**TRUSTS**

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# Question 1

**What is a Trust**

According to ***Section 2 (a) of the Trusts (Scotland) Act, 1921***, “***Trust*** shall mean and include any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by Royal Charter, or by resolution of any corporation or public or ecclesiastical body”.

According to ***Section 3 of the Trusts (Scotland) Act, 1921***, all trusts shall include the following powers and provisions unless the contrary be expressed, i.e.,

1. The power of any trustee to resign the office of the trustee;
2. The power of the trustee/trustees or of the quorum of the trustees to assume new trustees;
3. A provision stating that a majority of the trustees accepting and surviving shall be a quorum.
4. A provision stating that the liability of each trustee shall be to the extent of his own acts and intromissions (Follan, 2020, p.323). No trustee shall be liable for the acts and intromissions of other trustees. Trustees shall not be held liable for omissions.

To create a trust, the following three requirements should be fulfilled:

* There must be 3 parties to create a trust, i.e., ***Trustor, Trustee, and Beneficiary***.
* The property must be legally transferred from the trustor to the trustee.
* There must be a ***clear purpose and certainty of intentions*** to create a trust.

**Types of Trusts**

***Inter Vivos Trusts***

***Inter Vivos*** is a Latin phrase that means “***Between Persons***”. An inter vivos trust is also known as a ***living trust*** (Zaritsky, and Danforth, 2018). It is a fiduciary relationship that is created during the lifetime of the trustor and is used in estate planning. The duration of this trust is determined at the time of its creation (Negron, and Alberto, 2019, p.498). It comes into effect during the lifetime of the trustor. This trust is created to make it easier to distribute the assets of a trustor to the beneficiaries.

***For Example***

*In Rae v Meek (1889) 16R (HL) 31*

Mr. and Mrs. Rae created a trust. The beneficiaries of the trust were their children. The couple also selected the trustees and took a speculative loan against the security of under construction buildings in the Gallowgate in Glasgow. The trustees did not take independent advice regarding the investment. The investment in those buildings was disastrous and did not yield positive results. The children filed a case against the trustees. The House of Lords held that the trustees should have taken independent advice. The standard of care of the trustees was not subjective but objective and hence they were held liable to pay compensation to the trust.

***Mortis Causa Trust***

Mortis Causa trust is also known as Testmenatriy trust and it is the opposite of an Inter Vivos Trust (Cohen-Murison, 2020, p.47). This trust comes into existence after the death of the trustor. These trusts are created mainly for the protection of the rights and interests of the dependents and minors who are not able to take care of themselves.

***For Example***

*Macpherson v Macpherson’s Curator Bonis (1894) 21 R 386*

In this case, the deceased left their money in a will for Katherine and her unsound sister for their benefit. The court held it to be a sufficient declaration of trust.

***Private Trusts***

Private trusts are created for the benefit of a specific group of individuals who are named or designated in the trust deed (Donnelly, 2020, p.39). In private trusts, the trustees manage and control the property of the beneficiaries until they become major or if they are not of sound mind. In a private trust, the trustees are under a legal duty to do the best for the beneficiaries.

***Public Trusts***

Public trusts are made to benefit either the entire community or a particular section of the community. In a public trust, no private individual gains any profit from the operations of the trust and the assets of the trust. The assets of the trust are used for the benefit of the public.

***For Example***

*McCaig’s Trustees v Kirk Session of the United Free Church of Lismore* 1915 SC 426

In this case, a woman named Catherine McCaig left a will that stated that trustees could react bronze statues of her family members at McCaig Tower in Oban. the court held it to be void and against public policy and it was of no benefit to anyone.

***Charitable Trust***

In Scotland, so many public trusts are also charities. These trusts are registered in the office of the Scottish Charity Regulator (OSCR) (McGregor-Lowndes, and Hannah, 2020). These trusts are subject to the provisions of the Charities and Trustee Investment (Scotland) Act 2005.

***Reasons to Create Trust***

* *To administer the estate or other assets of a deceased person-* A trust is created to distribute the property of the deceased among the beneficiaries without any dispute.
* *To protect the vulnerable-* To maintain those beneficiaries who are under age or are of unsound mind or have any disability.
* *Liferents-* The property owned by a trust but being used by the beneficiaries without having rights to dispose it off.
* *Bankruptcy-* To set aside the property and separate it from the personal assets of the owner to avoid creditors.
* *Finance-* Eg. Investment Trusts, Unit Trusts, and Pensions Funds.
* *Tax Planning-* To avoid paying higher taxes, creating trusts is the best option.
* *Charitable Purposes-* In Scotland many trusts operate for Charitable purposes to benefit beneficiaries at large.
* *Trustor’s Insolvency-* The trustor will have many benefits in case of any incapacity.
* *Employee Share Scheme-* To obtain shares or rights in a company and to distribute them among the employees.

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