

Constitution of Trusts and Gifts Essay

Trusts and gifts are ways in which an individual voluntarily decides to transfer their beneficial interest in property to another person. An individual who is creating trust should have the capacity. The law defines capacity as the capability to understand and retain information relating to the decision and to weigh it in balance when making a decision. Trusts and gifts have been so fractious because the law is not entirely clear. To get a clearer picture of this field, it is crucial to look at case laws and how the courts have interpreted them. This discussion will consider case laws involving trustees and givers as references to show how cases of trusts and gifts have been handled legally.

Court decisions are usually helpful because they reinforce knowledge and understanding of tough subjects. This is why they are more relevant to trust, given the subject that, in most cases, has been bewildering for those who do not trust practitioners. The requirements for a valid trust to be created are certainty of trust property, intention, and beneficiaries. Most disputes that arise in a proper trust involve the certainty of purpose. Still, in some instances, the question of trust property may develop, and it is exciting as it involves sole trader business individuals. A perfect case concerning the validity of trust is *North v Wilkinson*. The case's primary goal was to determine whether John North had correctly established a trust for shares in a company endeavor he was running, which involved many investors. His company's investors sued Mr. North for documents and agreements that he planned to construct trusts in their favor, and as a result, they were entitled to a share of the damages recovered from Electrolux. After listening to both sides, the court of appeal concluded that the relevant documents submitted were prepared without legal advice. This case shows that records should be created so that there is no doubt trust has been made between the subjects involved.

In some instances, a settlor can give lifetime trust to either a kinsfolk or any other person they choose. However, there are questions about clauses in the trust deed's legal documents. One of the cases involving the interpretation of two contradicting clauses in a lifetime trust is *Millar v Millar*. Two of the trust's early terms gave the settlors reversionary interests and power of appointment. However, a later clause was formulated, and it contradicted the earlier provision by excluding the settlers from receiving any benefits from the trust. This contradiction led to the settlers of the trust and its trustee seeking a solution from the court.

To resolve the contraction, two alternatives were put on the claim of trust deed: first, its construction, and second, rectification. The judge did not grant a hearing for the case; instead, he used evidence from a solicitor who had prepared a trust deed. In addition, the judge confirmed the principles of constructing valid wills from the supreme decision on *Marley v Rawlings* and then applied them to the case. From this case, the judgment was that there is evidence of the true intention of settlors, and the clause was inconsistent with that intention; therefore matter of construction should be abandoned entirely. It is clear from this case that having legal advice is not a guarantee that a will is appropriate. Further, there appears to be a clear case of "paraphrase" when constructing a trust, with conventional clauses from a predecessor book being copied.

Settlors should be cautious when including beneficial clauses in their wills to avoid creating a problem for executors when determining who should profit from their assets. The decision of *Macintyre v Oliver* is an excellent example of the significance of exercising caution while drafting suitable clauses. The disagreements concern Violet Hamblen-Thomas' will trust and the court's directions on choosing trustees and the actual design of the trusts. Violet's will stated that her estate should be held in trust for her son Edwin for the rest of his life, with his children taking over if he dies. If Edwin dies without children, the estate has to go to her closest friend, Enid. If Enid died earlier, Violet, Enid's daughter, Victoria, should inherit the property. Violet's will was perfectly constructed to avoid court cases over the estates. However, issues arose because Violet died in 1973, and Enid survived but passed on in 1998. In addition to the dispute, Edwin died in 2014, and he was childless.

According to the executors' perspective, a gift to Enid was subjected to a condition, and Edwin's death after her was not included in the will. Since Edwin did not predecease Enid, the gift over Victoria fails. On the other hand, Victoria's argued that Violet's estate to Enid would not fail. The case was left open to the judge to understand the relevant clause in Violet's scenario on whether the gift to Victoria will take effect. The judge ruled in favor of Victoria because Violet had initially intended to gift over the estates to lifelong friends if close family or kinsfolks were not available. Although the court decides on this case, a will should not be left to court due to its unavoidable costs. Therefore, settlors constructing intentions should be helped by a legal adviser who will identify any wording not about the trust.

Some gifts left to the trust can be subjected to inheritance tax relief from another perspective. Estates' gifts and some assets that have been gifted to charity at 10% or more of the net value are usually subjected to inheritance tax (IHT) relief. However, there have been disputes on some gifts not qualifying to have IHT reduction. *Routier v Commissioners for Her Majesty's Revenue and Customs (HMRC)* is a perfect case law that involves despite of properties that qualify for IHT. It involved a gift of UK property willed to a charitable trust governed by Jersey law during the construction of the will. The argument brought forward by HMRC was that UK law does allow that kind of gift to be exempted from IHT. In addition to the statement, the charity receiving the gift was governed by Jersey law, which is opposed by UK law. If the gifts were given to a UK charity under UK law, they would have been exempted from IHT.

On the other hand, the taxpayer argued that UK law was breaching EU law as it restricted the movement of capital between EU member states. After reviewing both sides' arguments, the Supreme Court ruled in favor of the taxpayer and concluded that IHT should not be paid as the UK was inconsistent with EU law. This ruling is a significant development with potential implications for gifts of charities to states under EU law. Although EU law is considered supreme, such cases will be affected in the future if Brexit happens.

Currently, deathbed gifts have become controversial due to not following requirements strictly. After making deathbed gifts, they become effective after the giver's death, but the law's needs are not strictly followed. The case of *Davey & Anor v Bailey & Ors*, on the other hand, has raised questions about the issue by highlighting that the standards should be implemented firmly and narrowly regardless of compassion for the party who is harmed by the strict approach. In addition, this case highlighted the dangers of deathbed gifts. The most common risk is that

disgruntled heirs of the dead may challenge the gift. Due to this, deathbed gifts should not be used as alternative options in complex situations because they are subjected to strict requirements with narrow interpretations. The controversy over deathbed gifts is yet to be resolved, and the courts are unwilling to reduce the requirements anytime soon. Soon courts are likely to be asked to look deeply into the deathbed gifts since Covid-19 has brought issues of lockdown that lead to incomplete wills.

When a settlor establishes an explicit trust, they must either use a self-declaration of trust or transfer property to the trustees, instructing them to keep the property in trust for the beneficiaries. This adaptation is commonly known as the rule in *Milroy v Lord*. The beneficiaries, which could be a volunteer, can implement the trust due to the trust's immaculate creation. However, in instances where trust construction is incomplete, the transaction concerning the intended trust is used as the agreement of creating trust. According to the contracts act of 1999, which protects third parties' rights, a trust agreement can be enforced by an individual who has provided consideration.

The judgment delivered by Turner on *Milroy v lord* identified different methods of constructing an express trust. In general, the judge determined two ways of creating trust, and the responsibility was on the settlor to implement the strategies to carry out his intention. The case brought to judges Knight-Brue and Turner involved a settlor who had executed a deed suggesting the shares to Mr. Lord on trust for Mr. Milroy. The transfer of shares was complete if the transferee's name was registered in the company's records. Despite authorization as the settlor's agent, the trustor did not finalize the transition. Following the settlor's death, Lord presented shares credentials to the settlor's administrators, and the issue that arose was whether the shares were held in the claimant's trust. According to the purpose for holding, there was no gift of shares to the objects and no transfer of shares to the intended trustee.

Upon reviewing the evidence for the case, the court decided that there was no gift of the shares to Mr. Milroy. Secondly, the intention of the settlor was not to create trust. Third, whether forming a trust or legally passing property, the transferor should do everything possible to guarantee that the possession is vested in the name of the designated transferee. Fourth, the conditions for transferring property vary based on the property involved. Fifth, subject to a legitimate declaration of trust, the trustee can pass the asset to the trustee. Sixth, the settlor has the right to declare himself as a trustee. Finally, when there is an intention to create trust using these modes, the court will not automatically adopt another construction method. Although these rulings were made many years ago, they are still the primary rules that concern the constitution of a trust.

Further on, the constitution of trusts and gifts has been facing controversies regarding the appointment of protectors and trustees. *Davidson v Seelig* is one most common cases that have tried to handle the issue of trustees and protectors. The second defendant in the case asked for authorization for the ostensible guardian of the two settlements to alter his defense and file a counterclaim in action brought by the ostensible beneficiaries disputing the validity of his appointment as the protector. The agreements were based on voluntary trusts established in the names of legatees, including the settlers' children and distant relatives. The trustees established a protectorship regime in 2003 through deeds of appointment. Upon reviewing the case, the

judges rejected the application because it was late and attracted a stricter approach by the court. The judgment, in this case, shows that it is tough to change and re-amend wills about protectors and trustees.

Bibliography

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