

## Trusts Outline

### **I Essay Approach: 1) Are the reqs of a trust met? 2) What kind of Trust was created? 3) Was the Trust Modified or Revoked? 4) Are T's Acts Authorized and has T Breached Any duties?**

#### **A) Are the Elements of a Trust Met?**

- 1) Trust Defined: A fiduciary relationship + w/r/t specific property + created by settler + where T holds legal title to the Res + for benefit of B. B has enforceable equitable rights.
- 2) Requirements for a valid private express trust: **MNEMONIC: "B TRIPS"** ("So B Won't "Trip")
  - (a) Beneficiary: 4 reqs
    - (i) Req: **Mnemonic: A B can't be "BAD"** – benefit, accepts, definite & ascert
      - (1) Definite + Ascertainable person or group (capable of being identified by time interests are to be enjoyed). Includes: class gifts (if not overbroad/too big. E.g., state), child conceived but not born, corps & unincorporated assoc (under ML but not CL).
        - a. Note: Watch out for violation of RAP
      - (2) directly benefit from trust
      - (3) capable of taking & holding title to property
      - (4) accepts trust (may occur before/after creation of trust). Notice not req but E of intent no trust was intended
    - (ii) Consequences of no B: Argue there's 1) if discretionary power of appt formed or 2) resulting trust
    - (iii) Transferability of B's interest: General rule – freely transferable + creditors may attach. EXCEPTIONS: Spendthrift, Discretionary, Support Trusts or valid forfeiture provision
  - (b) Trustee: 4 reqs . **A Trustee must be someone who "CAAN" be a trustee.**
    - (i) Trustee must be NAMED (but Trust won't fail if T not named/named T refuses etc bc ct can assign)
    - (ii) T must have ACTIVE duties or B takes legal title
    - (iii) T must be CAPABLE of holding property for own benefit to be capable of holding property for trustee
    - (iv) T must ACCEPT responsibilities. (Once accepted, she can resign only w/ct's permission OR all B's consent. Not effective until new T)
      - (1) Merger: If B & T same person – legal & equitable titles merge. T holds legal title.
  - (c) Res (Trust Property): Must be:
    - (i) A presently existing property interest – NOT a mere expectancy. May be a future interest
    - (ii) identifiable & ascertainable (fee simple, insurance, stocks/bonds OK But NOT future profits, gifts S expects to inherit, or debt S owes to B bc liability, not property)
    - (iii) capable of being transferred into a trust
    - (iv) If res is land: writing required to satisfy SOF (unlike personal property, no writing req)
  - (d) Intent to Create a Trust:
    - (i) Precatory expressions/mere suggestions insufficient to create a trust UNLESS 1) specific & defined 2) directed to a fiduciary 3) failure would result in unnatural disposition & 4) S previously supported intended B. **Mnemonic: not permitted unless S makes a "FUSS"**
    - (ii) Intent must be externally manifested by S at time S owned property
    - (iii) S must intend trust take effect:
      - (1) If S intends trust to take effect at S's death: MUST comply w/Statute of Wills
      - (2) If S intends trust to take effect during S' lifetime: S may either have a:
        - a. Transfer in trust: 3<sup>rd</sup> person is trustee. If res in writing, S must execute & deliver deed complying w/SOF to trustee; if res is personal property: only need delivery
        - b. Declaration in Trust: S is the trustee; if res real property: W must satisfy SOF + state S is trustee; if personal property: no req for delivery

- (iv) Consequence of no manifestation of intent: TRANSFEREE owns res in FSA
- (e) Purpose: Must be a valid purpose (not contrary to public policy or illegal – restraint on marriage, fraud on creditors, encourage divorce, criminal/tortious conduct).
  - (i) If illegal at creation: excise OR if not capable of excision, invalidate trust or allow Trustee to keep res (punishes S)
  - (ii) If illegal after creation: Resulting trust
- (f) Settlor:
  - (i) Must have Capacity: Same as Ws
  - (ii) Revoking: Majority (Can not revoke unless express provision) v minority/CA: revocable
  - (iii) Beneficial interests retained by S (e.g., right to income for life) are alienable: involuntary alienation (may be attached by creditors) & voluntary alienation (S may transfer)

## II What Type of Trust is Created?

### A) Charitable Trusts (BTRIPS)

- 1) Definition: trust created for public benefit (poverty, religion, education). Consider: effect of trust.
- 2) Beneficiary: must be indefinite & not specifically named but ok if individual gets incidental benefit. S/A if charitable trust exists if to a small group of ppl (some cts: private express trust)
- 3) Generally – RAP does not apply. May endure indefinitely.
- 4) Consider Cy Pres Doctrine: Where the trust demonstrates general charitable intent (i.e., no specific beneficiaries), a ct in equity may MODIFY provisions of charitable trust where necessary so that T's intent is not frustrated by circumstances S did not anticipate. The COURT invokes doctrine so that T's intent may be effectuated "as nearly as possible."
  - (a) Distinguishing bw general & specific intent (whether B is specific, e.g., UCLA): consider both intrinsic E (Trust instrument) & extrinsic Parol E.
  - (b) E.g., S' general intent is to help poor & sick. Free hospital but funds insufficient. Cy pres: free clinic.  
Consequences of NO Cy Pres: Resulting Trust
  - (c) **TIP**: If cy press NA (i.e., specific intent), consider Doctrine of Changed Circumstance (A/k/a: Deviation Power): CT changes administrative/management provisions of T due if unforeseen circumstances to S + necessity (E.g., Great Depression, only bonds but then 1990, T petitions ct)

### B) Pour-Over Wills

- 1) Definition: An attempted testamentary gift to a pre-existing trust/attempt by D to have assets of estate added to corpus of trust
- 2) Ways in which pour-over provisions are probated w/W: 1) incorporation by reference 2) independent significance 3) UTATTA

### C) Honorary Trusts:

- 1) Definition: Trust created w/specific noncharitable purpose + no living B (e.g., trust for S' dog/to build a house, to advance an unusual ideology)
- 2) Consequence: Majority – unenforceable/T not required to carry out S' intent so resulting trust. Minority: power of appt created
- 3) RAP: may be violated bc no measuring life in being BUT some cts use T's life

### D) Totten Trust

- 1) Definition: Trust created whereby T holds \$ in savings account for B.
- 2) Characteristics:
  - (a) Freely revocable at any time expressly/impliedly
    - (i) BUT delivery/declaration of irrevocability: makes Trust irrevocable
  - (b) T has full control over account during lifetime & owes B no fiduciary duties
  - (c) terminates on B's death

(d) In some states: S' creditors can reach

3) Creation: Requires manifestation of intent to create trust

(a) Rebuttable presumption: where person deposits \$ in own name as "trustee for another"

E) Trusts That Restrain Alienation

1) General Rule: B of private express trust can voluntarily alienate interest in property (i.e., transfer rights to future payments) and creditors can involuntarily alienate B's interest in property (attach B's rights to future payments). EXCEPTIONS: Spendthrift, Discretionary, & Support Trusts

2) Spendthrift Trusts/Spendthrift Provision of Private Express Trust:

(a) Definition: Trust whose terms expressly prevent B from transferring his rights to future payments of income/principal AND which prevents creditors from attaching B's rights to future payments of income/principal. Restraint on Voluntary & involuntary alienation to protect B from own improvidence.

(b) Exceptions (CL):

(i) Preferred creditors may attach notwithstanding – include: 1) Govt creditors (IRS) 2) those who provide B's necessities of life 3) Child/Spousal Support 4) Tort j'ment creditors

(ii) Any creditor may attach amounts not needed to support B in his accustomed manner of living ("surplus"). Subjective test.

(c) Creating a self-settled spendthrift trust: permissible for voluntary alienation but not for involuntary alienation (to prevent creditors from attaching. Against public policy)

3) Support Trusts:

(a) Definition: Trust where the terms expressly provide that trustee can pay only so much principal/income as is necessary for B's health, support maintenance & education.

(b) Alienation: No voluntary alienation (B can't transfer rights). Involuntary alienation & self-settled support trust: same rules as w/spendthrift trusts

4) Discretionary Trusts:

(a) Definition: Trust where terms expressly give T discretion in determining when and how much principal or income to pay to the B, if ever.

(b) Alienation: No voluntary alienation; Creditors can't attach BEFORE T exercises discretion to make payments but after T exercises discretion, right "vests" in B & creditors may attach

5) Resulting Trusts:

(a) Definition: An implied in fact trust where resulting T transfers property to S if settler is living. If S is not living, to residuary estate & if no residuary estate, to heirs in intestacy.

(b) Creation: 7 situations

(i) When private trust ends by own terms + no provision for what happens to corpus afterwards (e.g., S creates Trust to give daughter law school education. What happens after she gets JD?)

(ii) When private express trust fails bc no B

(iii) Where private express trust fails bc after creation – the trust becomes illegal

(iv) Where there is excess corpus in private trust (trust had limited purpose)

(v) Where charitable trust ends bc of impossibility/impracticability AND Cy Pres can't be used

(vi) A "purchase money resulting trust" exists. E.g., Rajan (A) makes a trust when he's 150 yrs old. Because I'm dead, Rajan pays Gilbert (B) to have title to Arizona house transferred to my niece (C).

(1) If A & C are closely related (e.g., Rajan & his daughter): rebuttable presumption that Rajan meant to make a gift to his daughter.

(2) BUT if A & C aren't closely related (e.g., Rajan & Aumor), there is rebuttable presumption that Aumor is holding as a purchase money resulting trustee for benefit of Rajan.

(vii) Secret and Semi-Secret Trusts: **Tip: HEAVILY TESTED – Discuss both**

- (1) Secret: Where there is no mention of the trust in the W + res devised to Trustee, constructive trust imposed in favor of intended B ONLY IF: trust ascertainable w/extrinsic E – to establish B’s identity.
    - a. E.g., I leave W & devise res to pool cleaner but my W makes no mention of the trust.
      - Consequence: Constructive trust imposed in favor of my daughter IF she can present parol E to ascertain her identity as B.
  - (2) Semi-secret: The W makes a gift to a person to hold as trustee But doesn’t name the B
    - a. E.g., Above e.g. I leave W that mentions trust & gives res to pool cleaner but don’t mention my daughter – my intended B. Different consequence: RESULTING TRUST (residuary devise & if I have none, then my heirs in intestacy)
- 6) Constructive Trusts:
- (a) Definition: An equitable remedy to prevent fraud/unjust enrichment/disgorge profits from ill-gotten gains. Legal title is in the trustee wrongdoer who must convey equitable title & account for all profits/damages to the B. Equitable defenses apply (remedies).
  - (b) Creation: 4 situations
    - (i) Self-dealing
    - (ii) Fraud in the inducement: W denied probate & heir is made constructive trustee
    - (iii) Secret trust (supra)
    - (iv) Oral real estate trusts: E.g., I tell Gilbert, If I give you the deed to my house, will you hold it for my daughter’s (B’s) benefit?
      - (1) General Rule: Gilbert (T) can claim SOF as affirmative defense but EXCEPTIONS (3):
        - a. There is a fiduciary relationship bw Settlor (me) & trustee (Gilbert)
        - b. Fraud in the inducement by Trustee
        - c. Detrimental reliance by B: Requires BOTH possession AND making improvements.

### **III Was the Trust Modified or Revoked? Consider: Modification by Settlor, Ct, Termination of Revocable Trusts v Irrevocable Trusts**

- A) Modification of Settlor:
  - 1) Majority: S may modify trust ONLY if S expressly reserves power to. If S has the power to revoke, S automatically has the power to modify
  - 2) E.g., Majority. Rajan leaves a trust for my niece where Rajan expressly reserves power to revoke. Rajan wants to add assets to trust after trust created. Rajan has power to modify bc power to revoke
- B) Modification by the ct: Consider 1) Cy Pres & 2) Deviation Power/Doctrine of Changed Circumstance
- C) Termination of Revocable Trust: Majority: S must expressly reserve v CA/Min: freely revocable
- D) Termination of Irrevocable Trust: 3 ways irrevocable T may end prematurely (before time set in T)
  - 1) S + all Bs agree to terminate: Bs include contingent remaindermen – must appt guardian ad litem
  - 2) All Bs agree to terminate + all material purposes accomplished. Appt guardian ad litem for CR
  - 3) Operation of law: Under Statute of Uses, if T has no active duties & just holding bare legal title, B get legal title by operation of law. Some jxs.

### **IV Are T’s Acts Authorized and has T breached any duty? Consider: T’s powers, T’s duties to B & Remedies & T’s duties to 3<sup>rd</sup> Persons**

- A) T’s Powers: T has enumerated powers expressly conferred by trust instrument + implied powers (necessary to carry out trust purposes). E.g., power to sell, incur expenses, lease, borrow & sue (B can’t sue unless w/T).
- B) T’s Duties Owed to B: **MNEMONIC: “SEA FAADE” (Tip: Always discuss several – always duty care)**
  - 1) Supervise Agents: T can only delegate acts that would be unreasonable for T to perform BUT can’t delegate administration of entire estate. May rely on professional advisers but can’t delegate decision-making authority to them + can’t delegate to another trustee.

- (a) Co-trustees can act by MAJORITY (ML) & may be liable to acts of ea other
  - (b) CL: Can't delegate duty to invest to a professional manager v ML: can delegate.
  - 2) Earmark assets: T owes a duty to separate trust assets from other assets. Traditional: T SL. ML: T liable only if damages caused by failure to earmark. May not commingle personal funds & trust funds AND trusts from diff funds.
  - 3) Act w/degree of care, skill & prudence exercised by RPP managing own property (higher if special skill)
  - 4) Follow instructions: to comply w/terms & duties under trust (but not blindly)
  - 5) Avoid self-dealing/Duty of Loyalty:
    - (a) T must administer Trust for benefit of B & thus not engage in self dealing (e.g., preferring one B over another, selling property to trustee's spouse, or trustee-L hires herself; doesn't matter if T had good faith)
    - (b) Consequences of breach: trustee is "surcharged"- must make good lost or profit disgorged via constructive trust
  - 6) Account: T on regular basis must give Bs a statement of Income & Expenses on trust or Bs may file action for accounting. Cash dividends treated as income but stock dividends as principal. Expenses: property taxes, mortgage payments, repairs & maintenance.
  - 7) Diversify/Duty to Invest: 3 views.
    - (a) State lists: Some states specify "good investments" – fed govt bonds, federally insured CDs, 1<sup>st</sup> deeds of trust in real estate, & some jxs – stocks of solid publicly traded co. NEVER in new business or 2<sup>nd</sup> deeds of trust in real estate, unsecured loans or 2<sup>nd</sup> mortgages. Individual investments scrutinized
    - (b) CL Prudent Test: Must invest prudently w/degree of care req (or higher stnd if applies). "good" investments under CL: fed govt bonds, fed insured CD, 1<sup>st</sup> deeds of trust in real estate, blue chip stocks, some jx: maybe mutual funds
    - (c) Uniform Prudent Investor Act: T must invest as a "prudent investor." Individual investments not scrutinized BUT T has a duty to diversify portfolio.
    - (d) Consequences of breach: T is "surcharged" (must make good on loss) or if a profit, Bs affirm
  - 8) Remedies for Breach: damages, constructive trust, equitable lien, remove trustee, ratify transaction if good for B
- C) T's Duties Owed to Third Persons: Liability in K and Tort
- 1) Liability in K:
    - (a) CL: T sued in personal capacity liable but can get indemnification. ML: If other person to K knows T is entering into K in T's representative capacity, T may only be sued in representative capacity & not personally liable
  - 2) Liability in Tort:
    - (a) CL: T sued in personal capacity but can get indemnification. ML: personally liable for torts ONLY if T personally at fault (acted negligently etc). NOT liable for acts of agents – then T sued in rep capacity