Formality Requirements for Creating Trusts

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“It is evident that although an isolated loose conversation will not give rise to a valid declaration of trust (see, for example, Jones vs. Lock (1865) 1 Ch App 25), the repetition of words by the owner, especially in the context of an intimate relationship, indicating that property is to be as much as the claimant’s as his own will be sufficient”.

Paklowsk, M and Everett, K “Declaration of Trust and Unmarried Couples” (1999) Fam Law 721

Critically discuss this statement. In particular, you should consider the following questions:

Have the courts become too willing to recognize the creation of trust in circumstances involving informal conversations or conduct?

Should it be easier to find trust in the context of a family relationship compared with situations involving commercial relationships?

Trust enables more than one person to have some interest in a property. By virtue of it, the person has to act in a manner that is beneficial to the property in one way or another. The trustee and the beneficiary enjoy rights over the property simultaneously. Therefore, the trustee must only act in a manner that does not affect the interest of the beneficiary in the property, i.e., managing the property with good and fair intentions. Seeing this scenario, there are two parties in a legal trust ownership: trustee and beneficiary. The trustee holds the legal title to the property, and he holds and manages the title for the benefit of the beneficiary; thus, the role of management is vested in him. The beneficiary, on the other hand, is the person who has an equitable interest in the property subject to the trust.

There are several types of trusts. The most common and the easiest to identify is the express trust in which the parties expressly exhibit their intention to create a trust on a property. They are governed by three elements, i.e., intention, subject matter, and the object. These are the three certainties. Although there is a clear indication of the settlor’s intention in an express trust, it can be identified as

either a fixed trust or a discretionary trust. The former is when there is no confusion or discussion on the areas of the title of the beneficiary and the amount of trust that the beneficiary is going to receive under this arrangement, whereas the latter is the setting in which the trust property is distributed at the discretion of the trustees. They distribute as they see fit. However, they are obliged to transfer all of the trust property to the beneficiaries and not to keep it for themselves.

The concept of the three certainties is the most crucial element of the arrangement of trust. These certainties provide the formula for finding the status of the creation and declaration of trust under any situation. The three certainties consist of intention, subject matter, and object. An express trust does not exist or cannot be created in the absence of any of these three certainties, especially in the case of a declaration of trust in circumstances involving informal conversations or conduct. Also, these certainties are used by the courts in order to recognize the creation of a trust through repetition of words by the owner, especially in the context of an intimate relationship, indicating that property is to be as much as the claimant's as his own. Although it can be argued that the courts have been too willing to accept declarations of trust in an informal setting, this is not always the case.

The certainty of intention is used by the courts in order to test the presence of requisite intention in the situation to consider if the creator of the trust was equipped with the required intention to create the trust, i.e., if he was willing to put someone under the duty of holding the property that did not belong to him. It is worth mentioning here that the term 'trust' is not required to be present in the conversation to indicate the intention of the owner of the property to create the trust. At the same time, the presence of the term in the conversation does not always indicate that the intention of the owner of the property is present in order to create the trust. Therefore, the courts look at the substance in the intention of the creator instead of focusing on the words used in the conversation or the alleged communication of the declaration of trust. Precatory words are evident if they are merely a request, such as confidence, requests, wishes, etc. Therefore, regard is given to the opinion of the reasonable person, and thus, the certainty of intention in an arrangement of trust is assessed objectively.

Lord Upjohn, in Re Gulbenkian (1970), stated that the court must use innate common sense in cases of ambiguity. He also expressed the need for the courts to use the desire of the settlor in connecting his intention with the creation of trust, such as in the cases of intimate relationships where it is argued that mere repetition of words can create trust. He explained that clear and unambiguous language creates trust, but obscure and ambiguous language must be interpreted by the courts in order to indicate the presence of certainty of intention on behalf of the settlor in order to declare the creation of trust between the parties, especially where there is self-declaration of trust.

Clarity and certainty of intention become a problem in situations with self-declaration. In Jones vs. Lock (1865), there was a lack of intent on behalf of the father, who received a check of nine hundred American dollars and said that he would keep it away for his son. In this case, the father self-declared a trust. The other party, i.e., the son, did not ask him to vest the rights of the property, which is the check, in his favour. Despite the fact that the father expressly showed his intention to create the

trust, the trust was not created between him and his son due to a lack of sufficient intent, as it was a self-declaration of trust. According to Lord Cranworth, trusts are not created as a result of loose conversation between people (Jones vs Lock, 1865) because it can be dangerous, especially in the cases of commercial settings where the declaration of trust is on a large scale. Therefore, it is easier to find trust in the context of a family relationship compared with situations involving commercial relationships.

However, it can be questioned whether creating trust in a family relationship should be easier than in a commercial relationship or not. The answer lies in the certainty of intent. If the intention of the settlor is loud and clear, the courts will verify the declaration of trust between the parties, but if it is ambiguous and obscure, then the court will verify that there is no valid declaration of trust between the parties. It is worth mentioning here that the courts look at the substance in the intention of the creator instead of focusing on the words used in the conversation or the alleged communication of the declaration of trust. Precatory words are evident if they are merely a request, such as confidence, requests, wishes, etc. Therefore, regard is given to the opinion of the reasonable person, and thus, the certainty of intention in an arrangement of trust is assessed objectively. The trustees can take the property beneficially if the settlor transfers the property to someone else. But, in the case of self-declaration, there is no valid creation of trust at all.

Moreover, the certainty of the subject matter of the trust must be made clear in the process of creation of trust because it can be created on all types of properties, including intangible properties such as debts or covenants. Therefore, it is necessary to include the subject matter clearly in the declaration of trust as it raises the question of fact in the cases of trust. The clarity of the subject matter is crucial. For instance, if someone describes the property as a bulk of something, it is not a clear and unambiguous subject matter (Palmer vs. Simmonds, 1854). The reason behind it lies in the fact that the term ‘bulk’ cannot be identified and, thus, defined in the context of any property in the arrangement. On the other hand, the description of the subject matter as ‘anything that was left’ of the estate of the person after his death is a clear subject matter due to the fact that it can be quantified and measured and, thus, can be transferred from the hands of one person to that of another within the arrangement of creation of trust (Re Last, 1958).

At the same time, when the property is quantified, it must be identified too. It means that the property must be identifiable because the trust will be void of certainty if the property, i.e., the subject matter within the context of the arrangement of trust, cannot be identified. Hunter vs. Moss (1994) provided the distinction between tangible and intangible properties for the purpose of declaration of trust. The case is concerned with shares in a company, i.e., intangible assets. Therefore, it is differentiated from Re London Wine Co (Shippers) Ltd (1986), which was concerned with the passing of title after the appropriation of chattels. Therefore, despite the fact that title is an intangible property, it is interlinked with a physical property. Thus, the subject matter of a case concerning the passing of title does not belong to the intangible category of the properties but the tangible ones. However, it can be argued that proving the element of trust is more difficult in the scenario of Hunter vs. Moss (1994) as compared to Re London Wine Co (Shippers) Ltd (1986) because

identifying the rationale behind how trust works in practice is not possible.

Thus, the subject matter must be measurable and identifiable. If these two elements are missing in the context of an arrangement of trust, then there is an uncertainty of subject matter, and this lack invalidates the declaration of trust. It also depends on the kind of uncertainty that has been created in any situation. For instance, if a portion of the property has been given in trust to some person but the identity of the subject matter has not been made clear, then the beneficiary has an absolute right over the property; otherwise, the trust cannot be created limited to one portion of the property only. Similarly, if the property is unidentifiable, then the trust cannot be attached to it. In the case where there is more than one beneficiary, and the property under the declaration of trust is to be divided between them, trust will be created between them due to the fact that the intention of the creator is clear about not giving the property to the beneficiary outright.

The question of express trust is also dependent on the certainty of objects. It is the most complicated part of the context of the creation of trust, especially in circumstances involving informal conversations or conduct. It can best be discussed with regard to different types of trusts. For instance, it is quite easily possible for the courts to identify the beneficiaries in the case of a fixed trust. Thus, the property can easily be distributed among the beneficiaries. It is the complete list test in which all important details concerning the beneficiaries are listed. However, it is not necessary to include the time at which the trust is to be completed in this list.

The declaration of a discretionary trust is the setting in which the trust property is distributed at the discretion of the trustees. They distribute as they see fit. However, they are obliged to transfer all of the trust property to the beneficiaries and not to keep it for themselves. The test of certainty varies in the case of discretionary trusts because it depends on whether it is a condition precedent or a condition subsequent. In the former case, the property cannot be distributed among the beneficiaries if the condition has not been satisfied, whereas in the latter case, the beneficiary is no longer entitled to the trust if the condition has been satisfied. Therefore, in the case of a subsequent condition, there must be certainty as to the condition from the outset of the trust, whereas, in the condition precedent, the trust is valid even if only one person satisfies the condition.

There is a dominant use of trust in commercial law for securitization and other distinctly non-gratuitous commercial transactions. Therefore, it can be argued that the creation of trusts should be subject to more stringent formality requirements or that it is easier to find trust in the context of a family relationship compared with situations involving commercial relationships. However, there is a lack of research in this regard due to the fact that very little attention has been given to the question of whether trusts are a better form of business arrangement than traditional alternatives, as well as whether the existing trust law has the capacity to govern commercial trusts. In an attempt to answer these questions, it can be debated whether corporations and commercial trusts can be viewed as mirror images of the same law, which are used to respond to and satisfy different needs of investors. For this reason, trusts have been used as an alternative to the traditional form of business organizations in the nineteenth century (Langbein). However, they are less frequently used today with

the same purpose because they are way more aggressive and heavily leveraged today than they were in the nineteenth century – a time marked with less risk of failure of a new business venture. There was less risk of insolvency as well, an element actively present in today's business arrangements. Therefore, the creation of trusts should be subject to more stringent formal requirements in situations involving commercial relationships in an attempt to face the increased competition in the market, which is an aggressive strategy to resolve the stigma of insolvency.

Even the most common and the easiest trust to identify, i.e., the express trust in which the parties expressly exhibit their intention to create trust on a property, is uncomplicated because it is governed by three certainties of intention, subject matter, and the object. These certainties provide the formula for finding the status of the creation and declaration of trust under any situation. Mere repetition of words does not create trust because an express trust does not exist or cannot be created in the absence of any of these three certainties, especially in the situation of declaration of trust in circumstances involving informal conversations or conduct.

Although it can be argued that the courts have been too willing to accept declarations of trust in an informal setting, this is not always the case. The decision of the court primarily depends on the level of satisfaction of the three certainties. Moreover, in a commercial arrangement, the creation of trusts should be subject to more stringent formality requirements.