

TESTAMENTARY TRUSTS IN ENGLISH LAW: AN INTRODUCTORY APPROACH*

APROXIMACIÓN A LOS TRUSTS SUCESORIOS EN EL DERECHO INGLÉS

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Abstract: The trust is a legal institution developed in courts of equity in common law jurisdictions. Among the different types of trusts, the testamentary are created under a will and, traditionally, have been considered as an effective structure when considering estate planning. Nevertheless, this figure has not passed to civil jurisdictions. This article is aimed to offer a general and preliminary analysis of this institution in English law, identifying the parties involved and the formalities required to create a testamentary trust, analysing the purpose for which they are used, and highlighting the main advantages and incentives offered by this instrument. It must be read in the context of the debate about the recognition of trusts in Civil law jurisdictions in order to conclude whether the testamentary trusts may be an appropriate and useful instrument to be used as an estate-planning tool.

Key words: Trusts, testamentary trusts, international succession law, English law, settlor, trustee, beneficiaries.

Resumen: El trust anglosajón es una creación de los tribunales de equidad en los países del *Common Law*. Entre los diferentes tipos existentes, los *trusts* sucesorios son creados por el causante en su testamento y, tradicionalmente, se han considerado muy útiles en la planificación sucesoria. Sin embargo, esta figura no se encuentra regulada en la mayoría de los países de tradición jurídica de *Civil Law*. Este artículo ofrece un análisis general y preliminar sobre esta institución en Derecho inglés, identificando para ello las partes y los requisitos legales para su constitución, analizando sus objetivos y finalidad, y destacando las principales ventajas e incentivos que ofrece este instrumento. Y debe ser entendido en el marco del debate abierto en torno al reconocimiento de la figura del trust en los países de *Civil Law*, con el fin de reflexionar sobre la utilidad de los trusts sucesorios en la planificación sucesoria en estos países.

Palabras clave: Trust, trusts testamentarios, Derecho sucesorio internacional, Derecho inglés, settlor, trustee, beneficiarios.

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I. Introduction

1. The trust is a creation of equity and the English common law which involves the notion of holding property on behalf of someone else. In the trust there is not an absolute owner of the property and, once the settlor has constituted the trust, some ownership rights are vested in the trustee – management and control of the property –while others are vested in the beneficiary – the rights to benefit and profit.¹ Therefore, there is a division of the ownership rights between the trustee, who has the legal title to the property for the interest and benefit of the beneficiaries (legal ownership) and the beneficiaries who have the beneficial title (equity ownership). It has its origin in feudal land law of the Middle Ages where no person, apart from the Crown, was an absolute owner of land². Nowadays, the trust is a valuable estate-planning tool and one of the most used instruments of common law countries because of its flexibility, informality and ease of use. Precisely, this flexibility has contributed to its international development.³

2. This figure has not passed to civil jurisdictions where ownership is an abstract concept which, contrary to what happens in the trust, requires the owner to have the right of disposition, management and enjoyment of the property, in short, all the ownership rights.⁴ For this reason, civil law states find it very difficult to give effect to a trust in their jurisdictions where this figure is unknown, although some concepts developed under the civil law jurisdictions have some features or characteristics of the trust, for instance, the *fiducia*⁵. On the other hand, one of the main concerns about the introduction of the trust under civil law systems is its lack of formality and the possibility of using this figure for tax evasion. Therefore, there is a great debate about the recognition of trust law in civil law jurisdictions.

3. Nevertheless, in the sphere of the European Union, some civil law countries – Italy, Malta, the Netherlands and Luxembourg – have adopted an approach which involves ratifying the Convention

¹ MCLOUGHIN and C. RENDELL (1992), *Law of Trusts*, Macmillan, London, pp. 3-4.

² S. PANESAR (2010), *Exploring Equity and Trusts*, Longman, London, pp. 49-50, quoting J. L. BARTON (1965), *The Medieval Use* (1965) 81 *Law Quarterly Review*, pp. 562-577.

³ H. HANSMANN and U. MATTEI (1998), “The Functions of Trust Law: A Comparative Legal and Economic Analysis”, 73 *New York University Law Review* 434; D. HAYTON (1999), “The uses of trusts in the commercial context”, in D. HAYTON (Ed.), *Modern international development in Trust law* Kluwer Law International, London, p. 145.

⁴ Nonetheless, this figure has been studied by authors in most jurisdictions. Thus, for references to the relevant literature in Spain see, among others, E. ARROYO AMAYUELAS (2007) (Coord.), *El trust en el derecho civil*, Bosh, Barcelona; M. A. ASÍN CABRERA (1990), “La ley aplicable al trust en el sistema de Derecho internacional privado español” 547 *Revista General de Derecho*, pp. 2089-2119; E. CASTELLANOS RUIZ (2007), “El trust en el Derecho sucesorio español” 704 *Revista Crítica de Derecho Inmobiliario*, pp. 2429-2479; C. GONZÁLEZ BELFIUS (1997), *El trust: la institución angloamericana y el derecho internacional privado español*, Bosh, Barcelona; B. UBERTAZZI (2005), “El trust en el derecho internacional privado italiano y español” V *Anuario Español de Derecho Internacional Privado*, pp. 199 at 219; and M. VIRGÓS SORIANO (2006), *El trust y el Derecho español* Thomson Civitas, Pamplona.

⁵ See A. DYER and H. VAN LOON (1984), *Report on trusts and analogous institutions*, paras. 147-78, 77-92, (available at http://www.hcch.net/index_en.php?act=publications.details&pid=5791&dtid=1). For a comparative study between the trust and the fiducia, see J. DE ARESPOCHAGA (2000), *El trust, la fiducia y figuras afines*, Marcial Pons, Madrid; F. BARRIÈRE (2004), *La réception du trust au travers de la fiducia*, LexisNexis,); D. A. R. BECKNER, A. DEVAUX and M. RYZNAR (2014), “The trust as more than a common law creature” 20 *Ohio Northern University Law Review*, pp. 19-24; S. CÁMARA LAFUENTE (2003), “El trust y la fiducia : posibilidades para una armonización europea”, *Derecho Privado Europeo*, pp. 1099-1172; *ib* (2007), “New developments in the Spanish law of succession”, *InDret* 4/2007, p. 27; and E. CASHIN RITAINE (2005), “Panorama compare du droit materiel du trust (ou une esquisse impressionniste des concepts de trust et de fiducia)”, in *Le trust en droit international privé, Perspectives suisses et étrangères*. (Actes de la 17ème Journée de droit international privé du 18 mars 2005 à Lausanne, Institut Suisse de Droit Comparé, Schulthess, pp. 17-28.

on the Law Applicable to Trusts and on their Recognition⁶, while others have signed the Convention but not yet ratified it, such as Cyprus and France. Thus, as has already been said, the Hague Convention represents *a vital commencement between legal cultures in an agreement on trust law*⁷. In this way, the introduction of the trust into the conflict of law rules of civil law states could be a first step forward for the introduction of the trust into their domestic systems⁸.

In addition, there are other initiatives in Europe aimed at facilitating the understanding of the figure of the trust, and to encourage and enable its incorporation and development into the civil law system countries, for example, the Principles of European Trust Law⁹, which proposes a model or guide for a European trust law; or the project of Common Core of European Private Law¹⁰, that try to demonstrate a relationship between the different laws relating to the concept of the trust. More recently, the Principles, Definitions and Model Rules of European Private Law, which contain model rules for European private law, also includes provisions for trusts¹¹. Finally, many authors recognise the modern utility of the trust¹².

II. The nature of the trust

1. Definition of a trust

A) Under English law

4. It is not an easy task to find an entirely satisfactory definition of a trust since there is no statutory definition of the trust¹³. In the common law systems the rule of *stare decisis* (the doctrine of precedent) has a long tradition contrary to the civil law countries. Therefore, it can be said that the legal concept of the trust has emerged in the case law of the common law in English courts of equity; thus, it is an invention of the English judiciary, although some rules governing it have been changed by statute¹⁴. This invention was reflected by Maitland, who described the trust as “*the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence*”¹⁵.

⁶ This Convention was concluded on 1 July 1985 and entered into force on 1 January 1992. By now it has been ratified by the following States: Australia, Canada, Italy, Luxembourg, Malta, Monaco, the Netherlands, Switzerland and the United Kingdom; (available at http://www.hcch.net/index_en.php?act=conventions.text&cid=59). (henceforth, the Hague Trusts Convention).

⁷ D. W.M. WATERS (2005), “The Hague trusts Convention twenty years on”, in M. GRAZIADEI, U. MATTEI and L. SMITH (2005) (eds.), *Commercial Trusts in European Private Law*, Cambridge University Press, Cambridge, p. 97.

⁸ See J. HARRIS (2002), *The Hague Trusts Convention*, Hart Publishing, Oxford, p. 336.

⁹ These principles were the result of the project organised in 1996 at the University of Nijmegen, the Netherlands, and led by Professor David Hayton. See D. J. HAYTON, S. C. J. J. KORTMANN, and H. L. E. VERHAGEN (eds) (1999), *Principles of European Trust Law*, Kluwer Law International, London.

¹⁰ This comparative law study was launched in 1995 by U. MATTEI and M. BUSSANI. See M. GRAZIADEI, U. MATTEI and L. SMITH (2005) (n 7).

¹¹ Research Project promoted by the European Commission. See “Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)”, Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Based in part on a revised version of the Principles of European Contract Law. Edited by C. VON BAR, E. CLIVE and H. SCHULTE-NÖLKE and H. BEALE, J. HERRE, J. HUET, M. STORME (available at ec.europa.eu/justice/contract/files/european-private-law_en.pdf).

¹² See, among others, M. GRAZIADEI, U. MATTEI and L. SMITH (2005) (n 7); H. HANSMANN and U. MATTEI (n 3) p. 434; D. J. HAYTON, S. C. J. J. KORTMANN, and H. L. E. VERHAGEN (eds.) (1999) (n 9); J. H. LANGBEIN (1995), “The Contractarian Basis of the Law of Trusts” 105 *Yale Law Journal* 625 at 640–643; M. LUPOI (2000), *Trust: A Comparative Study*, Cambridge University Press, Cambridge; U. MATTEI (2001), “Basic Issues of Private Law Codification in Europe: Trust”, *Global Jurist Frontiers*: Vol. 1: No. 1, Article 5; and G. G. TRIANTIS (2004), “Organizations as Internal Capital Markets: the Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises”, 117 *Harvard Law Review* 1102.

¹³ J. G. RIDDALL (2002), *The law of trusts*, 6th edn, Butterworths, London, 291 at 292, quoting P. V. BAKER and P. S. J. LANGAN (1982), *Snell's principles of equity*, 28th edn, Sweet & Maxwell, London, p. 90.

¹⁴ D. A. R. BECKNER, A. DEVAUX and M. RYZNAR (n 5) 8; and L. A. SHERIDAN (1993) *The law of trusts*, 12th edn, Barry Rose Law Publishers Ltd, Chichester, pp. 4-5.

¹⁵ F. W. MAITLAND (1949, first published 1909), *Equity*, Cambridge University Press, Cambridge, quoted by S. GALLAGHER (2013), *Equity and the law of trusts. Centuries in the making*, Gallagher & Blake Publishing, Kent, p. 89.

On the other hand, according to the opinion of some authors, the word “trust” is an “accordion” word and, therefore, can have a very narrow or a very wide meaning¹⁶. For this reason, it is of great importance to describe the characteristics of the trust in order to know when one has been created.

Without a doubt, the difficulty in describing the trust is related to who holds the property which is subject to the trust, since, as noted above, on the one hand, the trustee has the control and management of the property and, on the other hand, the beneficiaries are going to receive the profits and benefit of the property.

5. Consequently, various definitions have been proposed but none has been considered as perfect and satisfactory. Nevertheless, the “classic” common law definition of a trust by Professor Underhill should be mentioned, as it has received judicial approval. It states, “*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 cestui que trust), of whom he may himself be one, and any one of whom may enforce the obligation*”¹⁷.

B) Under international conventions

6. The Hague Convention on the Law Applicable to Trusts and on their Recognition was adopted with the objective to settle the inefficiencies that arise as a consequence of the non-existence of this legal concept under the civil law countries. Therefore, the definition given by the Hague Convention could be helpful for the purpose of studying the trust. According to the 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*”¹⁸.

2. Classification of trusts under English common law

7. There are many different types of trusts. As far as their classification is concerned there is no universal agreement since they may be classified in many different ways, for example, by virtue of: a) the method of creation –express trusts, implied trusts, resulting trusts and constructive trusts, and statutory trusts– b) the type of beneficiary –private and public trusts (charitable trusts)– c) the character of the interest –fixed and discretionary trusts– and d) the nature of the duties –simple and special trusts–¹⁹. Nowadays, the three most significant types of trusts are express private trusts, resulting trusts and constructive trusts.

8. The express trusts, within which the testamentary trusts are integrated, are created intentionally by the absolute owner of property (settlor)²⁰. They have to meet three certainties – intention, subject matter and object – as the settlor must demonstrate a clear intention to create a trust²¹, and the properties’ legal title must be transferred to the trustees before it is effective²².

¹⁶ D. HAYTON (1999), “Principles of European trust law”, in D. HAYTON (ed.), *Modern International Developments in trust law*, Kluwer Law International, London, p. 21.

¹⁷ D. HAYTON (2007) (general ed.) with P. MATTHEWS, C. MITCHELL, *Underhill and Hayton, law relating to trusts and trustees*, 17th edn, LexisNexis Butterworths, London, p. 1. It has been received judicial approval since it was used by L. J. ROMER in *Green v Rusell* [1959] 2 QB 226 at 241, CA.

¹⁸ This definition has been criticised and considered unsatisfactory by some authors because of its ambiguity. See D. J. HAYTON, S. C. J. J. KORTMANN, and H. L. E. VERHAGEN (n 9) pp. 38-39.

¹⁹ See M. DOWLING (2013), *Equity and Trusts*, Round HALL & Thomson Reuters, Dublin, pp. 54-56; J. DUDDINGTON (2006), *Essentials of equity and trusts law*, Pearson Education Limited, Harlow, pp. 72-73; M. HALEY (2013), *Equity & Trusts*, 9th edn., Sweet & Maxwell, Thomson Reuters, London, pp. 21-27; P. S. JAMES (1989), *Introduction to English law*, 12th edn, Butterworths, London, pp. 499-507; and C. TURNER, J. BRAY (2014), *Equity & Trusts*, Routledge Taylor & Francis Group, London, pp. 9-10.

²⁰ *Re Kayford* [1975] 1 WLR 279; *Paul v Constance* [1977] 1 WLR 527.

²¹ *Knight v Knight* (1840) Beav 148, 49 ER 58; *Knight v Boughton* (1840) 11 Cl & Fin 513.

²² *Milroy v Lord* (1862) 4 De GF&&J 264.

9. Then, there are trusts which arise not by the transferor's intention to create a trust but by implication of law: resulting trusts and constructive trusts. Traditionally, a resulting trust arises under two circumstances:

- a) Where there is a gratuitous transfer of property from one person (A) to another (B), or where A makes a contribution to the purchase price of property and puts it under B's name. In this case, such a person (A) would acquire an equitable interest in the property on trust, that is to say, B holds the property on trust for A (presumed resulting trusts)²³.
- b) Where the settlor transfers property to B to hold on express, but fails to identify the beneficiaries, that is to say, the persons who have the equitable interests in a right in property, then, the trust fails due to the uncertainty of objects and the equitable interests go back to the settlor and B will hold the property on the resulting trust for the settlor (automatic resulting trusts)²⁴.

10. On the contrary, constructive trusts are created by the court in cases where a person has received a payment or a property by mistake. In these cases, such a person will be considered a trustee and will hold that money or property on constructive trust²⁵.

11. Finally, statutory trusts do not have their origin in equity but they are trusts declared by the legislature and they are imposed in certain specific circumstances; for example, when there are joint legal owners of land, the Trust of Land and Appointment of Trustees Act 1996 prescribes that the owners must hold the legal title on statutory trusts²⁶. Besides, statutory trusts arise on bankruptcy, on the conveyance of land to a minor, or in cases of intestacy²⁷.

12. As far as the type of beneficiaries is concerned, private trusts are created for the benefit of private individuals, like family members or friends, while charitable trusts are public trusts, which have a charitable purpose and offer tax advantages.

13. As regards the nature of the trusts, special trusts are trusts where the trustee has duties to perform and simple trusts are trusts where the trustee does not have to act²⁸.

III. Testamentary trusts

1. What is a testamentary trust?

14. Testamentary trusts are express private trusts created under a will as a consequence of the express and expressed intention of the absolute owner of the property (the settlor). This intention should be clear from the will of the testator in order to transfer the legal title to the trustee and the equitable interest to the beneficiaries of the trust. The trust established under a person's Will does not come into force until after their death²⁹; it could be said that after being set up in a will, the testamentary trust is dormant until the death of the testator who created the trust and, during that time, the settlor may introduce changes to the trust.

²³ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669. In this regard, see C. WEBB and T. AKKOUH (2013), *Trust law*, 3rd edn, Palgrave Macmillan, Hampshire, p. 68.

²⁴ C. WEBB and T. AKKOUH (n 23) pp. 182-183.

²⁵ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400. See also C. WEBB and T. AKKOUH (n 23) pp. 200-201.

²⁶ See the Trust of Land and Appointment of Trustees Act 1996 (available at <http://www.legislation.gov.uk/ukpga/1996/47/contents>).

²⁷ Administration of Estates Act 1925, section 33 (available at <http://www.legislation.gov.uk/ukpga/Geo5/15-16/23/contents>); See also L. A. SHERIDAN (n 14), pp. 41-42.

²⁸ L. A. SHERIDAN (n 14) p. 38.

²⁹ *Vanderplank v King* (1843) 3 Hare 1; *Lord Dungannon v Smith* (1845-46) 12 Cl. & Fin. 546, HL.

Accordingly, the trustees will be appointed by the will and, once the process of administration on death has been completed, the executors will transfer the property of the deceased person to the trustees and the testamentary trust will come into force, although sometimes it does not happen, as when the executor and the trustee are the same person³⁰. Nevertheless, it is arguable that it is not always appropriate that the same person plays the role of executor and trustee at the same time in view of the existing differences between the executor's duties – which can be completed within a few years– and the trustee's tasks, as the management of the trust can last up to 125 years. In addition, sometimes the powers given to the executors and the trustees may come into conflict³¹.

In addition, after the death of the testator a testamentary trust becomes irrevocable and questions regarding the validity of the trust which could arise must be resolved applying not only the law of trusts but also the law of successions, because of the interrelation of both laws.

15. The creation of testamentary trusts by will can occur in two cases:

- a) Where the will specifies that all or part of the property of the deceased person has to be held on trust; or
- b) Where the recipient of the property is under the age of 18 and the legal title has to be held for him or her until the mentioned age.

Thus, once the *settlor* has died, he or she is no longer the owner of the assets in the trust fund, but the trustees who will own the legal title to the assets and, consequently, the possibility of managing them after the death of the settlor. Therefore, this situation is more advantageous to the beneficiaries of the trust, that is to say, the heirs, compared to the administration of the properties by the personal representatives of the deceased person³².

2. Characteristics

16. A testamentary trust has no legal personality and one of its main characteristics is the separation of the legal and equitable interests. Hence, whilst the trustee is technically the legal owner, the beneficiaries are entitled to the benefit of that property. But if the separation of interests disappears, because the legal and equitable interests are in the hand of the same person, then the trust no longer exists. According to the Hague Trusts Convention 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*; and 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*”.

In addition, “*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*”.³³

3. Why use a testamentary trust?

17. Habitually, the trust has been considered as an instrument of investment, security and estate planning, as well as an alternative to the gift mechanism. The reasons for creating a trust can be many and varied, for instance, to protect the assets in cases of business; to protect the beneficiaries until they reach a certain age to manage the property, for instance, in the case of minors, or children who are not mature enough (or have disabilities) to manage the resources by their own, or in cases where there are children from different relationships of the settlor; to save on taxes in the case of inheritance tax or li-

³⁰ S. WILSON (2013), *Todd & Wilson's Textbook on Trusts*, Oxford University Press, Oxford, pp. 28-30.

³¹ G. STEEL (2012), *Trust practitioner's handbook*, 3rd edn, The Law Society, London, pp. 45-46.

³² *Ibid* pp. 8-9.

³³ Art 2 of the Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (available at http://www.hcch.net/index_en.php?act=conventions.text&cid=59).

fetime gifts; or to preserves property for subsequent generations³⁴. Although traditionally the property transferred in the trust used to be land, nowadays such property can take different forms other than land, like money, jewellery...

Consequently, the reasons to include a trust in the will can be varied, for example, to provide protection for young children or a disabled person, to save tax, or simply to protect the testator's assets after he or she dies. However, in the majority of cases testamentary trusts are made more by the needs of beneficiaries than by tax considerations. Certainly, the trust is created by the testator in his or her will to provide the benefits of property after the death of that person. Thus, often a family property is held on a trust established by the will of the testator because the testator does not want to leave his or her property directly to one or several persons.

4. Benefits and incentives of the testamentary trusts

18. Contrary to what happened when the figure of the trust was initially created, which occurred in a domestic setting, nowadays the trust is used, more and more, for financial and commercial purposes. As a general matter, the trust offers many benefits, such as tax advantages, privacy, or asset protection, being a good tool for estate planning. In addition, one of its main advantages is the flexibility that this instrument offers³⁵.

Nevertheless, a large proportion of trusts are still focused on the protection of the family and its assets, for instance, to safeguard and protect the rights of the spouse and the children in the case of the death of the settlor/testator³⁶. Precisely, testamentary trusts are a good tool for this purpose, which allow the transfer of property of the deceased person to the beneficiaries and offer advantages which are not available where the assets pass directly to the beneficiaries. Some good reasons for creating a testamentary trust are the following:

A) Protection of assets

19. There are many types of assets that can be held in trust, for instance, money and investments –which may produce income–, land or property, or other valuables assets, such as jewellery or painting.

The assets held by the testamentary trusts belong to the trust not to the beneficiary personally. This means that creditors are unable to access the assets in the trust, for example, where the beneficiary become bankrupt. Consequently, the testamentary trust provides the protection of assets for the beneficiary with respect to creditors.

B) Taxation benefits

20. From a tax perspective, testamentary trusts offer significant tax benefits, since they are taxed on the same graduated rates as individual taxpayers. Therefore, it is a great advantage³⁷. In addition, the income of the testamentary trust can be distributed to the beneficiaries on a discretionary basis at the end of the financial year. This means that income of the testamentary trust can be distributed to the most suitable beneficiaries –for example, the minor beneficiaries– in order to minimise the tax rates.

C) Family law considerations

21. On the other hand, testamentary trusts are a good instrument in order to safeguard and protect the rights of the spouse and the children in the case of the death of the testator, for instance, in cases of a child with a mental impairment, or a child who is unable to manage their finances properly, or a

³⁴ B. J. KIMMITT (2006), "Testamentary trusts, Critical issues in Estate planning today", (available at www.bennettjones.com/umplodedFiles/.../TewtamentaryTrusts.pdf) p. 3.

³⁵ D. A. R. BECKNER, A. DEVAUX and M. RYZNAR (n 5) p. 7.

³⁶ E. WARNER-REED (2011), *Equity and Trusts*, Longman, Harlow, pp. 29-30.

³⁷ B. J. KIMMITT (n 33) p. 2.

child with a drug problem. In all these cases, leaving the child's inheritance in a testamentary trust means that it is going to be controlled by the trustee who will make wise decision on behalf of the beneficiaries of the trust.

5. Perpetuities (the trust period)

22. The trust must specify the period and, in any case, the common law rule against perpetuities formulated in the seventeenth century stipulates that the traditional perpetuity period is a life (or any number of lives) from the moment that the trust is created plus twenty-one years, plus any actual periods of gestation.³⁸ Alternatively, for trusts declared after 16 July 1964 the perpetuity period “ (...) *shall be of a duration equal to such number of years not exceeding eighty as is specified in that behalf in the instrument*”³⁹.

However, the Perpetuities and Accumulations Act 2009 introduces a single perpetuity period of 125 years,⁴⁰ although this law applies to trusts taking effect after the commencement date of the act, 6 April 2010.⁴¹ Hence, the trust can end sooner, since in many testamentary trusts the ending date is when the beneficiary reaches an aged specified in the trust, but, in cases where the trust does not specify, a 125-year trust period will apply.⁴²

IV. Parties to a testamentary trust

In a testamentary trust we can identify three parties: the testator or *settlor*, the trustee and the beneficiary.

1. The settlor

23. The *settlor* is the person who has the legal title of the property, which wants to be object to the trust. This person creates the trust and transfers the legal ownership of the property to the trustee. In order to create or establish a testamentary trust, an individual must be full age and capacity, that is to say, be competent enough to deal with a legal estate or equitable interest in property.⁴³

After the death of the settlor/testator, the executors start to administer the estate and, then, transfer the assets to the trustee of the testamentary trust.

2. The trustee

A) Definition of trustee

24. The *trustee* is the person who has the legal title of the trust property. He or she has to administer and hold the property on trust until the end when he or she transfers the legal ownership to the beneficiaries. The trustee should be competent enough to manage the trust and not be under any legal incapability, that is to say, has to possess natural capacity and legal ability to execute the trust. In addition, the trustee should be resident within the jurisdiction of the court of equity and, under certain

³⁸ *Duke of Norfolk's Case* (1683) 3 Ch. Ca. 1 at 20, 28 and 48.

³⁹ Perpetuities and Accumulations Act 1964, section 1 (available at <http://www.legislation.gov.uk/ukpga/1964/55/contents>).

⁴⁰ Perpetuities and Accumulations Act 2009, section 5 (1) (available at <http://www.legislation.gov.uk/ukpga/2009/18/section/1>).

⁴¹ *Ibid* section 15.

⁴² J. KESSLER and L. SARTIN (2012), *Drafting trusts and will trusts. A modern approach*, 11th edn, Sweet & Maxwell, London, pp. 160-164.

⁴³ See J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (2008), *Lewin on Trusts*, 18th edn, Seet&Maxwell, London, pp. 14-15, para 1-20.

circumstances, the trustee's administration must be supervised by the court for the duration of the testamentary trust⁴⁴.

25. The trustee or trustees are invested with powers and obligations in order to manage the trust fund for the benefit of the beneficiaries. At the same time, they are under altruistic fiduciary obligations – the duty of acting in good faith or in the best interest of the other part – imposed by the law. It means that they can neither exploit their position for their own benefit nor get any remuneration for their job unless they are authorised to do so. Thus, the choice of the trustees is crucial because they are in charge of ensuring the fulfilment of the testator's wishes.⁴⁵

B) Number of trustees

26. Generally, there must be at least one trustee and there is no limit to the number of trustees who can be appointed, although, depending on the type of trust, there are certain exceptions. In the testamentary trusts, where land is involved, the number of trustees will be between two and four.⁴⁶

C) Who can be a trustee?

27. The trustee has control of the testamentary trust. Therefore, the trustee should be a person who the testator trust since he or she has to act in the best interest of the beneficiaries. For instance, where the trust is set up for a surviving spouse it would be appropriate that the spouse be the trustee. Likewise, where the trust is set up for adult children, then each of them would be trustee, but, where the trust is set up for an impaired child, then the trustee should be someone the testator trust in order to ensure the interest of the beneficiary.

28. It is now necessary to examine the different scenarios that might arise when choosing the trustee. First of all, the settlor as trustee is a possibility which does not exist in the testamentary trusts where the trust is created by the will of the settlor (the testator) who has died at the moment the trust come into force.

29. Secondly, the beneficiary as trustee. It is clear that in many cases this may be beneficial for the trust and its beneficiaries. This solution can work well when there is only one beneficiary but in cases of several beneficiaries it seems to be difficult to appoint all of them as trustees. Consequently, when there is more than one beneficiary the appointment of one of them as trustee is a quite delicate matter because it can generate conflicts between them or potential conflict of interest, taking into account the role that the trustee is going to play in the trust. Nevertheless, in cases where the trustee is the only beneficiary of the trust property and the whole beneficial interest meets in the same person the result is that the same person is the absolute owner of the trust property.⁴⁷ On the other hand, the appointment of the beneficiary as trustee does not violate the general trust principle that a trustee cannot profit from his or her own trust, considering that in this cases the same person is acting simultaneously in different legal capacities.⁴⁸

⁴⁴ J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43), p. 31, para 2-13; and D. FOX (2011), "Non-excludable trustee duties", *Trusts & Trustees*, Vol. 17, Nº 1 (available at <http://tandt.oxfordjournals.org/content/17/1/17.full?sid=f92c63a9-7017-4795-a1ad-db81b8300080>), p. 22.

⁴⁵ See R. EDWARDS, N. STOCKWELL (2013), *Trusts and Equity*, 11th edn, Pearson Education Limited, Harlow, pp. 375-376; S. GALLAGHER (n 15) pp. 407-408; D. J. HAYTON (n 9) 4; and G. WATT (2012), *Trusts and Equity*, 5th edn, Oxford University Press, Oxford, pp. 337-338.

⁴⁶ Trustees Act 1925, section 34 (2) stipulates that the number of trustees shall not in any case exceed four (available at <http://www.legislation.gov.uk/ukpga/Geo5/15-16/19/section/36>).

⁴⁷ J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43), p. 9, para 1-09.

⁴⁸ See M. WATERWORTH (2003), *A Practitioner's Guide to Drafting Trusts*, 2nd edn, LexisNexis, Luton, pp. 110- 112.

D) Appointment, replacement, retirement and removal of trustees

30. As far as the appointment, replacement, retirement and removal of trustees are concerned, the following points must be dealt with: Whether the testator has constituted a testamentary trust and has failed to appoint trustees or, having appointed, they have died or are unwilling to act and there is no other person capable of appointing trustees, then the court has the power to do that. It means that the court has the power not only to appoint trustees but also to remove them against their will.⁴⁹

Meanwhile, when the testamentary trust of property consists of or includes land, appointment and retirement of trustees can take place at instance of beneficiaries where: “*a) there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, and; b) the beneficiaries under the trust are of full age and capacity and (taken together) are absolutely entitled to the property subject to the trust*”.⁵⁰

Besides, under certain circumstances, the person or persons nominated for the purpose of appointing new trustees, or the trustee or trustees for the time being, have the power to appoint an additional trustee without replacing the existing one.⁵¹

After the death of the sole trustee, the trust property will “*devolve from time to time on the personal representative of the deceased*”⁵² and the personal representative has the power to appoint one or more other persons to be a trustee or trustees in the place of the deceased trustee (replacement of trustees).

31. Assuming now that there is more than one trustee, during the life of the trust there can arise different situations, for instance, that one of the trustees is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or her, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant. In all those cases, the Trustee Act 1925 confers on existing trustees power to appoint one or more other persons to be a trustee or trustees in the place of the previous trustees (removal of trustees).⁵³

In any case, it is not obligatory “*to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed, but, except where only one trustee was originally appointed*”.⁵⁴

32. As far as the retirement is concerned, the trustees can be discharged from the trust (voluntary retirement) provided that it is in writing and that the other trustees consent to the retirement. Likewise, the court has the jurisdiction to remove an existing trustee and to appoint a new trustee or trustees (retirement by order of the court) when the trustee commit irresponsible breaches of trust or where the interests of the trust require the removal of trustees.⁵⁵

33. Finally, another important issue that should be given attention is the appointment of a trustee resident abroad. It shall be valid to the extent that it is expressly authorised by the trust instrument and under exceptional circumstances considered by the appointor, that is to say, the settlor.⁵⁶ According to the jurisprudence there are exceptional circumstances when there is a sufficient foreign connection to the trust, for instance, when the beneficiaries of the trust live permanently abroad,⁵⁷ or when there are

⁴⁹ Trustee Act 1925 (n 46), section 41.

⁵⁰ Trust of Land and Appointment of Trustees Act 1996 (n 26) section 19 (1).

⁵¹ Trustee Act 1925 (n 46) section 36 (6).

⁵² Administration of Estates Act 1925 (n 27) section 1 (1).

⁵³ Trustee Act 1925 (n 46) section 36 (1). See C. SPARKE (2014), “Removing executors and trustees”, *Trusts & Trustees*, October, 7, (available at <http://tandt.oxfordjournals.org/content/early/2014/10/07/tandt.ttu201.full?sid=b8f20a1f-5ff7-4a6a-8f93-0ada32bb591a>), p. 14.

⁵⁴ *Ibid* section 37 (1) (c).

⁵⁵ *Ibid* sections 39 and 41 (1). See C. SPARKE (n 53), p. 1.

⁵⁶ *Richard v Mackay* (1997) 11 Tru. L.I. 23; *Re Beatty's Will Trust* (Nº 2) (1997) 11 Tru. L.I. 77. Contrast this with the approach in *Re Whitehead's Will Trust* [1971] 1 W.L.R. 833-837, which did not make a distinction between the residences of trustees in order to make such an appointment.

⁵⁷ *Re Whitehead's Will Trust* [1971] 1 W.L.R. 833 at 837.

several beneficiaries living in different places, for example, one in England and the other abroad;⁵⁸ or when the beneficiaries, residents in England, can move abroad in the future because there are substantial foreign connections.⁵⁹ Without a doubt, the main reasons for the appointment of non-resident trustees in a trust constituted in England is tax advantages, although in these cases the problem may arise of whether the trustees or the beneficiaries reside abroad in a jurisdiction which does not recognise the trust, or does not enforce foreign trusts, or have a limited experience of trusts.⁶⁰

E) Powers and duties of trustees

34. To facilitate the administration of the trust, the trustee is invested with some powers according to the Trustee Act 1925; the Trusts of Land and Appointment of Trustees Act 1996; and the Trustee Act 2000.⁶¹ They refer to power to acquire land in the United Kingdom with the purpose of investment, occupation by the beneficiaries or any other purpose;⁶² power to sell land;⁶³ and power to insure any property under the trust against risk of loss or damage due to any event, as well as to pay the premiums out of the trust funds.⁶⁴

35. On the other hand, the fiduciary duties of a trustee are varied and onerous. They are defined by the settlor in the trust document and by the general law of trusts, subject to limitations for reasons of public order,⁶⁵ and are focused on the trust custody and administration in order to protect the interests of the beneficiaries of the trust as established in the Trustee Act 2000.

First of all, we have to refer to the duty of care, which will apply in relation to the following powers and functions: investment; acquisition of land; agents, nominees and custodians; compounding of liabilities; insurance; and reversionary interests, valuations and audit.⁶⁶ This duty of care must be exercised by the trustee *“as is reasonable in the circumstances, having regard in particular: (a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession”*.⁶⁷ The trustee, therefore, must exercise the same control as if the property were his or her own, acting under the fiduciary duties of loyalty and prudence.⁶⁸

Secondly, to exercise the powers conferred, the trustees have the duty to act unanimously. As a general rule, they must act jointly and unanimously in order to take decisions,⁶⁹ although the settlor can provide for majority voting in the trust instrument.

Thirdly, the duty to act impartially means that the trustees have to act honestly and diligently in the best interest of the beneficiaries and, at the same time, must act impartially for the benefit of all the beneficiaries without favouring any of them, in particular, in order to maintain equality between them.⁷⁰

Fourthly, the trustees cannot delegate the execution of their duties. Nevertheless, the Trustee Act 2000 stipulates that *“(...) the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent”*.⁷¹ In this sense, the “delegable functions” are: *“(a) any function*

⁵⁸ *Richard v Mackay* (1997) 11 Tru. L.I. 23; *Re Beatty's Will Trust* (Nº 2) (1997) 11 Tru. L.I. 77.

⁵⁹ J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43) pp. 14-15, para 1-20.

⁶⁰ *Ibid.*, pp. 491-494, para 14-45 at 14-49.

⁶¹ Trustee Act 2000 (available at <http://www.legislation.gov.uk/ukpga/2000/29/contents>).

⁶² See Trustee Act 2000 (n 61), section 8 (1); and Trusts of Land and Appointment of Trustees Act 1996, as amended by the trustee Act 2000 (n 26) section 6 (3) (4).

⁶³ Trusts of Land and Appointment of Trustees Act 1996 (n 26) section 6.

⁶⁴ Trustee Act 1925, as substituted by the Trust Act 2000 (n 46) section 19.

⁶⁵ *Hayim v Citibank* [1987] AC 730.

⁶⁶ Trustee Act 2000 (n 61) Schedule 1, Application of duty of care.

⁶⁷ *Ibid* section 1.

⁶⁸ *Learoyd v Whitely* (1887) 12 App.Cas. 727.

⁶⁹ *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121 at 125.

⁷⁰ *Lloyds Bank plc v Duker* [1987] 3 All ER 193.

⁷¹ Trustee Act 2000 (n 61) section 11 (1).

*relating to whether or in what way any assets of the trust should be distributed; (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital; (c) any power to appoint a person to be a trustee of the trust, or (d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian”.*⁷²

Finally, the trustees must provide accounts and information to the beneficiaries⁷³ and they must ensure that the trust property is passed and distributed to all those who are entitled – the duty to distribute.⁷⁴

36. Hence, powers and duties of the trustees are closely connected. Thus, for example, duty to invest trust money is linked to the power to acquire land with the purpose of investment, while the power to sell land implies the duty of getting the best price for the beneficiaries of the trust.⁷⁵

F) The No-Conflict rule and the No-Profit rule

37. There are two important rules of universal application related to the fiduciary duties imposed on the trustee. First of all, the No-Conflict rule stipulates that “ (...) *no one having such [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interest of those whom he is bound to protect*”.⁷⁶

In order to avoid conflicts of interest that may lead to fraud, this rule prevents trustees from purchasing trust property or from selling property to the trust, although there could be exceptions when it is authorised by the trust document or under permission of the court.⁷⁷

38. Secondly, the No-Profit rule is the principle of equity, according to which a trustee should not compete or take benefit from the trust.⁷⁸

G) Remuneration of the trustees

39. The general rule is that a trustee should not get any remuneration for his or her job, even in cases where it involves considerable time and personal inconvenience.⁷⁹ Otherwise, the costs of administration could decrease the value of the trust⁸⁰ and, more importantly, the principle of equity would be broken since there could be a conflict of interest between his or her duty as trustee and private interests. Certainly, it implies that the conflict of interest has to be avoided in order to comply with the above-mentioned rules. To give an example, the purchase by a trustee of trust property or the purchase by a trustee of a beneficiary’s interest could generate a conflict of interest contrary to the No-Conflict rule referred to above.

40. It goes without saying that the application of the principle of no remuneration may represent an obstacle to appointing a professional person or a trust corporation as trustee – for instance, a lawyer, an accountant or a banker – considering that under these conditions they may be reluctant to accept the position of trustee. For this reason, under certain circumstances remuneration can be paid to the trustees, provided that the trust instrument includes the so-called “charging clauses” authorising to charge for the

⁷² Ibid section 11 (2).

⁷³ *O’Rourke v Darbishire* [1920] AC 581.

⁷⁴ *Eaves v Hickson* (1861) 30 Beav 136.

⁷⁵ See J. G. RIDDALL (n 13) p. 423.

⁷⁶ *Aberdeen Railway Company v Blaikie Brothers* (1854) 1 Macq. 461; *Re Barber* (1886) 34 Ch. D 77, 80-81; and *Bray v Ford* [1896] AC 44 at 51; See R EDWARDS and N. STOCKWELL (n 45) 378-380.

⁷⁷ J. KESSLER and L. SARTIN (n 42) pp. 92-93.

⁷⁸ *Re Macadam* [1946] Ch 73.

⁷⁹ *Barrett v Hartley* (1866) L.R. 2 Eq. 789.

⁸⁰ *Robinson v Pett* (1734) 3 P. Wms. 249.

services of the trustee.⁸¹ In these cases, it can be said that the principle of equity is overriding in favour of the fulfilment of the will of the settlor's intention.

The trustee's entitlement to the payment under trust instrument is now in the Trustee Act 2000. As an exception to the general rule, it lays down that the trustee is entitled to receive payment in respect of services only if: "(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him to or on behalf of the trust, and (b) the trustee is a trust corporation or is acting in a professional capacity".⁸²

41. Needless to say, the trustees are entitled to be reimbursed from the trust funds for the expenses properly incurred by him or her when acting on behalf of the trust.⁸³

3. The beneficiaries

42. The beneficiaries are the persons who have been chosen by the testator to benefit from the trust property (equitable interest). From that moment, they have property rights in the trust property.⁸⁴ Anyone may be a beneficiary of a trust, irrespective of whether they are minors or under any legal disability, or whatever the place of their habitual residence – England or abroad.⁸⁵

In principle, all the duties and the personal obligations of the trustees in respect of trust property give rise to rights for the beneficiaries. The main right of the beneficiaries is to force the trustees to implement the terms and conditions of the trust. In addition, the beneficiaries are allowed to confront the decisions of the trustee as well as the lack of decisions, providing that the trustees are not acting in good faith.⁸⁶ Finally, where the beneficiaries have suffered any loss as a result of a breach of trust due to the trustees, they have a right against the trustees to be compensated for the suffered losses.⁸⁷

V. Constitution of a testamentary trust

1. Validity and formalities

43. There are no special formalities required in order to create an express private trust of pure personal property. However, a trust of land must be in writing in order to be valid. In addition, when the trust is created by a will (testamentary trusts) the formalities for making a will – for instance, the capacity of the settlor – as well as the formalities for the transfer of property, will have to be fulfilled.

In order to verify the validity of the will where the trust has been declared, the formal requirements of the Will Act 1837, as follows, must be met: a) it has to be in writing; b) it must be signed by the testator, or by some other person in his or her presence and by his or her direction; and c) the signature should be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.⁸⁸

To summarise, it can be said that the conditions that a testamentary trust should meet in order to be valid are the following: the declaration of trust by the settlor (the testator); the complying of the required formalities; the capacity of the settlor to constitute the trust; the three certainties (intention, subject and object); the complying of the applicable law; and the constitution of the transfer of the legal title to the trustee.⁸⁹

⁸¹ See J. G. RIDDALL (n 13) pp. 322-323; M. WATERWORTH (n 48) 112-116.

⁸² Trustee Act 2000 (n 61) section 28 (1), (2), (4).

⁸³ Ibid section 31 (1).

⁸⁴ *Saunders v Vautier* (1841) 4 Beav 115; *Tinsley v Milligan* [1994] 1 Ac 340, 371.

⁸⁵ See J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43) pp. 34-35, para 2-26 at 2-32.

⁸⁶ *Turner v Turner* [1984] Ch 100. See R. CLEMENTS and A. ABASS (2013), *Equity and Trusts, Text, cases and materials*, 3rd edn, Oxford University Press, Oxford, pp. 99-100.

⁸⁷ *Clough v Bond* (1838) 3 My & Cr 490; *Re Massingberd's Settlement* (1890) 63 LT 296; *Nocton v Lord Ashburton* [1914] AC 932; *Target Holdings v Redfern* [1996] 1 AC 421.

⁸⁸ Wills Act 1837, as amended, section 9 (available at <http://www.legislation.gov.uk/ukpga/Will4and1Vict/7/26/contents>).

⁸⁹ S. GALLAGHER (n 15) pp. 130-131

2. The three certainties

44. There are three certainties which should be met by a testamentary trust in order to be valid; otherwise there will be no trust: the certainty of words or intention, the certainty of subject matter, and the certainty of objects. Lord Langdale stated these requirements in 1840⁹⁰ by explaining that it will be considered a trust: “(...) *First if the word were so used, that upon the whole, they ought to be construed as an imperative; secondly, if the subject of the recommendation or wish is certain; and thirdly, if the objects or persons intended to have benefit of the recommendation or wish also be certain*”.

This is the classification of certainty requirements that traditionally has been followed by the courts, but has also been criticised by some commentators.⁹¹ Certainly, the English court considers the existence of the three certainties to be necessary because they facilitate the court to recognise when the settlor has set up a trust, what the subject matter is, and who the beneficiaries of the trust are. Likewise, the three certainties will help the settlor, the trustee and the beneficiary to know the terms and conditions of the trust.⁹²

A) Certainty of words or intention

45. The intention of the donor (the *settlor-testator*) should be clear and explicit, disregard the words which he or she can use for doing that (certainty of intention). The problem, therefore, is what words are sufficient to consider that a trust has been created.

In this sense, the settlor's words have to be “*construed as imperative*”, for instance, when the testator declares that his or her property is going to be held “in trust” or “upon the trust” his or her intention in creating a trust is clear.⁹³

46. In relation to wills, taking into account that the testator's intention is the essential fact in the creation of the trust, the court must discover it and, consequently, the testator's intention should not be presumed; however, it must be proved.⁹⁴ So, as to ascertain the intention of the testator, the court will consider each situation on its own terms and context⁹⁵ and will take into account the words the settlor has used “(...) *in the light of such knowledge of relevant facts as (...) he must have had*”.⁹⁶

Where the intention of words is not certain, no express trust is created. In the case of testamentary trusts, it means that the estate of the testator would not be transferred to the trust.

B) Certainty of subject matter (property)

47. In addition, the certainty of the subject matter is essential for identifying the subject of the trust – the property – and the extent of the beneficial interest of each beneficiary. On the other hand, only existing property can be the subject matter of a trust. It means that future property would not satisfy the test of certainty of subject matter. Thus, for instance, in a testamentary trust, a right under the will cannot be the subject matter of the trust until the testator has died,⁹⁷ because during the life of that person there is only an expectation of succeeding to his or her property.⁹⁸

⁹⁰ *Knight v Knight* (1840) Beav 148 at 173, 49 ER 58.

⁹¹ S. WILSON (n 29), pp. 54-55 and 67.

⁹² S. ATKINS (2013), *Equity and Trusts*, Routledge, London, pp. 114-116.

⁹³ J. MOWBRAY, J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43) p. 84, para 4-03.

⁹⁴ L. A. SHERIDAN (n 14), pp. 112-115.

⁹⁵ *Re Hamilton* [1895] 2 Ch 370.

⁹⁶ *Re Osoba* [1979] 1 WLR 247.

⁹⁷ *Re Ellenborough* [1903] 1 Ch 697, HC. See also M. RAMJOHN (2010), *Unlocking trusts*, 3rd edn, Hodder Education, Abingdon, pp. 18-19 and 63-64.

⁹⁸ *Clowes v Hilliard* (1876) 4 Ch.D. 413; *Re Parsons* (1890) 45 Ch.D. 51 at 55. See also J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43) p. 55, para 3-34.

48. Conversely, intangible property, like intellectual property rights – for example, patents – or rights to dividends attaching to shares, can satisfy the test of certainty, provided that those rights are clearly identified by the settlor or testator, for instance, the identification of the shares.⁹⁹ However, in *Hunter v Moss*¹⁰⁰ the court held that a valid trust was created in spite of the fact that the share certificate numbers of the shares of the trust property had not been identified, since each unit (the ordinary shares) was undistinguishable from another unit.¹⁰¹

Where there is uncertainty of subject matter, there is no trust. In the case of testamentary trusts it means that the testator would keep the property beneficially.

C) Certainty of objects (beneficiaries)

49. Finally, the beneficiaries from the property settled in the trust should be clearly identified (certainty of objects), so that the trustees have no doubts about the identity of the beneficiaries of the trust and the interest to be held for each of the beneficiaries of the trust. Where the beneficial interest to be acquired by the beneficiaries is uncertain, then the testamentary trust will fail but a resulting trust for the transferor would arise.

3. Invalid trusts

50. Under certain circumstances a testamentary trust shall be invalid and, consequently, not be enforced. First of all, where a trust can be unlawful because:

- a) it is contrary to the common rules of public policy; or
- b) it contravenes the common law rules against perpetuities or excessive accumulations; or
- c) it establishes restrictions on alienation on the interest of the beneficiary or it is against the policy of insolvency law; or
- d) it prejudices the settlor's creditors.¹⁰²

51. Secondly, where the requirements for the creation of trusts have not been satisfied the consequence is that the settlor fails to create the trust. Thus, if the court, after looking at the will, cannot deduce that there is sufficient intention by the testator to create a trust, then it will not consider the trust as having been created.¹⁰³ In such a case, the trust will be void and the property is held for the settlor on the resulting trust. Similarly, if the trust property is not certain, it will not be possible to identify the property left on trust¹⁰⁴ and nor would the trustee be able to know the property which has to be administered, nor would the beneficiary know the property to which benefits he or she is entitled. Consequently, there can be no trust. In the same way, if the description of the object (beneficiaries) is not sufficiently clear the court will not be able to enforce the trust.¹⁰⁵

52. Finally, a testamentary trust which has been created for illegal purposes under the law of England also will be void.

⁹⁹ *Goldcorp* [1995] AC 74. See also M. WATERWORTH (n 48) pp. 14-16; and C. WEBB and T. AKKOUH (n 23), pp. 49-51.

¹⁰⁰ [1944] 1 WLR 452. This approach was approved in *Re Havard Securities Ltd* [1997] 2 BCLC 369.

¹⁰¹ This decision has been considered wrong by some authors. See A. HUDSON (2013), *Equity and trust*, 7th edn, Routledge, London, pp. 23-24.

¹⁰² J. MOWBRAY, L. TUCKER, N. LE POIDEVIN, E. SIMPSON and J. BRIGHTWELL (n 43), p. 122, para 5-02.

¹⁰³ A good example is the case *Re Adams and the Kensington Vestry* (1884) LR 27 Ch D 394, where the court held that some words appearing in a will were not sufficient to create a trust.

¹⁰⁴ As occurred in *Sprange v Barnard* (1789) 2 Bro CC 585; 29 ER 320.

¹⁰⁵ *Blair v Duncan* [1902] A.C. 37, HL Sc.

VI. Concluding remarks

53. In common law jurisdictions, testamentary trusts have been considered as an effective structure when considering estate planning, which offer remarkable advantages compared with ownership passing directly to a beneficiary. Nevertheless, the trust is a common law legal concept that does not exist in the majority of civil law jurisdictions. Consequently, the introduction of the testamentary trust institution in civil law jurisdictions seems to be impossible and is a controversial issue which has generated a large discussion which is still going on. The situation, nevertheless, would change in the coming years since many authors in civil jurisdictions recognise the modern utility of the trust. In addition, there are new projects that may contribute to the increasing international development of this figure and its acceptance in civil jurisdictions, for instance, the Principles, Definitions and Model Rules of European Private Law.

54. In my opinion, it is of great importance to recognize this figure in civil law jurisdictions due to the benefits that the testamentary trusts offer, especially when considering estate planning. In this sense, I consider necessary a preliminary approach to this institution and its regulation in English law, where it has developed over centuries, before carrying out an approach between the common law and the civil law systems that could be accomplished by the recognition of foreign trust under the Convention on the Law Applicable to Trusts and on their Recognition and, subsequently, by the adoption of substantive rules to introduce testamentary trusts in civil law jurisdictions¹⁰⁶.

¹⁰⁶ See S. BANAKAS (2006), "Understanding trusts: A comparative view of property Rights in Europe" *InDret* 1/2006, p. 6; See M. LUPOI (1998), "Effects of the Hague Convention in a Civil Law country", 4 (7) *Trusts & Trustees* (available at <http://tandt.oxfordjournals.org/content/4/7/15.full.pdf+html?sid=3f78817c-d28e-42e9-a815-96937ee67497>), p. 15; idem (1997), *Trusts: A Comparative Study*, Giuffrè, Milan, translated by S. DIX, Cambridge, Cambridge University Press, 2001; and A. PRÜM, T. REVERT and C. WITZ (2005), "La ratification de la Convention de la Haye par le Grand-Duché de Luxembourg", in *Trust & Fiducie – la Convention de la Haye et la nouvelle législation luxembourgeoise*, Montchrestien, Paris, p. 53.