

Formalities required for Transfer of Assets

Has there been a successful transfer?

BY WILL

Testamentary dispositions	s 9, Wills Act 1837 (as amended by Administration of Justice Act 1982, s 17): “No will shall be valid unless (a) It is in writing and signed by the testator or someone in his presence and his direction, AND (b) It appears that the testator intended by his signature to give effect to the Will, AND (c) In the presence of two or more witnesses present at the time, AND (d) Each witness either attests and signs the Will or acknowledges his signature in the presence of this testator PARTICULARLY IMPORTANT WHERE A SETTLOR/TESTATOR HAS DRAFTED THEIR OWN WILL
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Sham trusts

Snook v London and West Riding Investments: Defined a sham as being “acts done or documents executed by the parties which are intended to create the appearance of creating” a trust.

Midland Bank plc v Wyatt: The claimant bank obtained a charge order over Wyatt’s interest in the matrimonial home. Before this, Mr Wyatt had purported to declare a trust of his interest in the home for the benefit of his wife and children. The court held it was not a valid declaration of trust because he lacked any real intent to hold the interest on trust for the benefit of his family. Rather the trust was to safeguard his interest if his company were to face financial difficulties.

Twinsectra Ltd v Yardley: It is an objective test: i.e. it is based on whether the reasonable person would could a sham is being intended.

Certainty of Intention in a Commercial Context

Re Lewis’s of Leicester Ltd: A company which traded as a department store, licensed other traders to trade within the shop. Some of these traders, known as ‘concessionaires’ paid takings into tills controlled by the company, which takings were then paid into a separate bank account; at the end of the month. The company entered into administration and the question was whether the money paid into the bank account was intended to be held on trust for the concessionaires. Held: It was a trust because of the payment into a separate bank account, although the company was also a beneficiary of this trust to the extent of its right to receive a commission.

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IF THERE IS NO CERTAINTY OF INTENTION, THE TRUST WILL FAIL:

The property may be considered an outright gift OR the property will result back to the creator by operation of a resulting trust.

A discretionary trust might still be invalid however, for reasons of

(1) Administrative Unworkability

- If the class of objects is so wide that it cannot be considered to be anything like a class, the trust will be considered to be administratively unworkable and will be void
 - **McPhail v Doulton:** Lord Wilberforce tentatively suggested that a discretionary trust for the benefit of 'all the residents of Greater London' would be administratively unworkable and so void.
 - **R v. District Auditor ex p West Yorkshire Council:** It was held a court could not execute a trust with a very large class of objects
 - **Re Hay's Settlement Trust:** Sir Robert Meggry V-C recognised that a discretionary trust for anyone other than a few specified people would be administratively unworkable.

(2) Capriciousness

- A trust will not pass the is or is not test if it is no sensible and a class of beneficiaries that do not have a link with the settlor. ie. the settlor had no sensible intent in establishing the trust.
 - **Re Manisty Settlement:** A power given to trustees to benefit the 'residents of Greater London' would be capricious because there was no connection between the settlor and the residents in the area of Greater London.
 - Cf with **R v District Auditor, ex p West Yorkshire:** It was recognised that benefitting the inhabitants of West Yorkshire was not capricious. Because the settlor was the county council for that area which was consequently especially interested in the needs of those living there.

Applying the is or is not test:

Re Baden (No 2): The question here was whether 'relatives' was conceptually certain. Court of Appeal recognised that both 'relatives' and 'dependants' were conceptually certain.

Sachs LJ: Defined 'relatives' as descendants from a common ancestor whereas. Said if a particular person were not proved to be within the class, then he or she should be considered to be outside of it but this would not render the trust void; it would simply mean that the particular person was not an object under the trust.

Megaw LJ: Defined 'relatives' as descendants from a common ancestor whereas. However adopted a different approach. He concluded it was not necessary to show that a particular person either was or was not a member of the class, because it was not necessary to ascertain that it was enough that it could be shown of a substantial number of objects that they "is or is not" within the class. He said a 'substantial number' is a matter of common sense and degree in respect of the particular trust.

Stamp LJ: Defined them as the next of kin or nearest blood relations. He said it was not enough to be able to show that one person fell within or outside the class; rather it needs to be shown of any given person that he or she either "is or is not" within the class. It would be enough to show of anybody who might potentially be an object that he or she is or is not an object.

Stamp LJ's approach is most consistent with the test propounded by Lord Wilberforce in McPhail v Doulton: "is or is not" test.

- **Discretionary trusts**

- The trustee is under an obligation to distribute at some point, but has discretion as to how and when. Trustee is also under an obligation periodically to consider whether to distribute.
 - This type of trust is sometimes described as a 'trust power' - for criticism of the term in this context see *Bartlett and Stebbings* [1984]. This is because there is an obligation to make an appointment, but the trustee has a discretion as to who will benefit.
- The power must be exercised by the trustees. If the trustees fail to do so, it will be exercised by the court
 - So, in order for the power to be exercised, it is essential that the trustees know from the outset who the potential beneficiaries might be.
 - ***Sprange v Barnard* (1789) 2 Bro CC 595**
 - If this is unclear the trust will void for uncertainty

- **The essential test of certainty**

- Note the test for powers in:

- ***Re Gestetner Settlement* [1953] Ch 672**
- ***Re Gulbenkian's Settlement Trusts* [1970] AC 508**

- ***Harman J. in Re Gestetner***

- Donees of a power have to be able to say with certainty of any given person that he is or is not within the scope of the power. The "is or is not test" (or "Given Postulant").

- Confirmed by H.L. in ***Re Gulbenkian***

The rule was applied to discretionary trusts in the House of Lords in ***McPhail v Doulton* [1971] AC 424**

- The House of Lords decision in ***McPhail v Doulton***

- **Facts**

- the settlor established a fund for the benefit of the employees and ex-employees of the company, and their relatives and dependants
- It was recognised that the settlor had purported to create a discretionary trust, but the validity of this trust turned now whether relatives and dependants were sufficiently certain objects
 - Lord Wilberforce, giving the leading judgment.
 - **Held:**
 - Must be sufficient to say with certainty that any given individual 'is or is not' a member of the relevant class - **This is the GIVEN POSTULANT test.**
 - Any given person refers to anybody at all who might be considered to be a potential object
 - They stressed the need for linguistic certainty
 - Must be sufficiently clear concept, which you can tell with certainty a claimant "is or is not" a member of the relevant class.
 - Whereabouts of that person does not matter.
 - E.g. not knowing all your 'first cousins'.

The trial judge and the Court of Appeal applied this test in ***Re Baden's Deed Trusts (No. 2)*** but the test was interpreted in different ways by the three judges both as regards to conceptual certainty and evidential certainty.

- **Conceptual certainty**

- The test of certainty of objects will not be satisfied if it is not possible to define the description of the class with sufficient clarity (*McPhail*)
- ***Re Baden (No 2)***
 - The court of appeal recognised that both 'relatives' and 'dependants' were conceptually certain.
 - 'Dependants' were defined as those who are wholly or partly financially dependent on somebody else
 - 'Relatives' were defined by Sachs and Megaw LJ as descendants from a common ancestor; whereas Stamp LJ defined them as the next of kin or nearest blood relations
 - And so in ***Re Barlow's Wills Trusts***
 - the normal meaning of 'family' was considered to be those related by blood.

- **Re Harding**
 - A trust for the black community of four London boroughs would have been void for being administratively unworkable had it not been a charitable trust.
- **Re Hay's Settlement Trust**
 - Sir Robert Megarry V-C recognised a discretionary trust for anyone other than a few specified people would be administratively unworkable

(2) **Capriciousness**

- Considerations should be given to the nature of the class to determine whether the settlor had a good reason to benefit that particular class.
 - If it is arbitrary, the trust is likely to be void
 - **Re Manisty Settlement [1974] 2 All ER 1203**
 - **Templeman J**, although in the context of a case concerning fiduciary powers rather than discretionary trusts, suggested that a power given to trustees to benefit the 'residents of Greater London' would be capricious because the terms of the power negatives any sensible intention on the part of the settlor.
 - Why is benefiting the inhabitants of West Yorkshire not capricious and Greater London is?
 - Numbers - the connection between the settlor and the chosen objects must be significant as well. In **West Yorkshire**, the settlor was the county council for the area, which was especially interested in the needs of those living there.

If a settlor chooses to establish a trust for the residents of an area with which she has no connection and who he or she had no reason to benefit, it will be considered a capricious motive - This was recognised by Templeman J in **Re Manisty**.

No discretionary trust has however been invalidated for capriciousness

That trust will not pass the is or is not test if it is no sensible idea a class of beneficiaries that do not have a link with the settlor will be defined as capricious.

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Applying the is or is not test:-

- **Re Baden's Deeds Trust (No. 2) [1973] Ch 9** –
 - is "relatives" conceptually certain?
 - If relatives means from a common ancestry, can anyone say for certain that that person "is not" related.

Have to decide whether relatives pass the is or is not test:

- **Stamp L.J.**
 - Impressed with the argument that says you have to put a person in a "is" box or "is not" box for the test to be passed.
 - If relatives does mean decedents from a common ancestor - LJ stamp would have to name it void for uncertainty.
 - **Harland v Glin**
 - Talked about the word relations as "next of kin". Using that narrow definition, he held "relatives" was conceptually certain and so did pass the is or is not test.
- **Sachs L.J.**
 - Emphasised the need for conceptual certainty. He did think relatives meant decedents from a common ancestry but he believed provided the concept is clear, it does not matter if there is evidential difficulties, it is put to any person coming forward that he comes within the "is" part.