



## TRUSTEES NEED TO KNOW: CHALLENGING VALIDITY

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### What are the requirements for a valid trust?

In order for an express trust to be valid under English law the settlor must have capacity, the appropriate formalities need to be complied with, the trust property must be transferred and sufficient certainty is required.

### What are the three certainties?

*"As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommend, or entreated or wished, to dispose of that property in favour of another, the recommendation, entreaty or wish shall be held to create a trust. First if the words 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."*

*Knight v Knight* [1840]

### Certainty of words or intention on the part of the settlor or the testator:

- No particular form of words is needed and it is not necessary to use the word "trust".

### Certainty of subject matter:

- The rule applies to both trust property and the respective interests of the beneficiaries. Trustees must know exactly what is included in the trust.

### Certainty of objects:

- Beneficiaries must be clearly defined or there must be a suitable methodology to enable trustees to identify them.
- All three certainties must be present for the trust to be valid. In the absence of certainty an outright gift is presumed.
- There are different rules for charitable trusts, resulting and constructive trusts.

### **For what reason might a trust be set aside and assets claimed by third parties?**

1. The trust may be void for uncertainty
2. The assets may be located in a jurisdiction that does not recognise trusts
3. The will effectively comprising the trust deed is invalid
4. The trust is fraudulent
5. The trust is a sham

### **What makes a will invalid?**

You can contest a Will on the basis that it is invalid by relying on one or more of the following grounds:

1. The Will has not been correctly executed
2. The testator lacked the necessary mental capacity
3. The testator lacked knowledge or approval of the contents of their Will
4. The testator was subject to undue influence
5. The Will is forged/fraudulent

### **What is a sham trust?**

The most recognised definition of a sham is taken from the judgment of Mr Justice Diplock in *Snook v London and West Riding Investments Ltd* [1967]:

*“It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the “sham” which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create”*

### **How can we help?**

We act for trustees, executors, personal representatives and for individuals claiming against estates, trustees or other parties. We also often advise on complex and cross-jurisdictional issues, and regularly work alongside other intermediaries based offshore. Our team is recognised for our expertise in this field by the legal directories: The Legal 500 and Chambers & Partners.

If you have any questions arising from this ‘Need to Know’ please do not hesitate to contact our Wills, Trusts and Inheritance Disputes Team:

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This **Need to Know** provides general guidance of the law in this area at the date of publication. Specialist advice should also be sought.