

# A MUCH NEEDED AMENDMENT TO THE TRUST ORDINANCE

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## Objectives of this article are,

1. To discuss the requirements to be fulfilled in formation of a Trust,
2. To discuss the Law relating Expressed Trusts in Sri Lanka,
3. To review the practical differences between Law relating Charitable Trusts and Expressed Trusts
4. And, about the important amendments we should look into in the context of charitable trusts.

This letter proposes some of the important amendments we should look into in the future in the context of charities for animals as well as charitable trusts on plant reservation.

## Introduction

The concept of trusts was developed in England, through the concepts of equity. According to the opinion of George W Keeton, the British law professor, "Law of Trust is the golden creation of equity". And Lord Lindley has affirmed, "a trust as equitable obligation to deal with the property in a particular way". This concept of law arrived Sri Lanka via English law. The English Law of trust heeds dual ownership of the trust property where the legal title vests with the trustee while the equitable title vests with the beneficiary.

The Trust Ordinance was established in 1917; Act no:9 of 1917. As stated by Mark Corey, "Law of Trust was practiced in Sri Lanka unofficially before the commencement of the ordinance ." According to the Ordinance, section 3 describes what trust is " trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another person, while the ownership is nominally vested in the owner, the right to the beneficial enjoyment of the property is vested in such other person , or in the such other person concurrently with the owner. "For an another definition, Keeton describes the concept of trust as" a trust maybe said to be the relationship which arise, wherever a person called the trustee is compelled in equity to hold the property whether real or personal and whether by legal or equitable title for the benefit of some persons fir some objects permitted by law in such a way that the real benefit of the property accrues not to the trustee but the beneficiaries or other objects of the trust " **Parties to the trust.** There are three parties who engage actively in trusts. The person who reposes or declares the confidence is called the **author of the trust.** The person who accepts the confidence is called the **trustee.** The person for whose

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benefit the confidence is accepted is called **beneficiary**.

### **General Classification**

There are the four types of trusts which are recognized by law in a general classification, namely Express Trusts , Informal / Implied Trusts , Resulting Trusts and Constructive Trusts. We'll be looking into Charitable Trusts in this letter which comes under Express Trusts with slight differences. Section 5(1) describes, subject to the provisions of section 107, no trust in relation to immovable property is valid unless declared by the last will of the author of the trustee , or by a non - testamentary instrument in writing signed by the author of the trust or the trustee, and notarially executed.

In the above section, it specifically states that, the last will or the non - testamentary instrument by the author of the trust or the trustee should be notarially executed. This term is defined in the section of the trust ordinance to mean that the instrument should be executed in the manner prescribed by the section 2 of the Prevention of Frauds Ordinance. In the decided case of *Bernedette Valangberg V Hapuarachchige Anthony (1990 / 1 Slr 190)*, court has declared the above interpretation.

When we distinguish the charitable trust from the express trust, which is also a form of express trust, it is necessary to consider the essential elements to form a trust. But they do not seem to have much in common.

**There are basically five elements to be full filled in formation of a trust.**

The three persons must have the capacity to enter into the transaction. There must be certainty as the intention to create trust, beneficiary and subject matter, which are known as three certainties of a trust. And trust must not violate the rule of perpetuity. It must be a lawful purpose. Trust property must be transferred to the trustee.

**The trustee, settlor and beneficiaries must have the capacity to enter the transaction**

Section 7(a) describes, a trust may be created by every person competent to contract. Competent to contract carries the idea of who is of the age of majority or has otherwise acquired the status of majority according to the law to which he is subject, and who is of sound mind and is not disqualified by law from contracting - sec 3(1)

Section 2 and 3 of the Age of Majority Ordinance provides that legal age of majority is 18 years . But for a minor, a trust may create with the permission of the court by or on behalf of a minor - section 7(b).

Capacity of the trustee, section 10(1), every person capable of holding property may be trustee, but where the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract.

Capacity of the beneficiary, section 9(1), every person capable of holding property may be a beneficiary.

Every written law whether made before or after the commencement of this ordinance, unless there be something repugnant in the subject or context person includes Anybody of persons corporate or unincorporated-section 2 of the Interpretation Ordinance. Animals can not be the beneficiaries of a trust.

### **When it comes to Certainties**

***Knight vs Knight***, the famous English case, Lord Lonsdale declared three things were necessary. They are, a) The words employed must be couched that, taken as a whole, they could be deemed to be imperative. b) The subject matter of the trust must be certain. c) The objects or persons intended to be benefited must be certain.

- (a) In Sri Lankan trust ordinance , in section 6 , it has mentioned that subject to the provisions of section 5 and 107 , a trust is created when the author of the trust indicates with the reasonable certainty by any words or acts -  
an intention on his part to create thereby a trust,
- (b) the purpose of the trust ,
- (c) the beneficiary,
- (d) the trust property and (unless the trust is declared by Will or the author of the trust is himself to be the trustee ) transfers the trust property to the trustee.

And the ordinance further notices that, the object must be certain, practicable and lawful. Section 4 describes, a trust may be created for any lawful purpose . The purpose of a trust is law full unless it is

- (a) forbidden by law, or
- (b) is of such a nature that, if permitted , it would defeat the provisions of any law , or
- (c) is fraudulent, or
- (d) involves or implies injury to the person or property of another, or
- (e) the court regards it as immoral or opposed to public policy.

### **Distinguishing Charitable Trusts and Express Trusts**

The above mentioned formalities are the very basic and general concerns of express trust. Distinguishing the requirements of charitable trust will become much easier by knowing the basic requirements of an express trust.

When it comes to the Certainties, As cited in the above , section 6 is expressly subject to 107 , it may be argued that 107 accord the court power to ignore the requirement of certainty of beneficiary in relation to the charitable trusts. It is also relevant that most of the decisions have ignored the requirement in the section 6 that beneficiaries must be indicated with certainty in a valid charitable trust.

Thus, when comparing with other trusts, The formalities for creation of charitable trusts are very simple and flexible. Provided there is a charitable intention, the beneficiaries of a charitable trust need not be indicated with certainty. Furthermore, The Perpetuity rules do not apply to charitable trusts.

## Charitable Trusts in Sri Lanka

Trust Ordinance of Sri Lanka is the governing law regarding trusts. Various cases have decided on usage of provisions of the Trust Ordinance. Charitable trusts are described in 10th paragraph of the ordinance. From section 99 to section 109 paragraph lasts.

Section 99 states that, the expression charitable trust includes any trust for the benefit of the public or any section of the public within or without Sri Lanka of any of the following categories.

- a) for the relief of poverty , or
- b) for the advancement of education or knowledge , or
- c) for the maintenance of religion or the maintenance of religious rites and practices , or d) for any other purposes beneficial or of interest to mankind not failing within the preceding categories. The preceding categories.

Actually this is an adaptation of Lord Macnagten's classification of charitable purposes with some modification in order to give a wider scope to religious trusts. In the decided case of *Income tax commissioner vs Pemsel*, Lord McNaughton laid down that, Charity in its legal sense comprises four principal divisions  
1) trusts for the relief of poverty 2) trusts for the advancement of education 3) trusts for the advancement of religion and trust for other purposes beneficial to the community , not failing under any of the preceding head.

## Trusts for relief of poverty

Trusts for the relief of poverty , the word poverty may mean different things. Sir Raymond Evershed in **Re Coulthurst** 1951 has stated that, Poverty of course does not mean destitution It is a word of wide and indefinite import , and , perhaps , it is not unfairly paraphrased for present purposes as meaning persons who have to go short in the ordinary acceptance of that term , due regard being had to their status in life and so forth.

In **Re Rounders** will trust case, justice Herman states that, "working class people will not amount to poor. So the trust was not accepted by the courts ".

In *Oppenheim v Tobacco Securities Trust 1951*. Income of a trust fund was to be used to educate the children of employees and former employees of company and its subsidiary current employees of the company number offer 110000 but as the opportunity to benefit was restricted by a personal Nexus the public aspect was not satisfied.

In Sri Lanka the beneficiaries must not be the relations of the settler. But the Charitable Trust of Vijayawada case is an exception. And in Sri Lanka the public benefit factor must be fulfilled.

## Trusts for advancement of education

English law, Trust for advancement of education or knowledge , the test of public benefit has been set aside. But in Sri Lanka the courts had declared that every charitable trust which constitute in Sri Lanka must have

the benefit for the public in the case of Trustees of Wijewardena charitable trust v commissioner of Income tax.

For an instance , in the decided case of Commissioner of Income tax vs Abdul Gafoor ( 1958) the courts had established the fact that "a trust created for the advancement of education but which is not for the benefit of the public or a section of the public is not a charitable trust"

Slade justice has stated in the decided case of McGovern v AG (1981) A trust for a research will ordinary qualify as a charitable trust if , but only if the subject matter of the proposed research is a useful object of study and ,he public , or a sufficiently important section of the public. In the absence of a contrary context however, the court will be readily inclined to construe a trust for researches importing subsequent dissemination of the results thereof. Furthermore , if a trust for research is to constitute a valid trust for the advancement of education , it is not necessary either that the teacher /pupil relationship should be in contemplation or that the persons to benefit from the knowledge to be acquired should be persons who are already in the course of receiving education in the conventional sense.

### **For the advancement of religion**

In the section 99(1) of the Trust Ordinance in Sri Lanka, subsection (c) describes the trusts in relation with religion. It particularly states that for the advancement of the religion or the maintenance of religious rites and practices; . The last part of the sentence was intended to

accommodate local religious practices some of which might not have satisfied the requirement of the public benefit as understood in England.

This has enabled courts of Sri Lanka to uphold trusts to observe annual Muslim festival, and ask to keep a lamp burning in a Buddhist temple. In the decided case of Rathgama PagnnasekaraThero v Kaldera, court has affirmed that charitable trust can be made in order to keep the "Dolosmahe pahana" burning. And in the decided case of Mohammadu V Meerakandu, observing of Muslim annual festival was affirmed as a valid trust.

Professor L.J.M Corey further cites that Public Benefit test is irrelevant in trusts with the purpose of advancement of the religion. But, English law states about the factor of public benefit. In the decided case of BILMORE vs COATS 1941, Money was settled on trust for the purpose of supporting a community of cloistered nuns. It was held that the trust's purpose fell within the category of advancement of religion, but the purpose was not held beneficial and so was not charitable; the counsel claimed that the purpose was beneficial on the basis that the nuns' prayers delivered a benefit to the wider public, but this benefit was rejected as incapable of proof

**For any other purposes beneficial or of interest to mankind not falling with in the preceding of categories**

Section 99(1)(d) has given stated on the above trusts. In the decided case of Williams Trusts V IRC, a trust was formed in the purpose of enhancement of the culture of

Wales. But courts have stated it as not valid because of the failing of public benefit test.

We can notice that English law has arbitrarily decided on these type of trusts . For an instance in the decided case of *Re Moss's* case, trust was permitted which was on the purpose of caring animals (cats). And the charitable purposes have listed by the charity commission of UK. They are as follows.

1. provisions of public works and services such as the repair of bridges , ports and the provisions for the water and lightning.
2. Relief of unemployment, the promotion of mental or moral improvement.
3. Preservation of public order
4. Promoting of the sound administration and development of law
5. Rehabilitation of ex - offenders and prevention of crime.

In Sri Lanka, courts have considered the facts of beneficial to mankind and they have limited it to only people not for any other living being or environment. This provides legality in formation of trusts on the benefit for the sports and etc.

### **Three Certainties of the expressed trust and Charitable Trusts**

When creating an expressed trust, the rule of three certainties must be considered. As I mentioned in the above Section 6 of the Trust ordinance has mentioned about four certainties that one should consider when creating a trust. *Kandasamy v Kumarasekaran.*

Section 6 specifically states that , the rule of certainties are subjected to the provisions of sections 5 and 107. But when it comes to the charitable trusts , we can see that the courts has not keenly concentrated on section 6. But , section 99 of the ordinance states that the charitable intention is much important to create a charitable trust.

However the section 6 is already subjected to the section 107, under section 107, a trust may be arisen even in the absence of a written declaration of trust as required by section 5 , or in the absence of a valid legal conveyance to the trustee as required by section 6 , and such trust may be imposed on a person who never agreed to be trustee.

We can satisfy with the conclusion by considering all three provisions discussed above of the trust ordinance (sections 6 , section 99, section 107) that in creation of charitable trusts certainty of the beneficiary, certainty of the purpose and certainty of the property are not considered much important than the certainty of the intention of the settler. And intention to create a trust is the most important certainty when it comes to charitable trusts.

And that conclusion has stated in the decided case of Trustees of the *Gomes charitable*

### **trust vs Commissioner of Inland Revenue.**

Where court permitted to a charitable trust on building a church and maintenance of it. Writer of this article suggests for an amendment regarding this topic. As mentioned above, there are three parties to a trust bond. Settler, trustee and the beneficiary. And in the process of formation of a trust beneficiaries are needed to be certain. But as discussed in the above paragraph, this rule will not need to be fulfilled when creating a Charitable trust. But beneficiary should be a person. No animals or plants can be the beneficiaries of a trust.

The section 3 (e) of the ordinance describes beneficiary as the person whose benefit the confidence is accepted is called the beneficiary and the section 9(1) states that Every person capable of holding property may be a beneficiary.

The word "person" further interpreted in the section 2 of the interpretation ordinance. It states that, Every written law whether made before or after the commencement of this ordinance, unless there be something repugnant in the subject or context "person" includes anybody of persons corporate or unincorporated.

This concludes as a trust for the maintenance of animals or trust for a preservation of forest or regarding environmental protection are invalid.

But, there is a way that one can create trusts which will indirectly makes animals or plants beneficiaries. For an example, one can create a trust for maintaining a process to prevent community from rabies by keeping an asylum

for street dogs. In a way, that make some impact on animals but the major purpose is public benefit.

### **The amendment that we should look into**

As we all know, animals and plants play a major role in our lives. The equilibrium between animals and plants are the reason that human beings are still exists on this planet. That equilibrium is about to be broken because of the consequences of human activities. Near-sighted people are destroying the food chains and habitats of other species, extinction of them cannot be prevented. That eventually effects this generation as well as generations to be born.

The point is, if humans are not taking necessary actions to preserve them who else does that job. Creating trusts making plant and animal species as beneficiaries is one of the best ways to protect them. Because it has the legal protection which strictly bind the trustees to get the job done. Even though the settler is no more, the process will be continued

So, we have to look in to an amendment that makes animals and plants as the legal beneficiaries of charitable trusts. That'll be a huge leap forward in Sri Lankan Law Of Trusts as well as Sri Lankan environmental law.

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