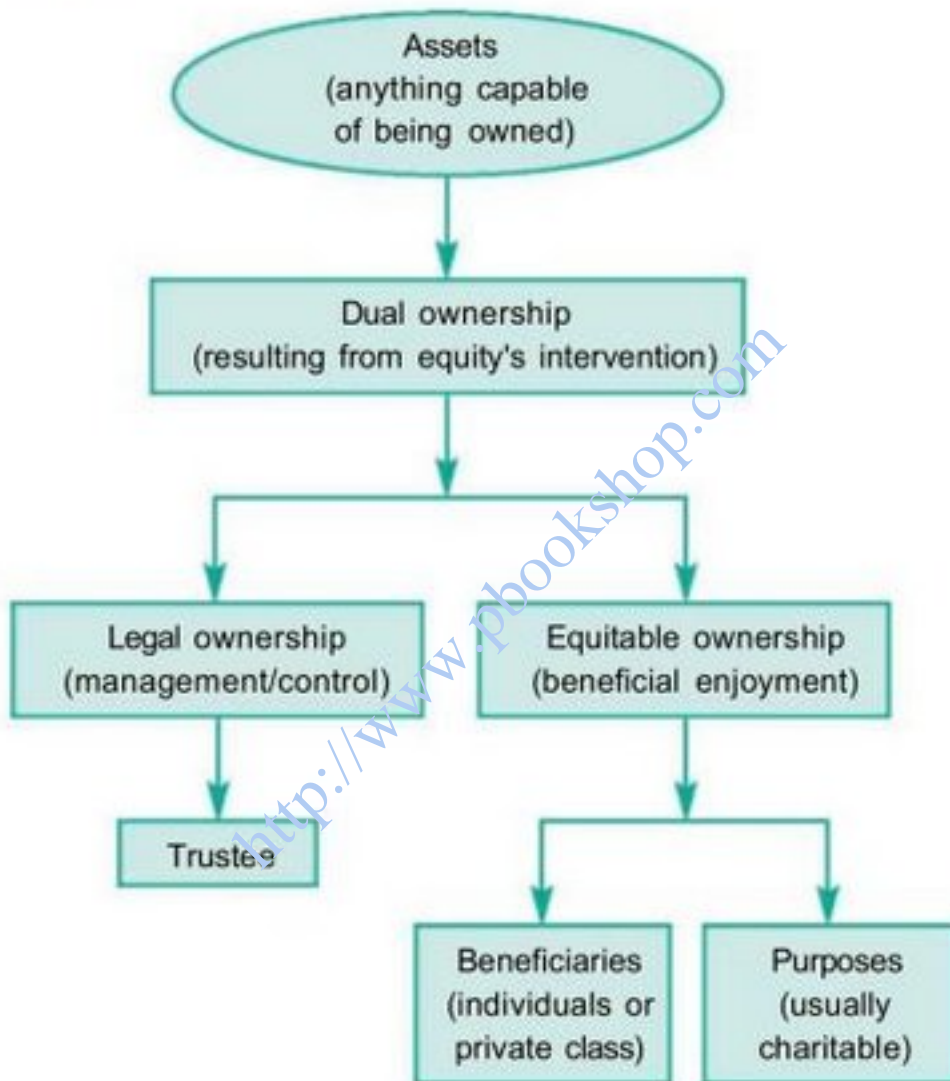


EQUITY AND THE NATURE AND TYPES OF TRUST

A trust is a relationship which arises where one person (the trustee) is compelled in equity to hold assets for the benefit of another (the beneficiary) or for a purpose permitted by law.

THE ANATOMY OF A TRUST



KEY ELEMENTS OF THE TRUST

ASSETS

Trusts are inextricably linked to assets. As Lord Browne-Wilkinson emphasised in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996], 'in order to establish a trust, there must be identifiable trust property'. Anything that is capable of being owned may constitute the assets.

EQUITABLE ORIGIN OF THE TRUST

The trust (or use as it was called) arose in the Middle Ages for a variety of reasons, for example as a way of avoiding feudal dues which were payable on death. By vesting legal ownership of property in two or more trustees, who could be replaced as they died, continuous ownership of the property could be secured and the feudal dues avoided.

From the outset, the common law courts refused to recognise the rights of the beneficiary who began to petition the King. In time, the King passed these petitions to his Chancellor, who could use his discretion and make such order as appeared to him to be fair or 'equitable'. The sittings of the Chancellor to hear the petitions became more regular and by the end of the 14th century had developed into the Court of Chancery. Gradually a doctrine of precedent began to develop for equity, just as it did for the common law.

There were thus two sets of courts, the common law courts administering the common law and the Court of Chancery administering equity. Both had their own particular procedure and remedies. During the 19th century, a number of reforms took place culminating in the **Judicature Acts of 1873–1875** which replaced the common law courts and the Court of Chancery by one Supreme Court of Judicature in which each court had the power to administer both common law and equity according to the same rules of procedure. The orthodox view is that whilst the administration of the common law and equity were fused, the rules of common law and equity remain distinct. 'The two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters' per Lord Evershed.

THE MAXIMS OF EQUITY

The maxims of equity are basic principles developed by the Court of Chancery which are still applied by the courts as guidelines when exercising their equitable jurisdiction. The main maxims are as follows.

Delay defeats equities

The claimant who seeks an equitable remedy should not delay in taking action.

Equity is equality

Where two people have an equal claim to property, equity will order an equal division.

EQUITY AND THE NATURE AND TYPES OF TRUST

Equity acts *in personam*

Equity acts against the person and not *in rem*, ie equitable remedies are exercised against the person, for example an injunction may compel a person not to do something. A failure to comply is regarded as contempt of court punishable by imprisonment.

Equity looks to the intent rather than the form

Equity will give effect to the substance of the transaction rather than merely to its outward appearance.

Equity will not allow a statute to be used as an instrument of fraud

The court will not apply a statute which imposes formal requirements if strict compliance would be unjust by promoting the fraud of a litigant.

Equity will not allow a trust to fail for want of a trustee

If necessary, the court will appoint a trustee.

Equity will not assist a volunteer

Equity will not provide a remedy for a person who has not given consideration, for example the contractual remedy of specific performance would not be available to a volunteer. However, in relation to trusts, a beneficiary (even if he is a volunteer) will be afforded the protection of equity *provided* the trust is completely constituted (see later).

Equity will not perfect an imperfect gift

If a donor makes an imperfect gift (ie the donor does not comply with the requirements to transfer legal title to the property to the donee), equity will not perfect that gift.

He who comes to equity must come with clean hands

Equitable remedies are discretionary, and such a remedy will not be granted if the claimant has acted fraudulently or unconscionably.

He who seeks equity must do equity

A person seeking equitable relief must be prepared to act fairly towards the other party.

ENFORCEMENT OF THE TRUST

Where a trust is for individuals or a private class of persons, eg 'my employees', this entitles those persons to enforce the trustee's obligations, ie the beneficiary enforces a private trust.

Where the trust is for a purpose recognised by the law as charitable, and is exclusively charitable and for the public benefit, then it may be enforced by the Attorney General as a charitable trust.

The general rule is that a non-charitable purpose trust is void as there is no beneficiary to enforce the trust.

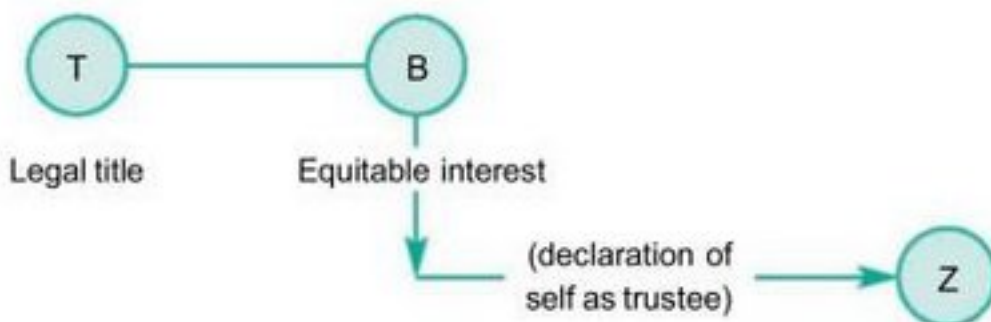
DUALITY OF OWNERSHIP

Under the common law, once trust property is vested in T, he is deemed to be the legal owner.

Equity does not dispute T's legal ownership but recognises B as the equitable owner of the trust property. In substance, this means that T is responsible for administering the trust property while B enjoys the benefits flowing from the property.

As Lord Browne-Wilkinson pointed out in the *Westdeutsche* case, the most notable consequence of such equitable ownership is that, 'once a trust is established, as from that date of its establishment, the beneficiary has, in equity, a *proprietary interest* in the trust property' [emphasis added]. The hallmarks of this interest are that:

- it is capable of being disposed of or acquired like any other interest in property;
- it may itself become the subject matter of a trust; for example, if T holds property on trust for B, B may declare himself a trustee of the interest for the benefit of Z (known as 'Sub-trust');



The diagram shows a central node 'T' (Trustee) with three arrows pointing to it from below: a solid arrow from 'Beneficiary', a dashed curved arrow from 'Beneficiary', and a solid arrow from 'Y'. To the left of 'T' is a circled '1' with the text 'B directs T to hold on trust for Y'. To the right of 'T' is a circled '2' with the text 'T now holds on trust for Y'.

CLASSIFICATION OF TRUSTS

Public trusts		Private trusts	
Type of trust/gift	Enforceability	Type of trust/gift	Enforceability
(1) Trust for specified charitable purpose	Enforceable by AG	(1) Trust for persons	Enforceable by beneficiaries
(2) Donations to charitable bodies	Enforceable by AG	(2) Trust for non-charitable purposes	Not ordinarily enforceable but may be upheld if for upkeep of tombs/pets and trustee is willing
		(3) Gift to unincorporated non-charitable body	Depends on whether it is construed as being on trust for its purposes or a gift to its members

Public or charitable trusts

A charitable trust or a public trust is for a purpose which is recognised by the law as charitable, for example the relief of poverty. The trust must be for the public benefit and be exclusively charitable. Charitable trusts enjoy a number of legal advantages, for example they may be enforced by the Attorney General, and have many fiscal privileges.

Private trusts

A private trust is for the benefit of individuals or a specified group of persons, for example 'my grandchildren', and is enforceable by such beneficiaries.

Difficulties arise where a trust is created not for the benefit of ascertainable persons but for a stated purpose which is not charitable. These are called non-charitable purpose trusts. The general rule is that these trusts are void as there is no beneficiary to enforce them.

However, there are three exceptions when trusts for non-charitable purposes will be upheld – they are trusts for the erection and maintenance of monuments or graves; trusts for specific animals; trusts for the saying of private masses. These exceptions are said to be 'concessions to human weakness or sentiment' *Re Astor's Settlement Trusts* [1952] and are called trusts of imperfect obligation or unenforceable trusts. See *Re Dean* [1889] and *Re Hooper* [1932].

The problem of whether a trust/gift is for a purpose or for persons is particularly acute where property is given to an unincorporated association which does not have charitable purposes (see Chapter 9). Such a gift may be construed as giving rise to a trust for the association's purposes, in which case it is liable to fail as a non-charitable purpose trust. Alternatively, the gift may be construed as one to the members who collectively make up the association with the result that it will not fail for want of beneficiaries. As a rule, however, the individual members do not thereby acquire immediate distributive shares in the property given; rather it will be treated as an accretion to the association's assets to be applied for the benefit of the members. See *Leahy v AG for New South Wales* [1959]; *Neville Estates v Madden* [1962]; and *Re Recher's WT* [1972].