



**University of  
Zurich** <sup>UZH</sup>

Faculty of Law

# Law of Equity, Trust and Succession

Principles of Common Law

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# Equity and the Trust

- Historical development of equity and the Court of Chancery
- Maxims of equity
- Terminology of trusts
- Different types of trust
- Modern uses for trusts/international context

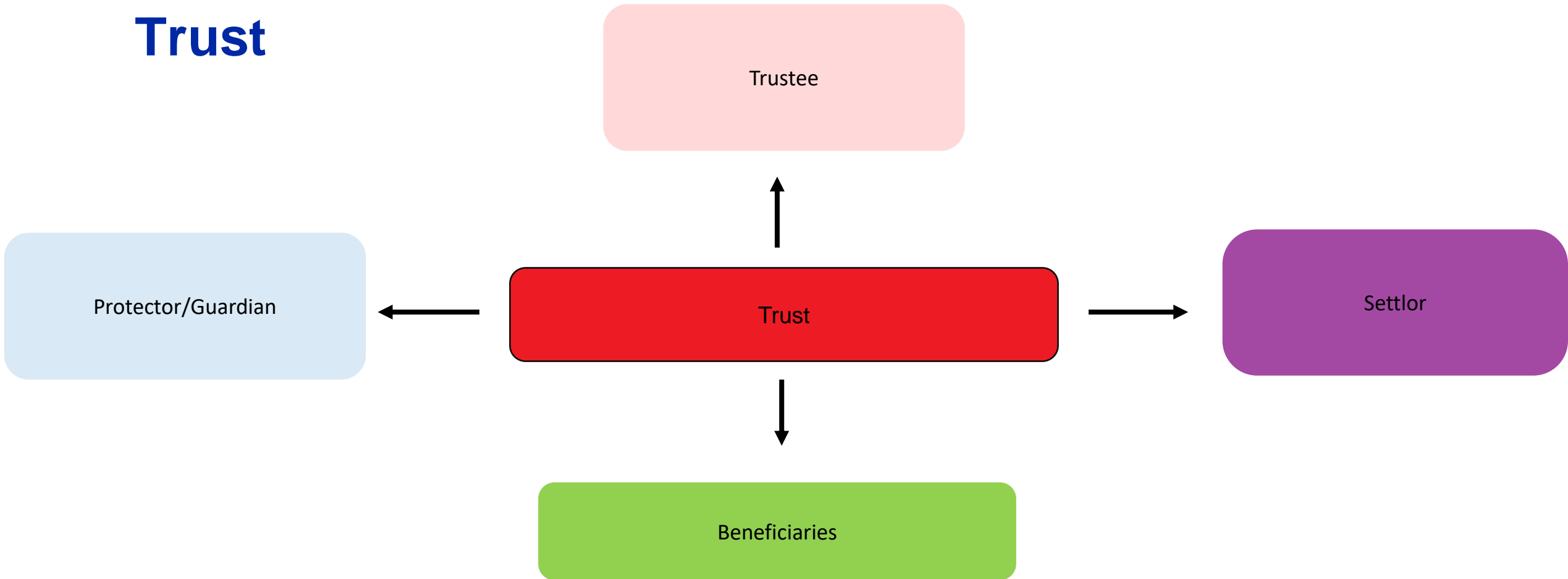


# Trust

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.”

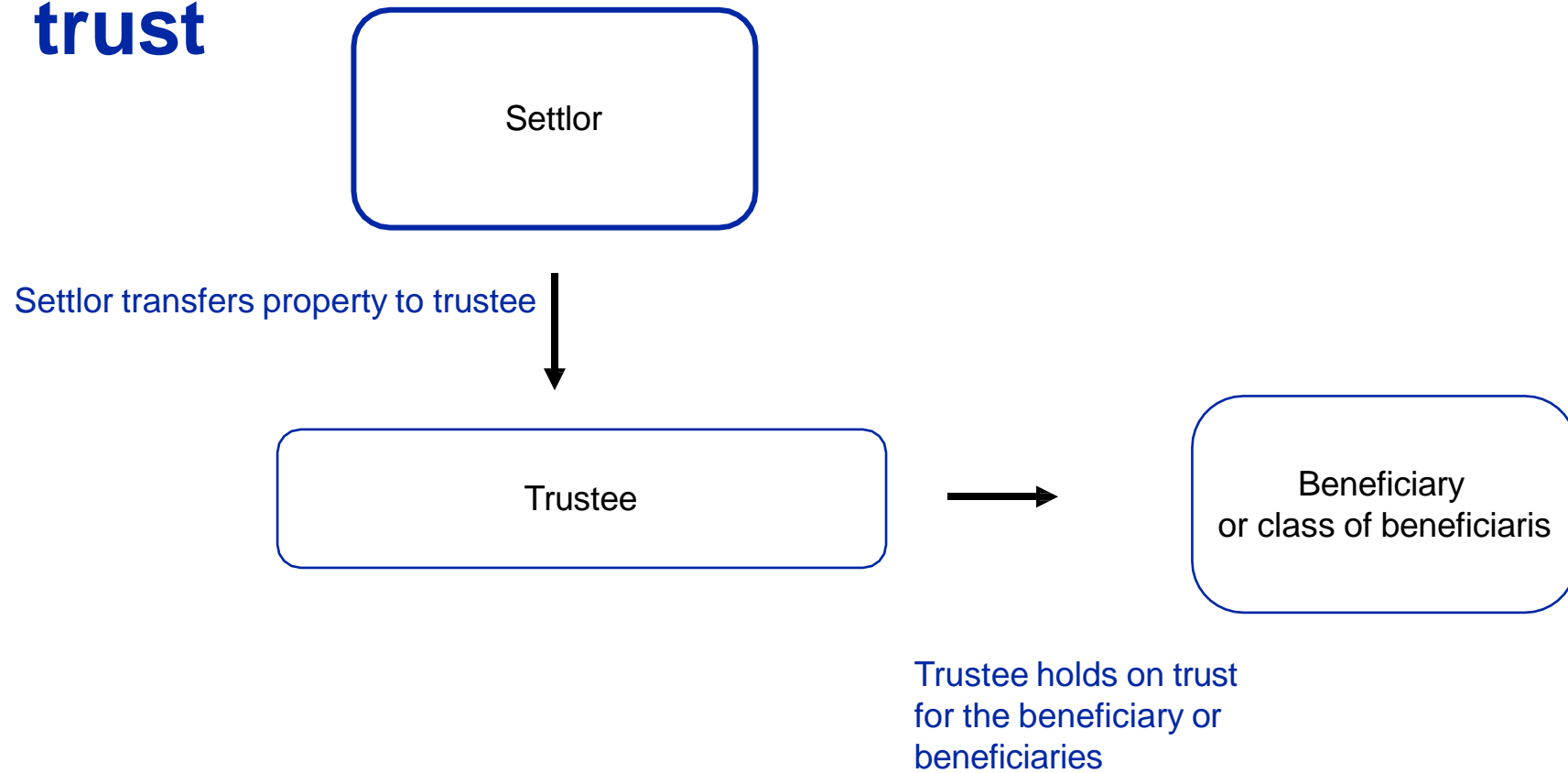


# Trust





## Parties to the trust





**There is no contract between settlor and trustee,**  
It is a unilateral act of the settlor.

The trust assets are to be managed separately by the trustee and **may not be mixed with his/her private assets.**



# Equity

## Court of Chancery

- Chancellor received jurisdictional powers by the King
- The chancellor judged “according to conscience”
- Chancellor (mostly clergymen) was influenced by canon law, and by Roman *ius commune*)
- From the 15th century it became complementary to the common law royal courts

Development of the principles of equity jurisdiction parallel to common law jurisdiction



## Equity and Common Law

Earl of Oxford's Case (1615): Court of Chancery issued a common injunction prohibiting the enforcement of a common law order.

Sir Francis:

*'in the event of any conflict between the common law and the law of equity, equity would prevail'.*

Lord Ellesmere:

*'Men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances. The office of the Chancellor is to correct men's consciences for frauds, breaches of trust, wrongs and oppression of what nature so ever they be, and to soften and mollify the extremity of law.'*



# Equity

- 17<sup>th</sup> century only lawyers were appointed to the office of Chancellor.
- *Gee v. Pritchard* Lord Eldon (1818)

*The doctrines of the Court of Chancery ought to be well settled, and made as uniform, almost, as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed by every succeeding judge. Nothing would inflict on me greater pain in quitting this place than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.*



# *Judicature Acts 1873 and 1875*

Supreme Court of Judicature (today: Senior Courts of England and Wales)

- Court of Appeal
- High Court of Justice:
  - Court of Chancery
  - Court of Common Pleas
  - Court of Exchequer
  - Court of King's bench
  - Court responsible for Probate, Divorce, and Admiralty



# Consequences

- Fusion: administrative reasons
- Common law and equity can be administered from one single court, giving judgement on both legal and equitable matters

The Supreme Court Act 1981 s49:

*(1) Every court exercising jurisdiction in England and Wales in any civil cause or matter shall continue to administer law and equity on the basis that wherever there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail*



# Today

Senior Courts of England and Wales:

- The Supreme Court
- Court of Appeal (Civil Division and Criminal Division)
- High Court of Justice (1) the Chancery Division (business and property disputes, intellectual-property claims) (2) the King's Bench Division (contract, tort) (3) the Family Division (familial matters).



## Maxims of equity

- aid or a set of 'moral markers' for the court in making its decisions

### 1. Equity will not suffer a wrong without a remedy

“the legal owner of the property will be prevented from asserting their rights in respect of that property because they are deemed, in equity, to hold the beneficial, or equitable, interest in the property on trust for the beneficiary”

### 2. He who comes to equity must come with clean hands

a person who has acted wrongly cannot then seek to rely on the court for assistance in the bringing of a claim.

“The maxim will only apply if there is a genuine link between the claimant's wrongful act and the rights they wish to enforce”



# Cleaver v Mutual Reserve Fund Life Association [1892]

“the law did not allow the enforcement of rights directly resulting to the person enforcing them from the crime of that person”



## Maxims of equity

### 3. He who seeks equity must do equity

“if a person wishes to make a claim in equity, they must be prepared to submit to the judgment of the court in respect of the rights of the other party to the action as well”.

### 4. Equity regards as done that which ought to be done

“it means that two parties contracting to perform certain legal actions will, in the eyes of equity, be considered to have carried out those actions from the moment of contracting to do them, rather than when the contract is actually performed”.



# Maxims of Equity

## 5. Equity follows the law

No remedy that is contrary to law

## 6. Equity will not permit a statute to be used as an instrument of fraud

“serves to prevent a person from relying on the absence of statutory provision if to do so would result in unfairness to a third party”.

## 7. Equity looks to substance not form

“able to look beyond the external appearance of any state of affairs that exists between the parties and make its judgment based on the position of the parties as they genuinely intended it”.



# Maxims of Equity

## 8. Equity acts *in personam*

”the courts of the common law had the ability to adjust ownership rights in property- had the ability instead to require an individual to obey their judgments, in default of which they could take away that person’s liberty”

## 9. Equality is equity

*Midland Bank v. Cooke* [1995] 4 All ER 562 (ownership matrimonial home)

”In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did [...] if no such inference can be drawn [...] the court is driven to apply [...] the maxim ‘equality is equity’, and to hold that the beneficial interest belongs to the spouses in equal shares”.



# Maxims of Equity

## 10. Delay defeats equity

“If a person wishes to bring a claim in equity they must do so without delay or otherwise risk their claim being rejected”.

## 11. Equity imputes an intention to fulfil an obligation

## 12. Where the equities are equal the law prevails

## 13. Where the equities are equal the first in time prevails



# Equity, Common Law and Trust

- Trust as an invention of equity
- Legal ownership and equitable ownership

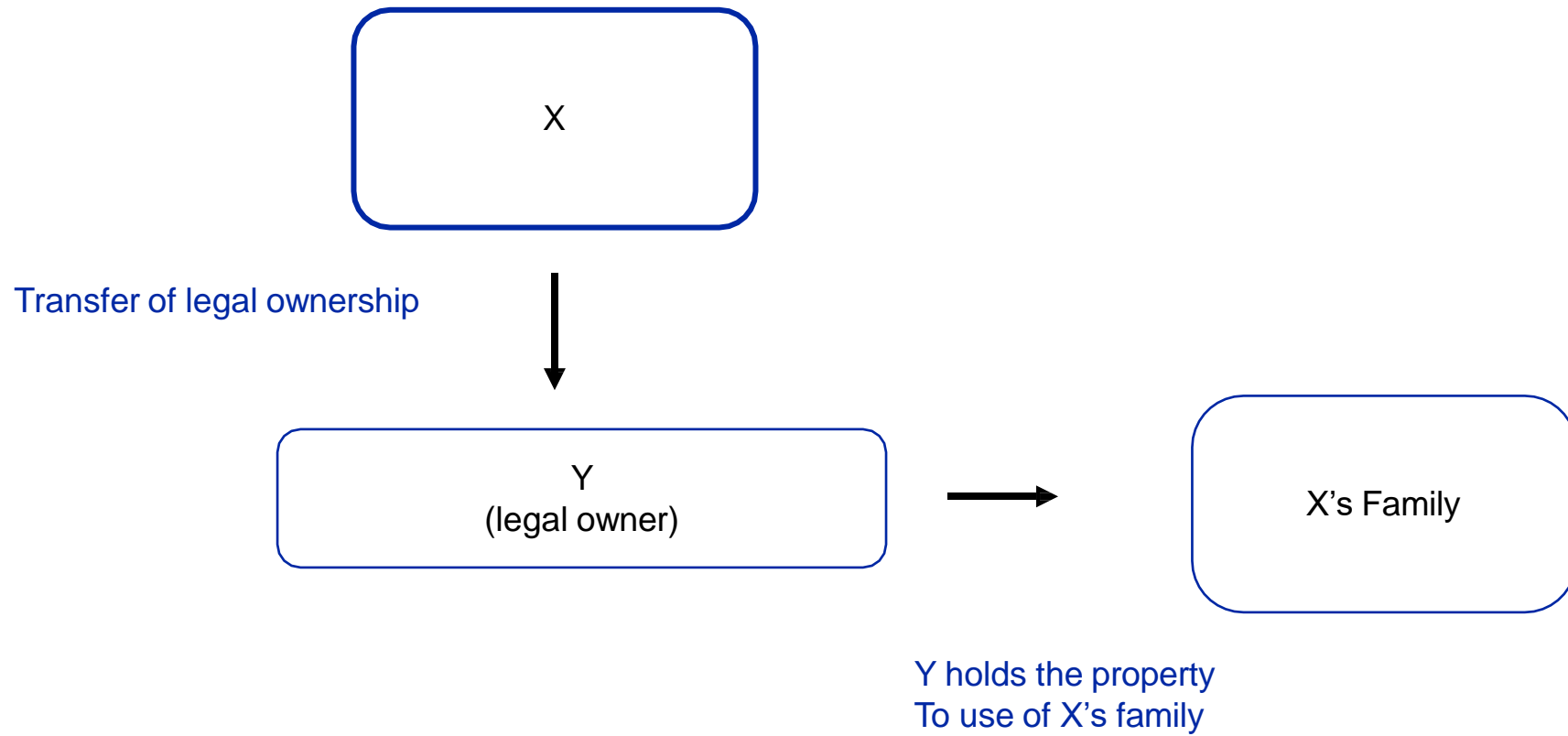


# History of Trust

- **Crusades** (1095-1291)
- English households were frequently deprived of their male heads for years and in some cases even decades.
- For the management of their land in their absence, **knights transferred the ownership** of their property into the hands of a **trusted relative or friend**
- they could act in their place, **managing the estate until their return.**
- Under the strict rules of the common law once the knight had transferred the legal ownership of his property to a third party, **all his rights in that property ceased.**
- There was therefore **no legal way** for the knight to protect his family from an unscrupulous friend or family member



## Use





## Civil Law System- A comparison

- fiducia, fideicommissum
- Treuhand
- Fideicommissum
- “It traced its roots back to the Roman Republic. In his will, the testator placed his trust in the loyalty of the heir to faithfully give an object from the estate or the entire estate itself to a third party”
- Early modern time “a *fideicommissum* was a special piece of property under private law created by a formal act of endowment that thereby became tied to a specific noble family in perpetuity and could neither be divided, alienated, or subject to collection for debt”



# Fideicommissum, Elements

- (1) a (normally) testamentary act of endowment or entailment,
- (2) the construction of a separate estate at all times carrying with it restrictions on its use by the respective holder, and
- (3) a determinate line of succession



# The terminology of wills

- settlor and testator/testatrix
- **Executor/executrix**'= person or persons who are in charge of carrying out the testator's wishes.
- The assets of the testator as a whole are collectively referred to as his **'estate'**.
- A gift of a personal possession of the testator or a share in the testator's estate made to a specific person in the will is termed a **'legacy'** or **'bequest'**.
- Legacies or bequests can be made either of money or of personal, moveable property, or **'chattels'**



## Excerpt from the Will of Diana, Princess of Wales

I DIANA PRINCESS OF WALES of Kensington Palace London W8  
HEREBY REVOKE all former Wills and testamentary

dispositions made by me AND DECLARE this to be my last Will which I  
make this first day of June one thousand nine hundred and ninety-three

1. I APPOINT my mother THE HONOURABLE MRS FRANCES RUTH SHAN  
KYDD of . . . and COMMANDER PATRICK DESMOND CHRISTIAN  
JEREMY JEPHSON of . . . to be the Executors and Trustees of this my Will

2. I WISH to be buried

3. SHOULD any child of mine be under age at the date of the death of the  
survivor of myself and my husband I APPOINT my mother and my brother  
EARL SPENCER to be the guardians of that child and I express the wish that  
should I predecease my husband he will consult with my mother with regard  
to the upbringing in education and welfare of our children



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4. (a) I GIVE free of inheritance tax all my chattels to my Executors jointly (or if only one of them shall prove my Will to her or him) (b) I DESIRE them (or if only one shall prove her or him) (i) To give effect as soon as possible but not later than two years following my death to any written memorandum or notes of wishes of mine with regard to any of my chattels (ii) Subject to any such wishes to hold my chattels (or the balance thereof ) in accordance with Clause 5 of this my Will . . .



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5. SUBJECT to the payment or discharge of my funeral testamentary and administration expenses and debts and other liabilities I GIVE all my property and assets of every kind and wherever situate to my Executors and Trustees upon trust either to retain (if they think fit without being liable for loss) all or any part in the same state as they are at the time of my death or to sell whatever and wherever they decide with power when they consider it proper to invest trust monies and to vary investments in accordance with the powers contained in the Schedule to this my Will and to hold the same UPON TRUST for such of my children PRINCE WILLIAM and PRINCE HENRY as are living three months after my death and attain the age of twenty five years if more than one in equal share PROVIDED THAT if either child of mine dies before me or within three months after my death and issue of the child are living three months after my death and attain the age of twenty one years such issue shall take by substitution if more than one in equal shares *per stirpes*\* and the share that the deceased child of mine would have taken had he been living three months after my death but so that no issue shall take whose parent is then living and so capable of taking

IN WITNESS whereof I have hereunto set my hand the day and year first above written SIGNED by HER ROYAL HIGHNESS in our joint presence and then by us in her presence



# Types of Trust

Private Trust

Public Trust (trustees to be used for some public use or benefit- charitable trusts)

Fixed trust: “the trustees are given very specific instructions as to how and to whom the subject matter of the trust is to be distributed; the trustees do not have any power to vary the amounts given to the different beneficiaries named or to decide whether or not to benefit one particular beneficiary over the other”.

Discretionary trust: “the trustees are given discretion, either to decide the shares into which the trust fund will be divided, or to decide who will benefit under the terms of the trust, or sometimes both”.



Purpose trust: private and public

Charitable Trusts

Constructive trusts (for example imposed by the court  
based on facts of the case)

Statutory Trust



## Questions

Which of the following are public trusts?

- (a) £10,000 towards the education of the nephews and nieces of Mathilda and Edward Jones.
- (b) £10,000 towards the education of the children of employees of Leeds Metropolitan University.
- (c) £10,000 towards the education of children from impoverished backgrounds in the county of North Yorkshire



Fixed or discretionary trusts?

I give £10,000 to my trustees to divide equally between my children, Jacob and Frances.

I give £10,000 to my trustees to hold for my children, Jacob and Frances.

I give £10,000 to my trustees to divide between those of my children they consider most deserving in their absolute discretion.

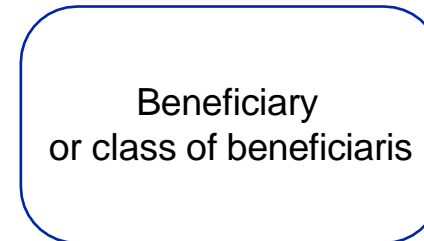


# Legal and equitable ownership

Legal owner



Equitable owners





# Modern uses- Trust

trusts for the protection of family assets;

- trusts to make provision for family members
- trusts for inheritance tax-planning purposes;
- trusts for the protection of creditors;
- trusts as a method of holding property;
- private and public purpose trusts;
- trusts for pensions and investments.



## CONVENTION ON THE LAW APPLICABLE TO TRUSTS AND ON THEIR RECOGNITION - 1985

### Article 2

For the purposes of this Convention, the term "trust" refers to the legal relationships created –inter vivos or on death –by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.

A trust has the following characteristics:

- a) the assets constitute a separate fund and are not a part of the trustee's own estate;
- b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
- c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law. The reservation by the settlor of certain rights and powers, and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust



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Article 11

A trust created in accordance with the law specified by the preceding Chapter shall be recognised as a trust. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee, and that he may appear or act in this capacity before a notary or any person acting in an official capacity. In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular

- a) that personal creditors of the trustee shall have no recourse against the trust assets;
- b) that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;
- c) that the trust assets shall not form part of the matrimonial property of the trustee or his spouse nor part of the trustee's estate upon his death
- d) that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. However, the rights and obligations of any third party holder of the assets shall remain subject to the law determined by the choice of law rules of the forum