**Trusts Outline**

1. **\*Private Express Trust**: a fiduciary relationship with respect to property whereby one person (trustee) holds legal title for the benefit of another (beneficiary) and which arises out of a manifestation of intent to create it for a legal purpose. [Memorize this definition.]
   1. **Trust Property**: any presently existing interest in property that can be transferred can be the corpus of a trust. Even contingent future interests. But not future profits to business, debt settler owes beneficiary, or what one expects to inherit or receive as gift.
   2. **Beneficiary**: any ascertainable person or group, including corporation, and under modern law, an unincoporated association.
   3. **Trustee**: trust must have a trustee, but court can appoint trustee.
   4. **Intent**: must be *present* manifestation of intent to trust, and no magic words necessary. Must use *mandatory words*, not precatory words (hope and desire). But, precatory words + parol evidence may be sufficient. Otherwise, “trustee” owns in fee simple. Trusts of personal property need not be in writing, SOF only for real property.
   5. **Creation**
      1. **Trust To Take Effect At Settlor’s Death**: *must* comply with probate code, i.e., be in will.
      2. **Trust To Take Effect During Settlor’s Lifetime**
         1. **Transfer in Trust**: a 3rd party is trustee. For real property, S must execute and deliver deed to trustee (actual, symbolic, or constructive; promise to deliver insufficient). For personal property, S must deliver property to trustee.
         2. **Declaration in Trust**: S is trustee. For real property, there must be a writing satisfying SOF indicating S is trustee. For personal property, must be present manifestation of intent.
   6. **Purpose**: trust must have some valid purpose not contrary to public policy or illegal.
      1. **Illegality at Creation**: try to excise illicit portion. If cannot, court will either (1) invalidate at inception or (2) permit trustee to retain property for himself.
      2. **Illegality After Creation**: a resulting trust is decreed. Must transfer to S or his estate.
2. **Charitable Trust**: any trust which confers a substantial benefit on society.
   1. **Creation**: same as private express trust.
   2. **Beneficiary**: no ascertainable person or group, as society is beneficiary. If trust benefits small group, split in authority as to whether Charitable or Private Express, so argue both.
   3. **Rule Against Perpetuities Inapplicable** to charitable trusts.
   4. **Cy Pres**: if settlor manifests a *general* charitable intent, but mechanism for effectuating intent is not possible or practicable, *court* (*not trustee*) can modify *as nearly as possible* to effectuate intent. Court will admit extrinsic evidence to ascertain intent. However, if settlor manifests specific charitable intent, no modification, and resulting trust.
3. **Pour-Over Will** (see Wills lecture)
4. **Miscellaneous Trust**
   1. **Honorary Trusts**: a trust which has no ascertainable beneficiary and confers no substantial benefit on society. E.g., to further fox hunting or care for S’s pet.
      1. Trustee not required to carry out intent, but has power to do so. If trustee refuses, trust fails—court will not appoint new trustee. Resulting trust.
      2. Rule Against Perpetuities: applicable. Some court strike trust at inception, others allow endurance for 21 years, followed by resulting trust.
   2. **Totten Trusts**: named beneficiary takes whatever is left in bank account at death. Not a true trust, because depositor/trustee owns account during lifetime and has *no fiduciary duties* to beneficiary. May be elevated to Private Express Trust if settlor manifests appropriate intent.
5. **Restraints on Alienation**
   1. **\*Spendthrift Provision**: provision that prevents beneficiary from transferring, and creditors from attaching, his right to future payments.
      1. **Voluntary Alienation**: generally, beneficiary cannot voluntarily transfer his rights to future payments. But, sometimes a court will recognize assignment on ground that beneficiary has merely ordered trustee to pay agent/rep.
      2. **Involuntary Alienation**: generally, creditors cannot attach right to future payment. However, at common law, preferred creditors can attach (e.g., Gov’t, those who provide necessities of life to beneficiary, child or spouse for support, tort creditor). Many jurisdictions also allow attachment by *any* creditor of “surplus” (as measured by beneficiary’s “station in life”).
      3. **Creation for Oneself**: trust is valid. Involuntary alienation permitted (creditors can attach). Voluntary alienation: split of authority.
   2. **Support Provision**: provision that allows trustee to pay to beneficiary o*nly* as necessary for his health, support, maintenance, or education. Same rules as Spendthrift Provision.
   3. **\*Discretionary Provision**: provision that gives trustee sole and absolute discretion to determine when and what, if ever and anything, to give to beneficiary.
      1. **Voluntary Alienation**: on one hand, beneficiary cannot transfer right because he may not get anything. On the other hand, if he does, transferee steps into beneficiary’s shoes, and if trustee decides to pay, he must pay transferee.
      2. **Involuntary Alienation**: on one hand, creditors cannot attach beneficiary’s right, because there might not be any. On the other hand, if trustee has notice of debt and creditor’s judgment against beneficiary, and decides to pay, he must pay the creditors.
      3. **Creation for Oneself**: same as Spendthrift Trust.
      4. **Hybrid**? If provision has both support and discretionary language, note that it could be either, and discuss both.
6. **Resulting Trusts**: an implied-in-fact trust based on presumed intent of parties. If decreed by the court, trustee will transfer property to settlor or estate. Arises when (1) Private Express Trust ends by its own terms, and no provision for aftermath, (2) Private Express Trust fails for lack of beneficiary or illegality; (3) there is excess corpus in Private Express Trust, (4) Charitable Trust ends because of impossibility/impracticability, and cy pres unavailable, (5) purchase money resulting trust, or (6) semi-secret trust.
   1. Purchase Money Resulting Trust: A pays B to transfer title to C, C is presumed to be trustee for A, unless C is closely related to A, in which gift is presumed.
   2. Semi-Secret Trust: when will makes a gift to a person to hold as trustee but does not name the beneficiary. Distinguish from Secret Trust.
7. **Constructive Trusts**: an equitable remedy to prevent fraud or unjust enrichment. Wrongdoer is deemed trustee and must transfer property to intended beneficiary. Arises when: (1) trustee of a Private Express Trust or Charitable Trust profits by self-dealing; (2) fraud in inducement or undue influence re a will; (3) oral real estate trust; or (4) there is a Secret Trust.
   1. Oral Real Estate Trust: settlor transfers title to property to A on oral condition that it be used for the benefit of B. Normally, A can invoke SOF, but cannot do so, and constructive trust imposed, where: (1) S & A in fiduciary relationship, (2) A committed fraud in inducement, or (3) beneficiary detrimentally relied.
   2. Secret Trust: will makes outright gift to A, but on basis of oral promise by A to use property for benefit of B. Parol evidence is admissible to show that B is intended beneficiary.
8. **Trustee Powers & Duties**
   1. **Trustee Powers**: powers expressly enumerated in instrument, provided by state law and court decree, and implied powers—those helpful and appropriate to carry out trust purpose. Trustee can sell property, incur expenses, lease, and borrow money as necessary.
   2. **\*Trustee Duties to Beneficiary**
      1. **Duty of Loyalty**: trustee must administer trust for benefit of beneficiaries, having no other consideration in mind. No self-dealing. Trustee is liable for loss, and must turn over ill-gotten gains as constructive trustee. Cannot sell to trust, or sell trust asset to relative, *even at FM*V. Beneficiary can recover profits from trustee or set aside the transaction.
      2. **Duty of Due Care**: trustee must act as a reasonably prudent person dealing with his own affairs.
      3. **Duty to Invest**: three alternative rules, discuss all 3
         1. **State Lists**: some states have default lists of permissible investments: federal government bonds, federally-insured CDs, first deeds of trust in real estate, sometimes stocks of publicly-traded corporations (depends on jurisdiction). Never invest in new business or second deed of trust.
         2. **Common Law Prudent Person Test**: trustee must act a reasonably prudent person investing his own property, trying to maximize income while preserving corpus. *Each investment* is scrutinized. Good investments include federal government bonds, federally-insured CDs, first deeds of trust in real estate, blue-chip stocks, mutual funds (depends on jurisdiction). Never invest in new business or second deeds of trust.
         3. **Uniform Prudent Investor Act**: trustee must act as a prudent investor. Each individual investment is *not scrutinized*, and may include risky/esoteric stuff. Performance is measured in context of entire portfolio.

Under any standard, trustee has a duty to diversify. For breach of duty to invest, trustee must make up for loss. No netting for big wins.

* + 1. **Duty to Earmark**: trustee must label trust property as trust property. If breached:
       1. Common Law: if there is a loss to the property, even if no relation to failure to label, trustee is liable for loss.
       2. Modern Approach: liable for loss only if caused by failure to label.
    2. **Duty to Segregate**: trustee cannot commingle personal funds with trust funds. If breach, trustee can be removed and held liable for loss.
    3. **Duty Not to Delegate**: trustee can rely on professionals in reaching decision, but cannot delegate decision-making authority to them. Modernly, trustee can delegate duty to manage money to professional.
    4. **Duty to Account**: trustee must, on a regular basis, give beneficiary statement of income and expenses. Remedy is action for accounting.
    5. **Remedies for Breach**: damages, constructive trust, equitable lien, ratify transaction if good for beneficiary, remove trustee.
  1. **Trustee’s Liability to 3rd Parties**
     1. **Contract Liability**
        1. Common Law: trustee is sued in personal capacity and personal assets at stake, but may get indemnification from trust assets if acting within powers and not personally at fault.
        2. Modern Approach: if counterparty knows trustee is contracting in capacity as trustee, trustee must be sued in representative capacity.
     2. **Tort Liability**
        1. Common Law: trustee sued in personal capacity, but may get indemnification from trust assets if without personal fault (e.g., strict liability, or agent committed tort.).
        2. Modern Approach: trustee sued in personal capacity and is personally liable only if at fault. Otherwise, representative capacity (e.g., strict liability, or agent committed tort.).

1. **Modification & Termination of Trusts**
   1. **Modification by Settlor**: settlor can modify the trust if settlor expressly reserves power to modify or has power to revoke.
   2. **Modification by Court**
      1. Can be modification of Charitable Trust via cy pres.
      2. **Deviation Power**: court can also modify trust to change administrative or management provisions if both (1) circumstances unforeseen by settlor, *and* (2) necessity—deviation necessary to preserve the trust. Court *cannot* change beneficiaries.
   3. **Termination of Revocable Trust**
      1. Majority: to retain power, settlor must expressly reserve in trust instrument
      2. Minority: settlor has power unless trust expressly made irrevocable.
   4. **Termination of Irrevocable Trust**: any of the following 3 methods for premature termination:
      1. **Settlor & All Beneficiaries Agree**: must account for contingent remainderman, by guardian ad litem.
      2. **All Beneficiaries Agree & Material Purposes Accomplished**: court will set aside sufficient assets to accomplish minor purpose.
      3. **Operation of Law**: in some jurisdictions, where there is a Private Express Trust of real property, and trustee has only passive duties (just holds bare legal title to res), trust terminates under the Statute of Uses, and beneficiary gets legal title by operation of law. Generally doesn’t apply to personal property, but should by analogy because equity should not see a useless act done.
2. **Income & Principal Problems**
   1. **Income & Expenses Allocated to Life Tenant**:
      1. **Gets**: cash dividends, interest income, net business income.
      2. **Pays**: interest on loan indebtedness, taxes, and minor repairs.
   2. **Income & Expenses Allocated to Remainderman**:
      1. **Gets**: stock dividends, stock splits, net proceeds on sale of trust asset.
      2. **Pays**: principal part of loan indebtedness, major repairs or improvements.
   3. **Adjustment Power of Trustee**: trustee can disregard above-state rules regarding allocation if a different allocation is necessary to administer the trust fairly.

Violation may be a breach of the duty of loyalty.