it.

There is a critical difference between a trust of a number of cases of wine and a trust of shares. Not all cases or bottles of wine are the same, even if they are the same grape and the same vintage. All shares of the same class in the same company are identical. It does not matter, therefore, which of the shares are subject to the trust in ***Hunter v Moss***. It does matter which cases of wine each customer receives in ***Re London Wine Co***. Applying this to the two trusts we started with, it appears that one is capable of being valid and the other is not. Sheep are not all the same. Sums of money are. Therefore, it is necessary to separate the rare sheep in the first trust; it is not necessary to separate the money in the second.

2.4.2.4 Certainty of beneficial shares

The beneficial shares of trust property must be identified with sufficient certainty, that is, the trustees must be able to work out what part of the trust property is held for each beneficiary. Uncertainty of this kind might arise because the settlor has used vague words to describe the size of an interest or because some event that must occur before the size of the beneficial interest is decided has not happened.

A good illustration is ***Curtis v Rippon [1820]*** in which both aspects of uncertainty of subject matter were in issue.



In this case, W received all of H's property under his will which included the words

“trusting that she [i.e. W] would, in fear of God and in love of the children committed to her care, make such use of it as should be for her own and their spiritual and temporal good remembering always, according to circumstances, the Church of God and the poor”.

The precatory words used here would be problematic if used today but crucially, the subject matter could not be ascertained. It was not clear what property was to be subject to the trust, nor what the beneficial interests were to be as regards the children, the Church of God and the poor, and so the trust failed and the wife was absolutely entitled to the property.

Phrases such as “reasonable sum” or “bulk of my property” are clearly uncertain but, more generally, the issue will be whether the trustees have sufficient information about what was intended so they can be sure they are carrying out the trust correctly. Thus, in ***Re Golay’s Will Trusts [1965]*** the testator, in his will, directed his executors “to let Tossy enjoy one of my flats during her lifetime and receive a reasonable income from my other properties”. The judge took the view that the yardstick of “reasonable income” was not intended by the testator to be considered subjectively, but objectively, and there would be no difficulty in

the court quantifying this. The gift did not therefore fail for uncertainty. The word **“reasonable”** used in isolation may still lead to failure – for example, where property is left on trust to pay a *“reasonable legacy”* or a *“reasonable sum”* to a beneficiary. The trust would not fail, however, if it was, for example, clear that the size of the legacy was to be fixed by the executors.

Certainty of beneficial interest does not mean that the precise amount of a beneficiary's share must be set in advance. There is no uncertainty where a testator leaves the residue on trust for their children in equal shares. The amount of property that falls into residue can be determined; it is just that it cannot be determined until after the testator's death. The **“residue of the estate”** is what is left after the personal representatives have paid or made provision for the deceased's debts and funeral expenses, the expenses for administering the estate and the payment of legacies or annuities.

The cause of uncertainty in ***Boyce v Boyce [1849]*** was not vague words, but the failure of a third party to carry out their part in the process of quantifying the interest. T devised two houses to trustees upon trust to convey one to M *“whichever she may think proper to choose or select”*, and the other to C. M predeceased T with the result that M's gift lapsed. It was held that the gift on trust to C must, in turn, fail for uncertainty since M had died before T and without making the choice, upon which C's interest depended. Here, the testator had provided a mechanism to determine the beneficial shares, but the mechanism failed.

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2.4.3 Certainty of objects

In cases other than charitable trusts and limited exception with purpose trusts (see **2.5.3**), the beneficiaries (i.e. objects) of the trust must be:

- human; and

- ascertainable.

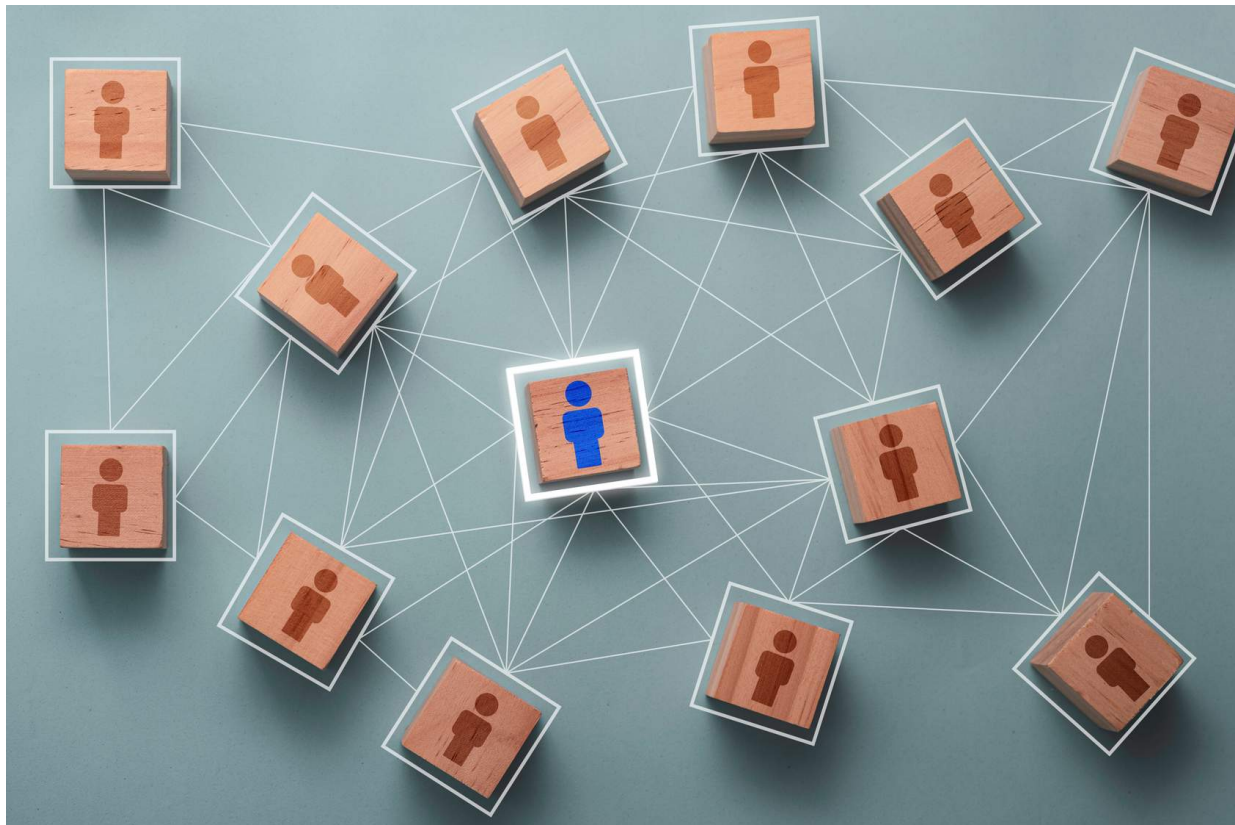
This section will concentrate on ascertainability, that is, whether the trustees can identify who the beneficiaries of the trust are. The test for certainty of objects varies according to the type of trust.

2.4.3.1 Fixed trusts

In a fixed trust, the trustees have no discretion as to beneficial shares. The beneficiaries might be identified by name, for example, Jim vests property in Terry and Thomas on trust for Belinda and Colleen in equal shares. Sometimes, the beneficiaries might be described rather than named, for example, Jim vests property in Terry and Thomas on trust for *“my employees in equal shares”*.

For this kind of trust, the test for certainty is that laid down in ***IRC v Broadway Cottages Trust [1954]***, namely, that the trust is void unless it is possible to ascertain every beneficiary – that is, it is necessary to be able to draw up a list of all the beneficiaries. This is known as the “complete list” or “list certainty” test.

This is not a problem where beneficiaries have been identified by name, but can present difficulties where the settlor indicates that the beneficiaries are a class or group, such as “my employees” or “my children”. Some terms used may have more than one meaning or may have broader or narrower meanings, so that it is impossible to tell which meaning the settlor intended. Thus, a trust for “all my friends and family in equal shares” is likely to be uncertain because the meaning of the terms is not precise enough to allow the trustees to produce a list of all the beneficiaries.



This does not mean that it is necessary to be able to find out where all the beneficiaries are or whether they are still alive. If their whereabouts or continued existence is in doubt, their shares can still be calculated and then paid into court.

2.4.3.2 Discretionary trusts

At one time, the test for certainty of objects in powers and discretionary trusts was the complete list test (*IRC v Broadway Cottages Trust [1954]*). This created problems where a settlor or testator named a class of persons as the beneficiaries of a trust. A series of cases ending in *Re Baden's Deed Trusts (No. 2) [1973]* clarified what level of certainty of objects was required for discretionary trusts.

For powers, this strict test was removed in ***Re Gestetner's Settlement [1953]***. The purpose of requiring a list was that it ensured that the donee or trustee did not leave a potential object or beneficiary out of consideration. This is obviously a problem if trust property is to be shared equally, as it means that some beneficiaries will receive more or less than they were intended to receive. With a power, however, there is no need to distribute the property to the objects, let alone distribute it equally. The court decided that since the donee of the power was not under a duty to exercise the power, the power would be valid so long as *"there is no difficulty ascertaining that the person"* claiming to be an object of the power is a member of the specified class.

2

Administrative unworkability



NB A discretionary trust to distribute among a class which might satisfy the any given individual test may be *"so hopelessly wide as not to form anything like a class, so that the trust is administratively unworkable"*. If so, it may be invalid.

In ***McPhail v Doulton [1971]*** Lord Wilberforce cited *"all the residents of greater London"* as a possible example of this.

CONTINUE

2.5 Types of trusts

At 1.3 we looked at the nature of a trust, role of a trustee and considered some of the express trusts that can be created during a person's lifetime.

In this section we consider a number of different types of trusts that are express, implied, created during a person's lifetime and by will, and a trust that bears the title but is not actually treated as a trust for tax purposes.

2.5.1 Trusts that are not in writing

While the majority of trusts are created either in writing or express orally, there are situations in which a trust will be created by operation of law; this can also apply to trusts involving property. These are known as **statutory trusts**.

2.5.1.1 Law of Property Act 1925

s34 Law of Property Act 1925 provides that where the legal estate in land is conveyed to more than one person in undivided shares, those individuals will take the legal title as beneficial joint tenants.

s36 Law of Property Act 1925 (as amended by **s5 Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996)**) provides that where land is conveyed to more than one person as joint tenants it creates a trust of land with power to sell. In other words, any legal owner is entitled to exercise their right to sell and if the other owner(s) refuse the remedy will lie in an application to the court for an order for sale.

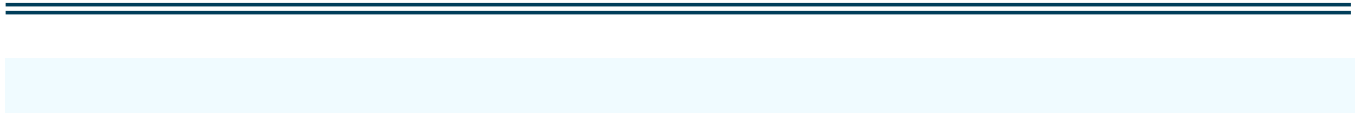
2.5.1.2 Administration of Estates Act 1925

s33 Administration of Estates Act 1925 (as amended by **TLATA 1996**) provides that if a person dies intestate their estate shall be held by the personal representatives on trust for sale and power to distribute the proceeds of sale.

CONTINUE

2.5.2 Secret and half-secret trusts

2.5.2.1 Why would a settlor create a secret or half-secret trust?



Example 1

Stephanie is a wife and mother of two children. She is also a reporter and finds her work to be exciting. It was through work she met Mark who she interviewed for one of her stories. Mark was very exciting and while he worked, he described himself as a free spirit and would spend his money on travelling. Stephanie has quite a large amount of money saved and decided to buy a property for Mark to live in so she has a place they can meet. Stephanie's brother James knows about Mark and because he never really liked his sister's husband and has no contact with him, is happy to keep his sister's affair to himself.

Example 2

Novak and Marta are married and have one child together. When Novak was younger, he was in a relationship with Nika and they had a child together (Ana). Novak was young at the time and shortly after Ana was born, they separated. Over the years Nika moved on and he lost contact with Nika and Ana. Ana is now 19 and following her mother's death she found and reconnected with Novak. Marta already knew about Ana but had never met her. While Marta understands Ana wanting to reconnect with her father, both Novak and Marta feel that it will cause too much of a strain for his parents to find out; he never mentioned Ana to them as he was too ashamed.

You can see that situations may arise in which a testator may not want the true identity of a beneficiary or reason for including a particular beneficiary to be known publicly. For example, keeping the identity of a secret lover or existence of an affair or illegitimate child secret, while maintaining financial provision.

In **example 1** Stephanie can create a secret trust in her will by gifting the property that Mark occupies to her brother James, but James has to agree that he will hold the property for Mark. Her family need never know the real reason.

In **example 2** Novak can make provision for Ana by leaving the gift to a named third party to be held on the trusts. This will create a half-secret trust and preserves Ana's identity when the will is admitted to probate.

For an example of how a complicated family situation can give rise to a case involving an argument between whether a secret or half-secret trust was created, see the case of Lucian Freud at the following link: [Artist left vast fortune to secret beneficiaries | STEP](#)

2.5.2.2 The terminology of secret trusts

1. Where a testator (T) makes a gift in their will, the beneficiary under the will can be identified as the secret trustee (ST) or primary donee, and the ultimate beneficiary under the secret trust as the secret beneficiary (SB) or secondary donee. (The alternative terminology of primary and secondary donee was adopted by ***Brightman J in Ottaway v Norman [1971]***.)
2. A **fully secret trust** arises where, on the face of the will, no trust is disclosed and all that appears is an absolute gift to the trustees. Consider, for example, "£50,000 to X and Y" – such gift only having been made on the express or implied undertaking of X and Y to hold the property upon certain trusts. Fully secret trusts may also arise:
 - a. where, on the strength of a trustee's promise, the deceased fails to revoke an existing gift (***Chamberlaine v Chamberlaine [1678]***);
 - b. where a testator revokes a codicil so as to revive a previous testamentary gift (***Tharp v Tharp [1916]***);
 - c. where an intestate, in reliance on the undertaking of those entitled on intestacy, fails to make a will (***Stickland v Aldridge [1804]***).

3. A **half-secret trust** arises where the existence of the trust appears on the face of the will, but the terms are not specified. Consider, for example, “£50,000 to X to hold on the trusts I have already communicated to him.” Here, there is no possibility of the secret trustee claiming beneficially.

2.5.2.3 How does a testator create a secret trust?

A secret trust can be established only where there is clear evidence of an intention to create a trust.

According to ***Megarry VC in Re Snowden [1979]***, the proof of such intention is the normal civil standard of proof, that is, on a balance of probabilities. There is a view expressed in ***Ottoway v Norman [1971]*** that the standard of proof should be pitched at a higher level than the civil standard of proof.

In ***Margulies v Margulies [2000]*** a son, Stephen, claimed that his elder brother, Marcus, held their father’s estate on secret trust with one-third in favour of Stephen or, alternatively, in favour of Stephen and his family.

However, Stephen could show no legally binding trust. The written communications between the father and Marcus were not expressed in imperative language nor was there certainty of subject matter.

Stephen’s claim failed.



In ***Kasperbauer v Griffith [2000]*** the words "*knew what she had to do*" imposed no more than a moral obligation on the testator's wife.

A secret trust can be couched in the terms of an obligation to make provision for an intended beneficiary after the death of ST (***Re Gardner (No. 1) [1920]***). In this case, W left her estate to H for life, and it had been agreed that certain property should be divided among certain beneficiaries on H's death. H died intestate, and the Court of Appeal decided that the property after his life interest was held on trust for the beneficiaries.

In ***Ottaway v Norman*** T left his freehold house to ST (his mistress/housekeeper) absolutely but intending her to dispose of it by her will to his son. She agreed to this but, in fact, left the property to friends. It was held (Brightman J) that the son was entitled under the secret trust.

The following essential elements must be proved for a fully secret trust to be enforceable.

1. T must communicate the fact of the trust to ST before T's death. If they do not, ST can keep the property themselves beneficially (***Wallgrave v Tebbs [1855]***).
2. Communication may be either before or after the will is made, and T may use an agent to do this (***Moss v Cooper [1861]***).
3. ST must accept the trusteeship by either communicating their consent to T or by silence as, for example, where T says "*I will assume you will do as I request unless I hear to the contrary*" and ST makes no response (***Moss v Cooper***).
4. If ST accepts their position but the terms of the trust are not communicated to them within T's lifetime, then ST must hold the property on a resulting trust for T's estate. In ***Re Boyes [1884]*** the terms were found in a letter among T's personal papers after his death directing the solicitor to hold the property on trust for the deceased's mistress and illegitimate child. This was too late, and the trust failed. It is important in such cases that **the trustee is offered the opportunity** to refuse to act in the manner prescribed by the testator.

2.5.2.4 How does a testator create a half-secret trust?

Obviously, the risk of fraud by a ST is high in the case of a fully secret trust (he may subsequently deny any trust), so a cautious T may prefer to create a half-secret trust.

As with fully secret trusts, it is necessary to prove the intent to create a trust, communication of the trust and its terms with the ST, and acceptance of the trust by the ST. However, the requirements for communication are not the same as with fully secret trusts.

With **fully secret trusts**, communication can be made at any time up to the date of death.

With a **half-secret trust**, communication of the terms of the trust must be made and accepted **before** the will is made.

1. In ***Blackwell v Blackwell [1929]*** T, by a codicil, gave £12,000 to five legatees “*for the purposes indicated by me to them*”. The trusts were communicated and accepted prior to the execution of the codicil. The House of Lords enforced the half-secret trust.
2. In ***Re Colin Cooper [1939]*** T bequeathed £5,000 to X and Y “*upon trusts I have already communicated to them,*” and X and Y accepted before the will was executed. Later, T increased the legacy to £10,000 by a codicil, but did not communicate this to X and Y. The trust was effective as regards £5,000 but failed in relation to the second £5,000 bequeathed by codicil.
3. In ***Re Bateman’s Will Trusts [1970]*** T directed his trustees to pay the income out of part of his property “*to such persons as shall be stated by me in a sealed letter to my trustees*”. It was held that the words “*shall be*” indicated that T was reserving the power to alter his will by naming a trustee and then making unwitnessed dispositions in the future. This contravened the **Wills Act 1837**, and so the trust was invalid.



Link to Practice

It is rare to receive an instruction to create either a fully secret or half-secret trust.

If this issue ever arises, ensure you check the requirements as a mistake in perfecting this type of trust can lead to unintended consequences and the deceased’s wishes not being carried out.

Ensure you make a clear note so that the testator’s true intentions can be evidenced at a later date if required.



Does the ability to create secret and half-secret trusts strike the right balance between a testator keeping issues secret from others and the risk that the trustee will deny any knowledge of trust arrangement and retain the trust funds for themselves?

CONTINUE

2.5.3 Purpose trusts

As with many rules there are exceptions and after taking you through the three certainties which must be present for a trust (except charitable) to be validly created, we will now look at a type of trust has been declared by the courts in very specific circumstances to fall outside this requirement.

The types of trust we will look at (see 2.5.3.1 to 2.5.3.3) are for specific purposes that would normally fail for want of certainty of objects. The objects of these trusts are not individuals that can be identified. For this reason, the courts have allowed specific objects. These trusts are known as trusts of imperfect obligation.

In addition, the courts have limited the term of such trusts to the common law position of life in being plus 21 years. As there is no life in being in these cases the trust term is limited to a maximum of 21 years.

We will look at some cases that illustrate the specific purposes that the court will allow a trust of imperfect obligation to be valid.

2.5.3.1 Tombs and monuments —

A trust for a monument etc. which is part of the fabric of a church, or for the maintenance of the graveyard as a whole, is charitable.

A trust for the erection of a particular monument or the maintenance of a particular grave is not, but may be upheld as a trust of imperfect obligation. Thus, in ***Musset v Bingle [1876]*** a gift for the erection of a monument to the testator's widow's first husband was held to be valid. In ***Re Hooper [1932]*** a gift to trustees for the care and upkeep of certain family graves and monuments "*so far as they can legally do so*" was held to be valid for a period of 21 years.



2.5.3.2 Animals —

As has been seen, gifts for the maintenance etc. of animals generally will be charitable; gifts for the upkeep of particular animals will not, but may be effective as trusts of imperfect obligation. This was held to be the case in ***Pettingall v Pettingall [1842]*** where T bequeathed £50 per annum to provide for his favourite black mare. In ***Re Dean [1889]*** there was a bequest of £750 per annum for the period of 50 years for the maintenance of T's horses and hounds if they should live so long. This was accepted despite the absence of a valid perpetuity period.



2.5.3.3 Trusts for private masses —

Trusts for the saying of masses (religious ceremonies in the Catholic Church) are treated as valid charitable trusts, provided that the masses are said in public.

In ***Re Khoo Cheng Teow [1932]*** a trust for the performance of private, non-Christian religious ceremonies to perpetuate the memory of the testator was held to be a valid, non-charitable purpose trust for the duration of the perpetuity period.



CONTINUE

2.5.4 Personal injury trusts

Earlier in this chapter we looked at deprivation of assets for care home fees (see 2.2.1.5); the same applies for means-tested benefits. There is, however, an exemption if the funds are the result of an award of damages or compensation following a personal injury claim. The award can be placed into a trust for the injured party to ring-fence for means-tested benefits.

If the injured party is **not claiming** universal credit, there will be a 52-week disregard in relation to means-tested

If the injured person is **in receipt** of universal credit, the disregard period is

benefits (**para 12A Sch 10 Income Support (General) Regulations 1987**).

12 months (**reg 75 Universal Credit Regulations 2013**).

For the capital disregard to apply the funds must not be tainted by adding funds that are not part of any personal injury award. Should this happen the entire fund will be taken into account when assessing means-tested benefits.

While creating a trust to ring-fence a personal injury award may be a primary reason, it is not the only reason to place such an award into a trust.

A trust will also have the effect of preserving the award from the injured party's creditors, against attention from the unwanted influences of others who may wish to take advantage of a vulnerable person. In addition, a trust can be used to protect funds from divorce or debt in the future.

CONTINUE

2.5.5 Bare trusts

A bare trust is a simple relationship in which the **trustee simply holds the trust assets** to the beneficiaries' order. The **beneficiaries have absolute entitlement to capital and income**. While the trust assets are in the name of the trustee, the beneficiaries can call on the funds at any time and the trustee has no discretion over whether funds are paid or not. Since HMRC does not view a bare trust as an actual trust for tax purposes, a bare trust does not need to be registered with HMRC's trust registration scheme and the trustees do not file tax returns for the trust. Income is deemed to belong to the beneficiaries and is taxed as part of their income.

A common example of how a bare trust will arise in a legacy left to a person in a will is: *"I give the sum of £50,000 to my nephew Freddie Anderson."*

If the testator dies when Freddie is 14, the trustees will hold the funds and pay the legacy together with interest earned on it to Freddie as soon as he turns 18.



Link to Practice

If taking instructions to leave a legacy to a minor, it is worth explaining to your client that there is no protection for the beneficiary when they reach 18.



Can a trustee of a bare trust lawfully delay giving a legacy to a minor who turns 18 on the grounds that the beneficiary is not mature enough to manage any funds and is likely to squander the money on an unsustainable lifestyle and friends which the trustee suspects will include buying illegal drugs?

CONTINUE

2.5.6 Life interest/interest in possession trusts

When created, this trust will identify the primary beneficiary known as the **life tenant** who will benefit from the income absolutely, and enjoy an interest in the capital. The trustees will allow the life tenant to use the capital assets (e.g. property to live in) but not allow the life tenant to spend the capital on themselves. The capital will be preserved for the ultimate beneficiary(ies) known as **the remaindermen**.

This type of trust, if created on the death of the first spouse to die, will allow the survivor to continue their lifestyle and enjoy the use of the deceased's share in the property. However, on the death of the survivor the share in the life interest trust will revert to the remaindermen who might be children from an earlier marriage or relationship.

The assets in the trust will also be ring-fenced from creditors of the survivor and care home fees.

It is a common form of trust created on death that lends itself as a solution to the modern blended families that are increasingly common.



Link to Practice

You may come across a variation of this trust known as a flexible life interest trust. The terms permit the trustees to advance capital at their discretion. While this may appear to be the ideal mix between life interest and discretionary trust, ensure you advise your clients fully about the implications and take detailed instructions as the

exercise of this discretion could leave the remaindermen with nothing.

CONTINUE

2.5.7 Discretionary trusts

"I give the residue of my estate to my Trustees to hold on trust and apply income and capital at their absolute discretion to my children ... "

A discretionary trust will identify the trust fund (e.g. the residue of my estate) and a class of beneficiaries, either by name or general reference (e.g. my children and my grandchildren whether living at my death or born during the trust period) and gives power to the trustees to apply the trust fund and any income it generates at their discretion for the benefit of any person within the class of beneficiaries.

This type of trust can be particularly useful in circumstances in which the testator wants to preserve his estate for his family without giving absolute amounts that may either be misused by the beneficiary, or to protect funds from creditors, or even his children during a divorce.

The flexibility of this type of trust can make it very attractive to a lot of testators.

The disadvantage is that discretionary trusts are classed as relevant property trusts (RPT) and attract the highest rates of income tax, capital gains tax, 10-yearly charges to IHT and exit charges. (NB. It is useful to be aware of this; however, the rates of tax and calculating exit charges and 10-yearly anniversary charges are outside the scope of this module).

While the tax considerations are relevant, those that want to create discretionary trusts do so because the flexibility is of greater importance and the taxation is a worthwhile price to pay to achieve the desired outcome.



Link to Practice

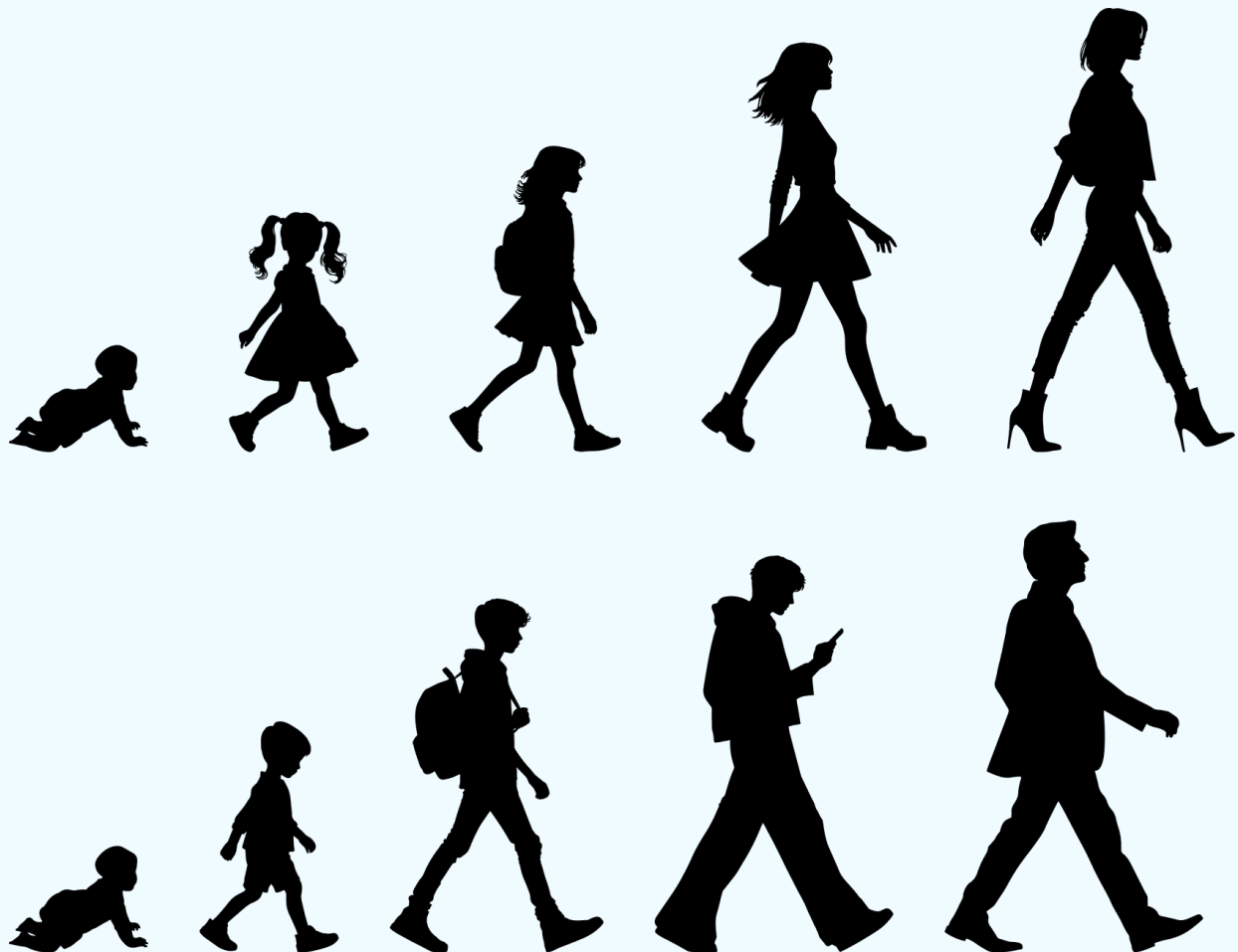
Discretionary trusts used to be very popular until the introduction of the residence nil-rate band (RNRB) and transferrable residence nil-rate band (TRNRB). This is because if the family home or proceeds of sale of the family home is placed into a discretionary trust the estate will lose the benefit of the RNRB and TRNRB. It is important to explore this issue when taking instructions so that the testator can make a fully informed decision.

CONTINUE

2.5.8 18–25 Trusts

Example

During your discussions with Mr and Mrs Shah they explain that their children are all under 18. They both feel that should something happen to them 18 is too young for children to inherit large amounts of wealth. They are concerned that their children may not be mature enough to benefit from large sums of money until they are older. They considered age 21 but felt that their children may still be in higher education and not have any real-life experience. Both agree that 25 is a reasonable age to inherit a large sum should they both die.



The above scenario is very common when discussing children inheriting wealth and appropriate ages. Every person you interview will have a different opinion and for different reasons. There is no absolute right or wrong position on this. It is for you as the lawyer to give your clients the options available to them.

Trusts of this nature are created on the death of the testator on or after 22 March 2006. The conditions to satisfy are similar to a bereaved minors trust (see 2.5.9). The testators will have the option of selecting an age between 18 and 25 for their children to take absolutely their presumptive share in an estate.

Until the beneficiaries take their share (e.g. attain the specified age), trustees will have power to advance income and capital from the beneficiary's presumptive share for their education, maintenance and well-being.

The taxation that applies to a discretionary trust will also apply to this type of trust, including exit charges (albeit at a reduced rate) on payments of capital to a beneficiary during the trust period; however, there are no 10-year anniversary charges.

Testators will often prioritise the protection this type of trust offers their children, over the slight tax disadvantages.

CONTINUE

2.5.9 Bereaved minor's trust (BMT)

A BMT is created on the death of a parent on or after 22 March 2006. The trust is created for a child of the deceased either by will or on an intestacy. A child includes step-child or child the deceased had parental responsibility for. The capital and income must vest in the

child when or before they reach 18. This type of trust does not attract any additional charges to IHT beyond IHT payable on death of the parent (if any).

While the comments made in 2.5.7 in relation to parents not wanting children to inherit too early reduces the number of these trusts created by will, it is important to understand the effect of a BMT in case you are asked to advise in a will instruction meeting, or in relation to an administration of an intestacy in which the deceased left minor children.

2.5.10 Disabled persons trust arising in lifetime or on death

This is a special type of trust for a disabled person, meaning someone who is incapable of managing their own affairs, or is in receipt of attendance allowance or certain levels of disability living allowance. Its lifetime creation will be a potentially exempt transfer (PET) for inheritance tax purposes (insofar as not covered by an exemption).

These trusts are not classed for tax purposes as an RPT (relevant property trust) and avoid the higher rates of taxation, entry and exit charges and 10-yearly anniversary charges.

The trust must be created either exclusively for the disabled person or if within a class of beneficiaries, no more than £3,000 advanced to a non-disabled person within the class per year for the trust to qualify.

On creating the trust an election must be signed by the trustees and by or on behalf of the disabled person confirming the trust qualifies as a disabled person's trust.

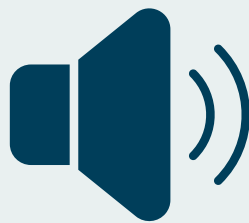
The reasons for creating the type of trust are not limited to the tax advantages. The trust will provide the means to benefit the disabled person and ring-fence the trust funds for their benefit without fear that the beneficiary will become susceptible to unwanted external influences, and the fund is ring-fenced for debt.

The trust fund will form part of the disabled person's estate for IHT purposes.



Activity

Identify members of your family and set out in bullet form the type of trust(s) that may suit that individual's circumstances, then state why in each case.



Law Explained: Trusts

Historically, trusts were used for a number of reasons. These included enabling rich individuals to look after their families after their deaths, without passing full ownership to them, as well as ensuring that their property passed to their children if, for example, their widows remarried.

Nowadays, statutory trusts arise on intestacy and where two or more people own land together. Wills will often be worded to create a trust with the executors having a dual role as trustees as well. This is particularly important where there are child beneficiaries.



5:25

1x



Audio Transcript

Hello, and welcome to this short presentation on trusts. In this recording I will try to put trusts into the context of the sort of work you are likely to come across as a wills and probate lawyer.

I will be looking at the way in which trusts are used in the modern world and considering, briefly, express, implied and statutory trusts.

You may be wondering why you would need to know about trusts, and feel that nowadays trusts are an outdated and little-used vehicle. Of course, historically trusts were very important, particularly for people with wealth and extensive lands, because a trust was a way of making sure that you could look after your loved ones without necessarily passing title to your property directly to them. It was also a way of making sure that your property ultimately remained in your family – for example, a trust could provide for your spouse for their lifetime with the remainder to your child or children.

This was particularly important in an era when women were not considered to be sufficiently commercially minded to be owners of property, and therefore property was often put into trust to be held (often by older and supposedly wiser male relatives) for their benefit, rather than allowing them to exercise the powers of an absolute owner.

Nowadays trusts are, arguably, much less common, perhaps because more people own some property without being exceptionally wealthy, and also because the role and status of women has changed, but you will still come across trusts in various circumstances as we have seen in **Chapters 1 and 2**.

There are, for example, statutory trusts. There are two main statutory trusts which you will come across fairly frequently:

1. the first is imposed when a person dies intestate, and
2. the second in any situation where land is owned by two or more people.

Implied trusts are more problematic and fortunately less common, but can still occur – for example, where a person who is not a legal owner of a property makes some sort of financial contribution. Implied trusts tend not to arise often in the context of wills and probate.

There are situations specifically with regard to wills and probate where property might be held on express trust. First of all, it is common for a residuary gift in a will to be drafted in such a way that the property of the testator is left to the executors, on trust for them to call in the assets, pay the debts and liabilities and distribute the estate. Another common example of an express trust occurs when a testator wants to make provision for a beneficiary who is disabled. Holding money on trust is an ideal way to do this, particularly where the trust is a discretionary one and therefore avoids the beneficiary being absolutely entitled to the property. This can help prevent any negative impact on their benefits if they are in receipt of these. There can also be inheritance tax advantages of holding property on trust rather than making an outright gift; these include trusts for bereaved minors and trusts for people with disabilities, and we will look at these again later in the book.

Another common example is where property is left to minor children. Even if the gift is expressed to be vested rather than contingent (which are both terms that we will examine in more detail later in the book), so that the child is entitled to the property immediately on the testator's death, it's quite

common to find that the executors will still set up a trust of which they will be trustees as, whilst a parent or guardian can give a valid receipt, executors are sometimes wary of allowing large amounts of money to be handed over and prefer to keep the money on trust so that they feel they are discharging their obligations to the testator. If the money is left contingently, so that the beneficiary has to reach a certain age before being entitled to it, then the executors will be bound to hold it on trust.

So, we can see from this that there are situations where trusts, particularly express trusts, are still important for wills and probate lawyers.



Law in Context: Creation of trusts

Trusts can be a complex area of law and occasionally disputes can arise between trustees and beneficiaries. It is important if you are a practitioner in this area to be aware of your record keeping responsibilities.

Read the Law Society's practice note on ['File retention: trusts'](#)

NB If you have not done so already, you will need to sign up to the Law

Society to read this guide, but you can do so free of charge.

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 3 questions in this knowledge check.

Question 1 of 3

Which of the following statements about trusts are correct?

(Select 3 correct answers)

- ☐ It is not possible to keep the beneficiaries of a trust secret.
- ☐ Trusts can be used to ring fence assets.
- ☐ Trusts relating to land must always have two trustees.
- ☐ A trust can be used to mitigate tax.
- ☐ Wealth can be preserved for a disabled person by placing it in a trust.

SUBMIT



Complete the question above before moving on.

Question 2 of 3

Which of the following clauses in a will demonstrate certainty of intention?

(Select 2 correct answers)

☐

"I give my collection of jewellery to Felicity, provided that she will use it wisely."

☐

"I give £50,000 to Ciara, for her to distribute between the families of Giacomo and Paulo in such a way as she considers right."

☐

"I give my house to Kevin to hold on trust for Amy."

☐

"I give my entire estate to Harvey, to be distributed amongst my nieces and nephews in equal shares absolutely."

SUBMIT



Complete the question above before moving on.

Question 3 of 3

Match the following scenarios to the correct type of trust that has been created.



Charles and Maxine together buy the legal estate of Rose Cottage and contribute the purchase price equally.

Statutory (s36 LPA 1925)



Geraint dies intestate.

Express



Colleen includes the following provision in her will; "I give the sum of £10,000 on trust to my executors to hold until my son Dermot reaches the age of 18."

Implied

⋮

Ewan moves in with his girlfriend Fiona, who already owns her house outright. Ewan pays for an extension on the understanding that Fiona will make sure his name is put on the deeds. When they split, Ewan finds that Fiona has not changed the title to the cottage.

Statutory (s33 AEA 1925)

SUBMIT



Complete the question above before moving on.

2.6 Summary

Reasons for creating a trust

- Tax planning – consider whether specialist tax advice is needed.
- Vulnerable persons – to protect individuals less capable of looking after wealth.
- Protection of wealth – consider addiction and debt.
- Land – trusts can be used so that multiple individuals can record beneficial interests in land.
- Care home fees – consider deprivation of assets.

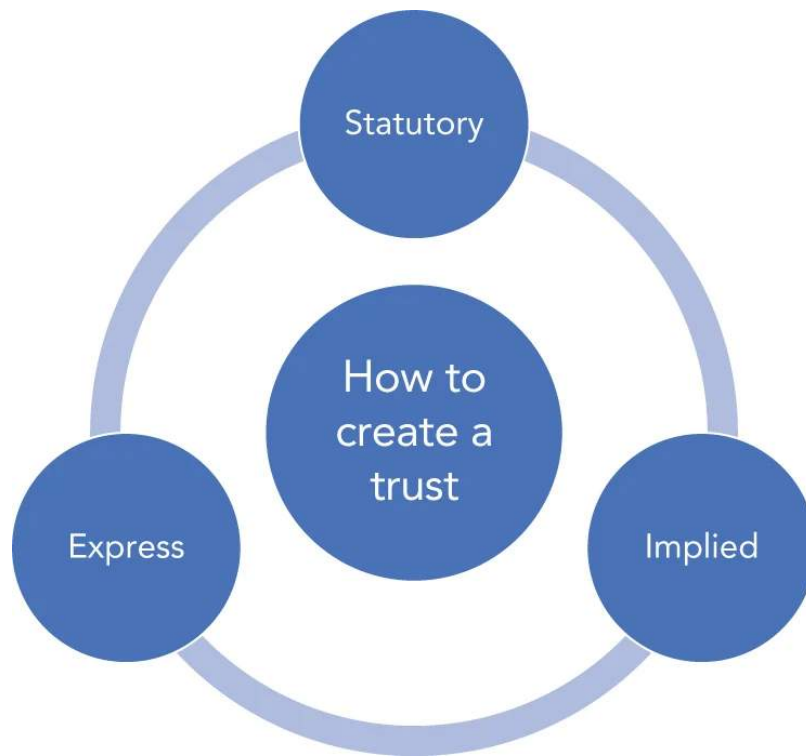
Figure 2.6a



How to create a trust

- Statutory
- Implied
- Express

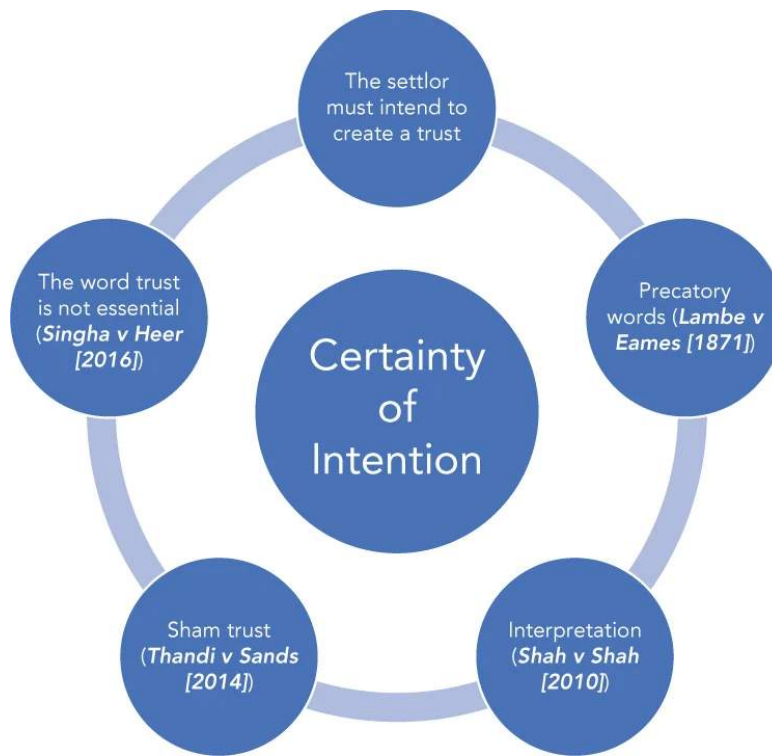
Figure 2.6b



Certainty of intention

- The settlor must intend to create a trust.
- Precatory words (*Lambe v Eames [1871]*).
- Interpretation (*Shah v Shah [2010]*).
- Sham trust (*Thandi v Sands [2014]*).
- The word trust is not essential (*Singha v Heer [2016]*).

Figure 2.6c



Certainty of Subject Matter

- The trust property must be identified with certainty.
- Failed gifts:
 - "Bulk of my residuary estate" (*Palmer v Simmonds* [1854]).
 - First class and blue chip (*Re Kolb's Will Trusts* [1961]).
- Trust of whatever is left. Consider and compare *Sprange v Barnard* [1789] with *In the Estate of Last* [1958].
- Tangible property. Consider *Re London Wine Co (Shippers) Ltd* [1986] and *Re Goldcorp Exchange Ltd* [1994].
- Trust for intangible property is treated differently. See *Hunter v Ross* [1994] and *Lehman Brothers (International) Europe (in Administration)* [2012].

- Beneficial shares. Consider *Curtis v Rippon* [1820] and *Re Golay's Will Trust* [1965].
- Uncertainty caused by a third party (*Boyce v Boyce* [1849]).

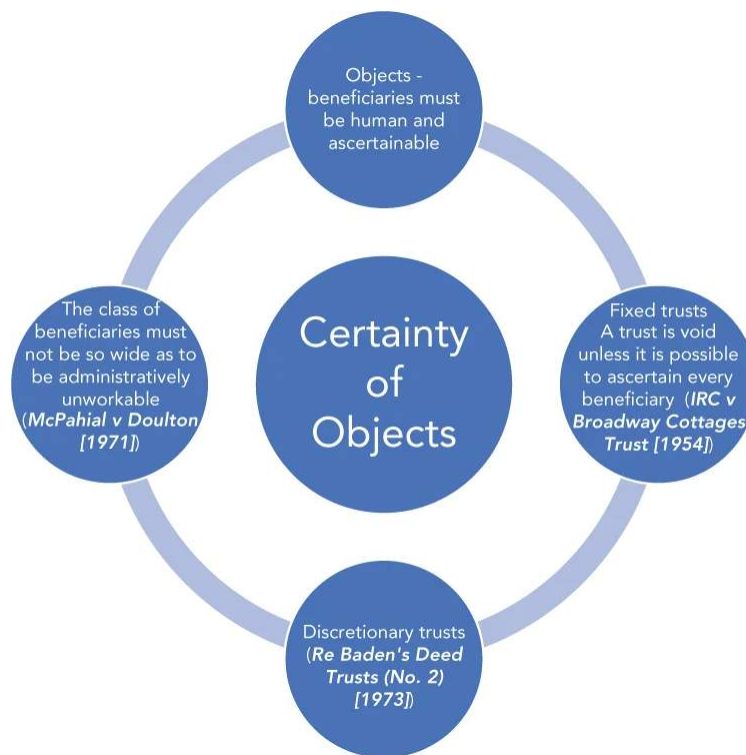
Figure 2.6d



Certainty of Objects

- Objects – beneficiaries must be human and ascertainable.
- Fixed trusts – A trust is void unless it is possible to ascertain every beneficiary (*IRC v Broadway Cottages Trust* [1954]).
- Discretionary trusts (*Re Baden's Deed Trusts (No. 2)* [1973]).
- The class of beneficiaries must not be so wide as to be administratively unworkable (*McPhail v Doulton* [1971]).

Figure 2.6e

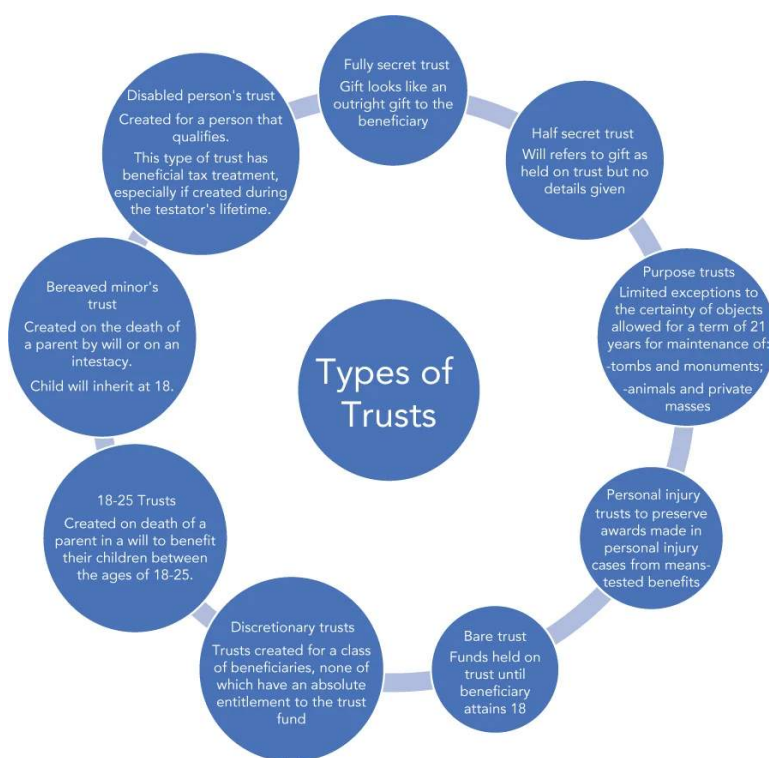


Types of trust

- **Disabled person's trust:** Created for a person that qualifies. This type of trust has beneficial tax treatment, especially if created during the testator's lifetime.
- **Fully secret trust:** Gift looks like an outright gift to the beneficiary.
- **Half secret trust:** Will refers to gift as held on trust but no details given.
- **Purpose trusts:** Limited exceptions to the certainty of objects allowed for a term of 21 years for maintenance of:
 - tombs and monuments;
 - animals and private masses.

- **Personal injury trusts:** Trusts to preserve awards made in personal injury cases from means-tested benefits.
- **Bare trust:** Funds held on trust until beneficiary attains 18.
- **Discretionary trusts:** Trusts created for a class of beneficiaries, none of which have an absolute entitlement to the trust fund.
- **18-25 Trusts:** Created on death of a parent in a will to benefit their children between the ages of 18-25.
- **Bereaved minor's trust:** Created on the death of a parent by will or on an intestacy. Child will inherit at 18.

Figure 2.6f



You have completed Chapter 2.

EXIT