

CED: An Overview of the Law

Trusts – General Principles

BY: *Richard E. Levinson, LL.B.*

II: Trusts – General Principles

Click [HERE](#) to access the CED and the Canadian Abridgment titles for this excerpt on Westlaw Canada

II.1: Introduction

See Canadian Abridgment: EST.II.1 Estates and trusts — Trusts — General principles

A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he or she has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he or she may be one, and anyone of whom may enforce the obligation.

A person may be a settlor, a trustee and a beneficiary of the same trust.

The terms “cestui que trust” and “beneficiary” are interchangeable.

A trust power includes three situations: a power of appointment where the donee of the power is obligated to exercise it and thus for this purpose is a trustee; a power of appointment given to trustees which they are obligated to exercise; and a power to distribute given to trustees and called a discretionary trust because they have to exercise the power of choice.

A bare trust (also known as a simple trust or a naked trust) is a trust where the trustee or trustees hold property without any further duty to perform except to convey it to the beneficiary or beneficiaries upon demand or as directed by the beneficiaries, that is, in favour of a third party.

An inter vivos trust or living trust is one made by deed, oral declaration or in writing to take effect during the lifetime of the creator of the trust (or settlor). A trust created under a will is called a testamentary trust.

A trustee de son tort is one who intermeddles in a trust and perpetrates or participates in a breach of trust and is thereby liable as if she or he were a trustee for the breach. Knowledge of the situation is crucial in making such a person a trustee de son tort.

CED: An Overview of the Law

The three certainties are the constituent elements that must be found before an express trust can be declared. The first certainty is that the language of the alleged settlor must be imperative. The second certainty is that the subject-matter or trust property must be certain. The third certainty is that the objects of the trust must be certain.

A secret trust exists when a settlor stipulates in a will that property should be devised to A but that the settlor had orally declared to A that A is to hold the property in trust for B. Under wills legislation all dispositions of estate property should be declared in writing; therefore technically the creation of this trust is invalid. However, courts have always been willing to suspend the strict enforcement of the writing requirement in wills legislation and have allowed for the admission of parol evidence to establish whether the devise is really a trust.

If funds are advanced from one person to another for the specific purpose of paying a third, that money is impressed with a trust and may not be otherwise appropriated.

Precatory trusts, constructive trusts and resulting trusts are defined later in this title under the appropriate headings.

Assets of a charitable trust may be exigible in tort claims.

II.2: Trusts Distinguished From Other Relationships

See Canadian Abridgment: EST.II.1.b Estates and trusts — Trusts — General principles — Trust distinguished from other relationships

Courts have distinguished trusts from agency relationships; contractual relationships; gifts; mortgages; banking relationships; and debtor/creditor relationships.

II.3: Secret Trusts

See Canadian Abridgment: EST.II.3.d Estates and trusts — Trusts — Constructive trust — Secret trusts

A court will examine extrinsic evidence to determine whether secret trust has been created.

Governments cannot appoint trustees in the absence of authorization under enabling legislation.

II.4: Express Trusts

See Canadian Abridgment: EST.II.2 Estates and trusts — Trusts — Express trust

CED: An Overview of the Law

Courts will recognize a valid express trust notwithstanding that the trust has not been established by conventional means.

Power over or entitlement to trust funds is not recognized in the absence of definitive proof that this entitlement has been established.

II.5: The Three Certainties

See Canadian Abridgment: EST.II.2.a.ii Estates and trusts — Trusts — Express trust — Creation — Three certainties

There are three certainties which must exist for trust to be recognized: certainty of intention, certainty of subject-matter, and certainty of objects.

II.6: Precatory Trusts

See Canadian Abridgment: EST.II.2.a.ii.B.1 Estates and trusts — Trusts — Express trust — Creation — Three certainties — Intention — Precatory trust

In the construction of wills the judiciary sometimes has to determine whether the testator intended to create a trust. A “precatory trust” is the name used to describe the wishes or desires expressed in a will with respect to a devisee and devised property. The judiciary must determine by the wording of the will and by all the attendant circumstances of the making of the will whether the testator intended to establish a trust. If it is thus found, the wording of the will creates a trust as valid as an express trust; however, if the intention to create a trust is not construed, then the language of the testator is described as “precatory” and no trust will be recognized.

II.7: Application of Statute of Frauds

See Canadian Abridgment: EST.II.2.a.iii.B Estates and trusts — Trusts — Express trust — Creation — Constitution — Formal requirements; EST.II.2.a.iii.E Estates and trusts — Trusts — Express trust — Creation — Constitution — Parol declaration of trust

The Statute of Frauds, passed in the reign of Charles II, is still applicable in most of the common law provinces of Canada. It is in force in Alberta and Saskatchewan in its original form. It has been replaced in Ontario and in British Columbia it has been incorporated in slightly different form in a statute of more general application. It has been repealed in Manitoba, although it still applies to contracts made before October 1, 1983.

II.8: Creation of Express Trust

See Canadian Abridgment: EST.II.2.a Estates and trusts — Trusts — Express trust — Creation

CED: An Overview of the Law

An express trust may arise by operation of law or by intention, in word or deed, of the settlor. The constituent elements of settlor, trustee, beneficiary and trust property as well as the absence of legislative bars to trust formation must be found for court to declare that an express trust exists. An express trust can only arise in the presence of the following three certainties: (a) Certainty of Intention: the trustee must have a specific obligation to hold property to the benefit of another person. A moral obligation is thus insufficient to give rise to a trust relationship; (b) Certainty of Subject Matter: the property subject to the trust obligation must, from the outset of the asserted trust, be clearly described or definitively ascertainable; and lastly, (c) Certainty of Objects: there can be no uncertainty as to whether any given person is a beneficiary of the trust.

Evidence of incapacity to create a trust on the part of the settlor may void an otherwise valid trust.

A trust created without due regard to the statutory or regulatory provisions of relevant enabling legislation may be declared a nullity by the court.

A trust may come under judicial scrutiny with respect to whether it constitutes a valid trust for income tax purposes.

A trust is voidable where it appears that it constitutes a sham to avoid creditors.

The presumption of undue influence may void an otherwise valid trust where it appears that settlor has been coerced into making an express trust.