

**Suite 604****PROPERTY TRUSTS***Trusts defined**Express, Implied and Constructive**Simple or Bare vs. Special Trusts**Private vs. Public or Charitable Trusts**Fixed, Discretionary and Hybrid Trusts**Specific, Unit and Protective Trusts***604.01 TRUSTS DEFINED**

In common law legal systems, a trust is a relationship in which a person or entity (the trustee) has legal control over certain property (the trust property or trust corpus), but is bound to exercise that legal control for the benefit of someone else (the beneficiary).

The trustee can be either a natural or a legal entity. There can be multiple trustees, in which case the trust should provide a mechanism for the trustees to make decisions. A trust will not fail solely for want of a trustee; if there is no trustee, whoever has title to the trust property will be considered the trustee.

The trust property can be any form of property, be it real or personal, tangible or intangible. The beneficiary can be either a single person or multiple persons, including people not yet born at the time of the trust's creation. The trustee can be one of the beneficiaries, so long as they are not the only beneficiary. A trust can also be created with some charitable purpose, as opposed to having a particular person or persons as its beneficiary.

The trust has been called the most innovative contribution of English legal thinking to the law. It plays an important role in all common law legal systems. (Do trusts exist in civil law legal systems? Yes and no. If not, is there anything that can be used to do similar things? There is the patrimony of affectation and the foundation that have similar independent patrimonies from their donors). Trust developed out of the English law of equity which has no equivalent in civil law jurisdictions, however since the use of the trust is so widespread some Jurisdictions have incorporated trusts into their civil codes.

Trusts are used for a number of purposes, including to plan one's estate and as a form of investment. They are also frequently used to reduce the amount of tax payable, since they often receive special tax treatment. Pension schemes are often set up as trusts.

**604.02 EXPRESS, IMPLIED AND CONSTRUCTIVE**

Trusts can be classified in a number of ways. One of these ways is by how the trust was created. Most commonly, a classification of trusts as express trusts, implied trusts and constructive trusts is used. Note however that this terminology is not accepted by all authors.

An express trust is created where one person (the settler) conveys property to another (the trustee) on the condition that the property will be used for the benefit of a third party or parties (the beneficiaries). The intention of the parties to create the trust must be shown clearly by their language or conduct. For an

Express trust to exist there must be certainty to the objects of the trust and the trust property. Statute of frauds provisions require express trusts to be evidenced in writing if the trust property is above a certain value, or is real estate.

An implied trust (also called a resulting trust) is created where some of the legal requirements for an express trust are not met, but an intention on behalf of the parties to create a trust can be presumed to exist.

Unlike an express or implied trust, a constructive trust is not created by an agreement between a settler and the trustee; rather a constructive trust is imposed on the trustee by the law. This generally arises due to some wrongdoing on behalf of the trustee, where the trustee has acquired legal title to some property but cannot in good conscience be allowed to benefit from it. For example, the Privy Council has held that if a fiduciary accepts bribes or makes an improper profit, a constructive trust is thereby created, by which the fiduciary holds the bribes or improper profit as trustee of a constructive trust for the benefit of the principal.

#### **604.03 SIMPLE OR BARE vs. SPECIAL TRUSTS**

In a simple trust (also called a bare trust) the trustee has no active duty beyond conveying the property to the beneficiary at some future time determined by the trust. In a special trust, however, the trustee has active duties beyond this.

#### **604.04 PRIVATE vs. PUBLIC OR CHARITABLE TRUSTS**

A private trust has one or more particular individuals as its beneficiary. By contrast, a public trust (also called a charitable trust) has some charitable end as its beneficiary. In order to qualify as a charitable trust, the trust must have as its object certain purposes such as alleviating poverty, providing education, carrying out some religious purpose, etc. The permissible objects are generally set out in legislation, but objects not explicitly set out may also be an object of a charitable trust, by analogy. Charitable trusts are entitled to special treatment under the law of trust and also the law of taxation.

#### **604.05 FIXED, DISCRETIONARY AND HYBRID TRUSTS**

In a fixed trust, the amount of money or other goods or services to be paid to the beneficiaries is fixed by the settler. An express fixed trust requires a certain degree of certainty regarding who are the beneficiaries and the amounts to be paid to them, so that the trustee has little or no discretion. If this degree of certainty is not met, an implied trust exists instead. In a discretionary trust, the amount of money or other goods or services to be paid to the beneficiaries is up to the trustee, so long as the decision is made based on the beneficiary's best interests. A hybrid trust combines elements of both fixed and discretionary trusts. In a hybrid trust, the trustee must pay a certain amount of the trust property to each beneficiary fixed by the settler. But the trustee has discretion as to how any remaining trust property, once these fixed amounts have been paid out, is to be paid to the beneficiaries.

## **604.06        SPECIFIC, UNIT AND PROTECTIVE TRUSTS**

A unit trust is a trust where the beneficiaries (called unit-holders) each possess a certain share (called a unit-holding) and can direct the trustee to pay money to them out of the trust property according to the number of unit-holdings they possess. Unit trusts are primarily used for investment purposes.

A protective trust is a type of trust that was devised for use in estate planning. Often a person, 'A' wishes to leave property to another person 'B'. 'A', however, fears that the property might be claimed by creditors before 'A' dies, and that therefore 'B' would receive none of it. 'A' could establish a trust with 'B' as the beneficiary, but then 'A' would not be entitled to use of the property before they died. Protective trusts were developed as a solution to this situation. 'A' would establish a trust with both 'A' and 'B' as beneficiaries, with the trustee instructed to allow 'A' use of the property until they died, and thereafter to allow its use to 'B'. The property is then safe from being claimed by 'A's' creditors, at least so long as the debt was entered into after the trust's establishment. This use of trusts is similar to life estates and remainders, and is frequently used as alternatives to them.