express trust under common law

Express trust under common law is a fundamental concept that governs how individuals and entities establish legal relationships involving the holding and management of assets for the benefit of others. This article delves into the intricacies of express trusts within the common law framework, exploring their creation, essential elements, types, and the duties and powers of trustees. We will examine how an express trust is formed, the vital role of certainty, and the various circumstances under which they are utilized, providing a comprehensive understanding for anyone seeking to navigate this complex area of law. Our exploration will cover the core principles that define the creation and operation of these legal instruments.

Understanding Express Trusts Under Common Law

At its core, an express trust under common law is a legal relationship created intentionally by a settlor, where the settlor transfers legal title of property to a trustee, who holds that property for the benefit of designated beneficiaries. Unlike resulting or constructive trusts that arise by operation of law, express trusts are deliberately constituted. This intentional creation is paramount and distinguishes them from other trust forms. The common law system has developed robust principles over centuries to ensure the validity and enforceability of these arrangements, providing a framework for the responsible management of assets and the fulfillment of the settlor's intentions.

The concept of an express trust is built upon the separation of legal and beneficial ownership. The trustee holds the legal title, meaning they have the power to manage and deal with the property according to the trust deed and the law. However, the beneficiaries hold the equitable or beneficial title, meaning they are entitled to the enjoyment and benefit of the trust property. This dual ownership structure is the bedrock of trust law and allows for sophisticated estate planning, asset protection, and charitable endeavors. The clarity and precision with which an express trust is established are critical to its success.

The Essential Elements of an Express Trust

For an express trust under common law to be validly created, certain fundamental elements must be present. These are often referred to as the "three certainties," a doctrine that ensures the settlor's intentions are clear and ascertainable, allowing the trust to be executed faithfully.

The Three Certainties of Trust Creation

The doctrine of the three certainties, first articulated in the landmark case of Knight v Knight, dictates that for a trust to be valid, there must be certainty of intention, certainty of subject matter, and certainty of objects.

Certainty of Intention

This certainty requires that the settlor must have intended to create a trust, rather than simply making a gift or imposing a mere moral obligation. The intention does not need to be expressed using the word "trust," but the language used must clearly indicate a binding obligation on the trustee to hold property for the benefit of another. Courts will look at the settlor's words and conduct to discern this intention. Precatory words, such as "I hope" or "I wish," generally do not create a trust, whereas imperative words, like "I direct" or "it is my will," are more likely to indicate a trust intention.

Certainty of Subject Matter

The subject matter of the trust refers to the property that is to be held on trust. This property must be clearly identifiable. For tangible assets, this is usually straightforward. However, for intangible assets or a portion of a larger bulk, the subject matter must be segregated or identifiable with sufficient specificity. For example, if a settlor declares a trust over "some of my shares," this would likely be void for uncertainty of subject matter. However, if the settlor declared a trust over "100 of my shares in XYZ Company," and they owned more than 100 such shares, this would generally be considered sufficiently certain, particularly in modern interpretations that allow for fungible assets to be identified from a larger class.

Certainty of Objects

The objects of a trust are the beneficiaries who are to benefit from the trust property. The certainty of objects depends on the type of trust. For a fixed trust, where the beneficiaries and their respective shares are specified, the "complete list" test applies – it must be possible to draw up a complete list of all beneficiaries. For discretionary trusts, where the trustee has the power to decide who among a class of beneficiaries will benefit and in what amount, the "given postulant" test, or "is or is not" test, applies. This means that it must be possible to say with certainty whether any given individual is or is not a member of the beneficiary class.

The Subject Matter of the Trust

The property that forms the subject of an express trust under common law can be almost any form of asset, whether tangible or intangible. This includes real estate, personal property (such as vehicles, jewelry, or artworks), financial assets (like bank accounts, stocks, and bonds), intellectual property, and even contractual rights. The crucial aspect is that the property must be capable of being identified and separated, either physically or conceptually, from the settlor's other assets. If the subject matter is too vague or amorphous, the trust will fail for uncertainty.

For example, a trust declared over "my desire to promote good causes" would not be a valid subject matter. However, a trust over "the proceeds of sale of my property at 123 Main Street" or "all my shares in the public company ABC Ltd." would generally be sufficiently certain. The law also recognizes trusts of future property, such as income yet to be earned from an existing contract, provided the source of that future property is sufficiently certain.

The Objects of the Trust

As discussed regarding the certainty of objects, the beneficiaries are the individuals or entities for whose benefit the trust property is held. In express trusts, these beneficiaries must be clearly identified or ascertainable. For charitable trusts, the objects are purposes rather than specific individuals, and the law has separate rules for certainty of charitable purpose, requiring the purpose to be for the public benefit and within recognized charitable categories.

The beneficiaries of a trust can be individuals, a class of individuals, or charitable organizations. The clarity of who is entitled to benefit is paramount to the proper administration of the trust. If the class of beneficiaries is too wide or ill-defined, the trust may fail. This is why careful drafting is essential when establishing any form of express trust.

How to Create an Express Trust

An express trust under common law can be created in two primary ways: during the settlor's lifetime (inter vivos) or upon the settlor's death through a will (testamentary). The method of creation often dictates certain formalities that must be observed.

Express Trusts Inter Vivos

An express trust created inter vivos, meaning "between the living," is established during the settlor's lifetime. This can be done by the settlor transferring the legal title of the property to a trustee, declaring themselves a trustee of the property for the benefit of beneficiaries, or by a beneficiary declaring they hold their equitable interest on trust for someone else. For certain types of property, particularly land, specific formalities are required, such as a written deed and registration. For other property, such as shares or bank accounts, the transfer of legal title may involve specific procedures laid down by the relevant company or financial institution.

Express Trusts Testamentary

A testamentary express trust is created through a will. The testator (the person making the will) directs in their will that certain assets should be held by an executor or a trustee for the benefit of named beneficiaries. Testamentary trusts are subject to the Wills Act requirements, which typically mandate that the will be in writing, signed by the testator, and witnessed by two or more witnesses. The terms of the trust, including the subject matter and the beneficiaries, must be clearly set out within the will itself or incorporated by reference into the will.

The Role of Intention in Express Trust Formation

As highlighted in the certainty of intention, the settlor's clear intention to create a trust is the cornerstone of its formation. This intention must be to impose a binding obligation on the trustee to hold property for the benefit of beneficiaries. It is not sufficient for the settlor to merely express a wish or hope that the property be used in a certain way. The language used must reflect a commitment to create a trust relationship. Courts will meticulously examine the surrounding circumstances and the wording of any trust instrument to determine if the settlor truly intended to create an express trust.

The Importance of Formalities

While the intention to create a trust is paramount, certain formalities must be adhered to for the trust to be legally effective, especially concerning land. Trusts of land, for instance, generally require the trust instrument to be in writing, signed by the settlor. This is often referred to as the "rule in Bona Vacantia" or more commonly the requirement for a declaration of trust concerning land to be manifested and proved by some writing signed by the person able to declare such trust. Failure to comply with these formalities can render the attempted trust void. For other types of property, the formalities relate to the proper transfer of legal title.

Types of Express Trusts

Express trusts come in various forms, each designed to meet specific settlor objectives. The classification often depends on how the beneficiaries' entitlements are determined.

Fixed Express Trusts

In a fixed express trust, the beneficiaries and their respective entitlements to the trust property are clearly defined by the settlor. For example, a trust might state: "To my son, John, £10,000, and to my daughter, Sarah, £20,000." The trustee has no discretion in distributing the trust property; they are bound to distribute it precisely as stipulated in the trust deed. This offers certainty for beneficiaries but less flexibility for the trustee in adapting to changing circumstances.

Discretionary Express Trusts

A discretionary express trust grants the trustee the power to decide which beneficiaries within a specified class will receive a benefit, and in what amount. The settlor might declare: "To my trustees, to be distributed among my children and grandchildren as they, in their absolute discretion, see fit." This type of trust provides significant flexibility, allowing trustees to distribute funds based on the current needs and circumstances of the beneficiaries. However, it requires the settlor to clearly define the class of potential beneficiaries to satisfy the certainty of objects requirement.

Unit Trusts

Unit trusts are commonly used for collective investment schemes. The trust property is held by a trustee, and beneficiaries, known as unit holders, own units in the trust fund. The value of each unit fluctuates with the value of the underlying assets. Unit trusts are popular for their ability to pool resources from multiple investors, allowing for diversification and professional management of investments. The terms of a unit trust are typically set out in a trust deed.

Purpose Trusts

While traditionally trusts were required to have ascertainable beneficiaries (the "beneficiary principle"), certain trusts for purposes can be valid under common law, particularly charitable trusts. Non-charitable purpose trusts, which benefit a purpose rather than identifiable individuals, are generally void unless they fall within recognized exceptions, such as trusts for the maintenance of graves or animals, or trusts for the benefit of unincorporated associations. These exceptions are narrowly construed and require careful drafting to ensure validity.

Duties and Powers of Trustees in Express Trusts

Once a trustee accepts their role, they are subject to a stringent set of duties and possess certain powers to manage the trust property. These are designed to protect the beneficiaries' interests and ensure the proper execution of the trust.

The Duty to Act Personally

Trustees are generally required to perform their duties personally. This means they cannot delegate their decision-making responsibilities to others, unless expressly permitted by the trust deed or by statute. While trustees can delegate administrative functions (such as appointing an investment manager), the ultimate responsibility for the trust's management remains with them. Delegation must be carried out with reasonable care.

The Duty to Act with Due Care and Skill

Trustees are expected to manage the trust property with the same degree of care and skill that a reasonably prudent person would exercise when managing their own affairs. This standard is often referred to as the "prudent trustee" standard. If a trustee possesses special skills or knowledge (e.g., a professional trustee), they will be held to a higher standard of care, commensurate with those skills.

The Duty to Act in the Beneficiaries' Best Interests

This is perhaps the most fundamental duty of a trustee. All decisions and actions taken by the trustee must be for the sole benefit of the beneficiaries. Trustees must act impartially between beneficiaries, especially where there are different classes of beneficiaries (e.g., life tenants and remaindermen). They must avoid any conflicts of interest between their personal interests and their duties as a trustee.

The Duty to Preserve Trust Property

Trustees have a duty to safeguard the trust assets from loss or damage. This involves investing the trust property prudently, ensuring assets are properly insured, and taking appropriate steps to protect the property from third-party claims. They must not engage in speculative or risky investments that could jeopardize the capital or income of the trust.

The Duty to Account and Provide Information

Trustees have a continuing duty to keep accurate accounts of all transactions relating to the trust property. Beneficiaries have a right to access these accounts and to receive information about the management of the trust. This transparency ensures accountability and allows beneficiaries to monitor the trustee's performance.

Trustee Powers

In addition to their duties, trustees possess various powers, which may be conferred by statute or by the terms of the trust deed itself. These powers can include the power to sell, lease, mortgage, or otherwise deal with the trust property, the power to invest trust funds, the power to appoint agents, and the power to pay trust income and capital to beneficiaries in accordance with the trust's terms. The trust deed is the primary source for understanding the specific powers granted to the trustees.

Revocation and Variation of Express Trusts

Generally, an express trust under common law, once validly created, is irrevocable and cannot be varied by the settlor alone, unless the trust deed expressly reserves such a power. This principle is to protect the certainty of the trust and the rights of the beneficiaries. However, there are mechanisms by which a trust can be altered or brought to an end:

- **Revocation by Settlor:** If the settlor has reserved a power of revocation in the trust deed, they may revoke the trust.
- **Consent of All Beneficiaries:** If all beneficiaries are of legal age and capacity, and they unanimously agree, they can direct the trustees to end the trust and distribute the property as they see fit, provided it does not prejudice any contingent

beneficiaries.

- **Court Intervention:** Courts have inherent jurisdiction to vary or terminate trusts in certain circumstances, such as when the trust purpose has become impossible to fulfill, or for the benefit of infant or unborn beneficiaries.
- **Statutory Powers:** Legislation in many jurisdictions grants courts or trustees powers to vary trusts, often subject to specific conditions and safeguards.

Breach of Trust and Remedies

A breach of trust occurs when a trustee fails to perform their duties or exceeds their powers, resulting in a loss to the trust property or a benefit to the trustee themselves or a third party. Common breaches include misapplication of trust funds, failure to invest prudently, or conflicts of interest. When a breach occurs, beneficiaries can seek various remedies from the court to restore the trust or compensate for the loss:

- **Personal Claims:** Beneficiaries can sue the trustee personally to recover losses caused by the breach.
- **Proprietary Claims:** If trust property can be traced, beneficiaries may assert a proprietary claim over that property, even if it has been transferred to a third party, provided the third party is not a bona fide purchaser for value without notice.
- **Injunctions:** Courts can issue injunctions to prevent a trustee from continuing a breach or taking certain actions.
- **Removal of Trustee:** In serious cases, the court can remove a trustee and appoint a new one.

The precise remedies available will depend on the nature of the breach and the circumstances of the case. The equitable jurisdiction of the courts plays a vital role in enforcing the obligations of trustees and protecting the interests of beneficiaries within the framework of an express trust under common law.

Conclusion

Understanding express trust under common law is crucial for anyone involved in asset management, estate planning, or philanthropic endeavors. The deliberate creation of these legal structures, underpinned by the essential elements of certainty, allows for the structured transfer of property and the fulfillment of specific intentions. From the careful drafting required to establish their validity to the rigorous duties imposed on trustees, express trusts represent a sophisticated legal tool for managing wealth and achieving long-term goals. The ability to tailor these arrangements to unique circumstances, whether through fixed or discretionary provisions, highlights their enduring relevance in modern legal practice.

Frequently Asked Questions

What is the core principle of express trust under common law?

The core principle is the clear and unambiguous intention of the settlor to create a trust, demonstrated through words (spoken or written), without relying on implied intentions.

What are the essential elements required to establish an express trust under common law (the 'three certainties')?

The three certainties are: certainty of intention (the settlor intended to create a trust), certainty of subject matter (the property to be held in trust is clearly defined), and certainty of objects (the beneficiaries of the trust are clearly identifiable).

Does an express trust under common law need to be in writing?

While not always strictly required for personal property, for land or real estate, an express trust must be evidenced in writing and signed by the settlor, as per the Statute of Frauds.

What is the role of the settlor in creating an express trust?

The settlor is the person who creates the trust, provides the trust property, and declares their intention to hold that property for the benefit of others.

What is the role of the trustee in an express trust?

The trustee is the legal owner of the trust property and has a fiduciary duty to manage and distribute the property according to the terms of the trust for the benefit of the beneficiaries.

What are the main types of express trusts under common law?

The main types are express private trusts (for the benefit of ascertainable individuals) and express public trusts (for charitable purposes).

Can an express trust be created orally under common law?

Yes, for personal property, an express trust can be created orally, provided the three certainties are met. However, for land, it generally requires written evidence.

What happens if an express trust fails due to a lack of certainty?

If an express trust fails for lack of certainty, the property typically reverts back to the settlor (if alive) or their estate, as the intended trust was never validly created.

How does the concept of 'fiduciary duty' apply to trustees of express trusts?

Trustees of express trusts have a high fiduciary duty, meaning they must act in the best interests of the beneficiaries, avoid conflicts of interest, and exercise reasonable care and skill in managing the trust property.

What are some common scenarios where express trusts are used in common law jurisdictions?

Express trusts are commonly used for estate planning (e.g., discretionary trusts, bare trusts), holding assets for minors or vulnerable individuals, charitable giving, and for commercial purposes like unit trusts.

Additional Resources

Here are 9 book titles related to expressing trust under common law, each starting with "" *and followed by a short description:*

1. Interpreting the Trust: Intent and Expression in Equity
This book delves into the core principles of equity as they pertain to the formation of trusts. It examines how common law courts have historically interpreted the settlor's intent, focusing on the express words used to create a trust relationship. The text explores the nuances of precatory words versus imperative declarations, highlighting the importance of clear and unambiguous language in establishing trust obligations. It serves as a foundational text for understanding the evidential requirements for express trusts.

2. The Express Trust: Foundations and Forms in Common Law Jurisdictions
This comprehensive guide provides a detailed overview of the common law requirements for the creation of express trusts. It systematically breaks down the "three certainties" – certainty of intention, subject matter, and objects – and illustrates their application through case studies. The book also explores various forms of express trusts, such as resulting and constructive trusts, and their distinct creation processes. It's an essential resource for practitioners and academics alike seeking a thorough understanding of trust law.

3. Words of Trust: Language and Legal Effect in Equity
This title focuses on the critical role of language in the creation of express trusts under common law. It analyzes how specific wording, phrasing, and the absence of clarity can determine whether a trust is validly established. The book offers practical insights into drafting trust instruments and interpreting existing ones, paying close attention to the judicial approach to semantic challenges. It's particularly useful for those involved in estate planning and trust administration.

4. Equity's Intent: The Express Creation of Fiduciary Duties
This work specifically addresses the express creation of fiduciary duties, which are intrinsically linked to the concept of trust. It examines how common law has evolved to recognize and enforce fiduciary relationships established through explicit agreement or clear declaration of intent. The book analyzes the types of relationships that can be expressly deemed fiduciary and the remedies available when these duties are breached. It provides a deep dive into the principles governing loyalty and good faith.

5. The Trustee's Duty: Express Mandates and Implied Obligations
This book explores the responsibilities of a trustee, with a particular emphasis on how these duties are expressly created by the trust instrument. It analyzes the specific powers, discretions, and obligations that settlors can legally imbue in their trustees. The text also contrasts these express mandates with the implied duties that arise from the nature of the trustee-beneficiary relationship under common law. It offers guidance on the scope and limitations of a trustee's authority.

6. Settlor's Will: Express Trusts and Testamentary Intent
This title investigates the creation of express trusts within the context of wills and testamentary dispositions. It examines how testators can utilize express trust provisions to direct the distribution of their assets and provide for beneficiaries. The book scrutinizes the legal requirements for valid testamentary trusts, including the formalities of wills and the certainty of intention within this context. It's a valuable resource for understanding estate planning and the legal framework for inheritance.

7. Benevolent Intent: Express Trusts for Charitable Purposes
This book focuses on the creation of express trusts established for charitable purposes under common law. It details the specific legal requirements and tests that must be met for a trust to be recognized as charitable, such as the benefit to the public and the ascertainable objects. The text explores how charitable trusts are expressed through founding documents and the ongoing oversight by the courts. It provides a comprehensive understanding of the legal framework for philanthropy.

8. Trusts in Writing: The Formalities of Express Trust Creation
This title emphasizes the crucial role of written instruments in the express creation of trusts under common law. It dissects the legal requirements for a trust to be validly constituted in writing, including the necessity of a trust deed or similar document. The book analyzes the implications of the Statute of Frauds and other legislative provisions on trust formation. It serves as a practical guide for ensuring the proper documentation of trust arrangements.

9. The Equitable Bond: Express Trusts and the Control of Property
This work examines how express trusts serve as a mechanism for controlling property interests under common law. It explores how settlors can use express trusts to dictate the management, use, and eventual disposition of their assets, effectively creating an

"equitable bond." The book analyzes the distinct legal and beneficial ownership that arises from an express trust and the rights and obligations associated with each. It provides a sophisticated understanding of property law through the lens of trust.

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