

Revisiting the Basics of Trusts

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Reviewed below are some of the most basic trust law principles that we so frequently encounter and apply (often in less than basic ways) in an estates and trusts practice and which are often relevant in other practice areas.

The Validity of a Trust

In order to be validly settled (created), a classic express trust must satisfy the following requirements:

- The person creating the trust (the settlor) and the trustee must have the requisite mental capacity.
- The *three certainties* must be present:
 1. ***Certainty of intention***: the intention to create a valid trust; it must be apparent that the settlor was aware of and had the objective of creating a valid trust at the time of transferring trust property to the person or persons who will hold assets in trust for the beneficiaries (the trustee(s));
 2. ***Certainty of subject matter***: the asset or assets to be held in trust must be ascertainable; and
 3. ***Certainty of objects***: it must be clear who the beneficiaries are (or who they can be).
- The trust property must be transferred from the settlor to the trustee.
- Any other necessary formal requirements must also be met. For example, a trust relating to interests in real property must generally be in writing.

Where we see an attack on the validity of a trust, it is often because of an issue relating to the three certainties. For example, in the case of a “sham trust”, there is typically an intention to deceive the (future) creditors of the settlor rather than the certainty of intention.

Illustrating the Concept of a Trust

To assist in explaining how a trust works, we might find it helpful to refer to the example of a *piggybank*:

- The settlor puts the first coin in the piggybank and hands it over to the trustee for safekeeping;

- Other assets may be added to the piggybank over time by the settlor or third parties;
- The trustee holds the piggybank and has control over when it is opened and, subject to the terms of the trust (whether oral or set out in a written trust deed), coins or other assets are distributed to the beneficiaries;
- The trustee themselves does not have an interest in what they hold in the piggybank (unless they are also a beneficiary of the trust);
- Once the settlor puts their coin into the piggybank (and absent an expressly-reserved power of revocation or their status as one of the beneficiaries), they can no longer have it back;
- Similarly, the beneficiaries (again, subject to the terms of the trust) may not have any enforceable rights in the coin/other assets held in the piggybank until distributions are made and/or dependent on the manner in which the trustee may exercise their discretion; and
- Over time, the trustee (or the court) may smash the piggy bank open as part of the variation or winding up of the trust.

While it may not be perfect and suit all situations, the piggybank example can assist in illustrating how a trust works in a straightforward manner. Exploring just how many of the trusts encountered in a legal practice may fit into this most basic model is interesting to keep in mind as we work through our files.

The piggybank example may be of some assistance in understanding the mechanics of an express trust, but resulting trusts and constructive trusts, which arise by operation of law, are subject to different requirements and are different in nature.

Resulting Trusts

In an estates and trusts practice, we often see the term “resulting trust” thrown around. Sometimes, in court materials, relief is sought in the form of a “resulting trust and/or constructive trust” just to make sure that we have all of our bases covered, but it can be important to understand the differences.

Resulting trusts are said to fall into two main categories:

1. *Those that arise on the failure of a classic (express) trust:*

- The trust could fail, for example, for lack of the three certainties, lack of mental capacity of the settlor, or on the basis that the purported trust was procured by undue influence, or the objects of the trust could be fully satisfied, leaving a surplus in the trustee’s hands; and

- Ordinarily, the result would be the return of the assets to the (intended) settlor, unless the evidence establishes that they intended to benefit the (intended) trustee with the assets.

2. Those that operate as the result of a presumption of resulting trust:

- For example, there is a presumption of resulting trust with respect to gratuitous transfers from a parent to an adult child; and
- The resulting trust will be imposed absent evidence rebutting the presumption of resulting trust, which can establish that a gift was instead intended.

While earlier Canadian case law also recognized “common intention” resulting trusts, the Supreme Court of Canada has since suggested that this category of resulting trust has no further role.¹

Because rebuttable presumptions are so closely interrelated with intention, whether or not a resulting trust can be imposed often becomes a question of intention at the time of the transfer of an asset. In fact, as the established categories of resulting trusts reflect, the matter of intention is key in determining whether a resulting trust may be imposed. Assets may be impressed with a resulting trust on the basis of the original asset-holder’s (presumed) intentions. As estates and trusts litigators know well, from a practical perspective, identifying evidence capable of corroborating a party’s personal evidence that a gift was intended (thereby rebutting the presumption of resulting trust), is a hurdle that we often face.

Constructive Trusts

Constructive trusts have been said to be the hallmark of unjust enrichment, lying at the heart of this equitable doctrine.

Historically, constructive trusts have been imposed in circumstances where “good conscience” requires it. More recently, there has been some debate over whether constructive trusts can still be applied where there is neither an unjust enrichment nor a wrongful gain.

The doctrine of unjust enrichment remains flexible and expansive. As we saw in *Moore v Sweet*,² which remains a leading decision of the Supreme Court of Canada in this area of the law, the test requires:

- The enrichment of the defendant/respondent;
- A corresponding deprivation of the claimant; and
- The absence of “juristic reason” for both the enrichment and corresponding deprivation.

¹ See, for example, [Kerr v Baranow, 2011 SCC 10](#).

² [2018 SCC 52](#).

There are a number of circumstances in which a constructive trust has been imposed that fall outside of what we normally think of traditionally as an unjust enrichment case, but, interestingly, where this test can still be satisfied and “good conscience” requires restitution.

Conclusion

Lawyers practising in all areas of law are likely to encounter convoluted structures involving trusts and/or issues relating to whether assets are held outright or in trust for the benefit of one or more beneficiaries. Even when dealing with complex structures and trust litigation, basic trust principles continue to apply and keeping it simple can assist us in understanding the most advanced scenarios.